

EXPLANATION AND PENAL CHANGE:

a study in the epistemology of criminal justice.

By
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This thesis is submitted in partial fulfilment of the requirements of the degree, Doctor of Philosophy, Department of Law, The London School of Economics and Political Science, University of London.



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THESES

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To Tonia Tzannetakis.

What has been said of human rationality may be apt:

"Inevitably, we start and end in the middle of our itinerary."

May the destination be Ithaka.



1283232

Two views on the human condition.

Pray that the road's a long one
Keep Ithaka always in mind
Arriving there is what you're destined for
But don't hurry the journey at all
better if it goes on for years
so you're old by the time you reach the island
wealthy with all you have gained on the way
not expecting Ithaka to make you rich
Ithaka gave you the marvellous journey
without her you wouldn't have set out
She hasn't anything else to give.

Konstantin Kavafis, Greece, 1961.

To mate with the air is difficult -
That sinuous invisible creature
Blows hot, blows cold, rubbing her grit of pollen
On the bodies of ploughmen and mountaineers

Who itch and curse! To mate with a river
Or a filled-up miner's quarry, that pleases me;
My cold kind mother, Sister Water,
Has no comment, accepts whatever I am,

Yet one may think of tentacles
Reaching, searching from under the darkest ledge,
And not want to be married. To mate with rock
Is obvious, fatal, and what man was made for,

Whose heart of rock trembles like a magnet
For deserts, graves, any hole in the ground
Where he may hide from Zeus. To mate with fire
Is what the young want most, like salamanders

Weeping in solitary flame, embracing
Red-hot stoves, walking the lava crust
An inch away from fire. Then my old gravedigger,
To mate with a woman is the choice

Containing all other kinds of death -
Fire, water, rock, and the airy succubus,
Without parable, without consolation
Except that each is the other's boulder and victim.

James K. Baxter, New Zealand, 1974.

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Abstract.

The modern moves to a 'Just Deserts' position are considered as part of the responses to a late modern dissolution of consensus concerning the foundations of criminal justice. Just Deserts appears to replace notions of rehabilitation and the influence of the welfare state with an individualist, punishment orientation. However, Just deserts is not a unitary phenomena. Although the rhetoric is simplistic the change in social organisation is complex and multi-layered.

As steps towards understanding penal change and prospects for future development an attempt to contextualise present developments is made pitching the investigation primarily at developing models of epistemological structuring of social thought, providing readings of the social theory of representative figures and considering the influence of epistemological configurations upon the discourse of criminal justice.

The present position of modern western societies is stylised in two ways.

First, by reference to the time categories pre-modern, modernity, and the post-modern. Modernity is depicted as the period from the Enlightenment onwards and characterised by the key idea of constructing the Grand Society via the application of knowledge under the epistemological warrant of truth. Post-modernity is depicted as a period of reflexivity and uncertainty, a time when modernity becomes conscious of the impossibility of achieving the narrative goals it set itself.

Second, by reference to modes of conceiving truth, that is by the epistemological imagination. This is stylised by reference to the categories rationalism, empiricism, and pragmatism. David Hume is taken as reflective of empiricism, Immanuel Kant of rationalism, and the later work of Ludwig Wittgenstein of pragmatism. Each modality for structuring thought impacts upon criminal justice in differing ways and the security which both

rationalism and empiricism is seen as providing societal consciousness is depicted as being undercut by reflexivity. As a result pragmatism becomes the modality for post-modern consciousness.

The thesis defends epistemological pragmatism against arguments which see it as a compromise position and the term 'reflexive pragmatism' is adopted as a theoretical position suitable for a post-modern perspective. The route to this pragmatic perspective is outlined in criminal justice by a historical narrative of the development of criminal justice perspectives.

"Progressive" criminal justice is seen as having undergone three stages: an early modern founding in philosophical construction; a modern faith in science based on the naturalist conception of the so-called natural sciences; and a late-modern pluralism of conceptions which serves as the backdrop to the rise in Just Deserts ideology.

The present is seen as a complex and ambiguous situation. The advent of the post-modern consciousness, or the pragmatism of belonging, both lowers modernist confidence and allows the possibility of confident power plays to dominate. The allure of simplistic solutions is ever present and the rhetoric of Just Deserts is seen as one socio-political choice concerning the proceduralisation of justice when the foundational security of rationalism or empiricism is seen to be lacking. This choice is implicitly contrasted to a reflexive pragmatic position, which, although underdeveloped and only possible to conceive of as 'notes for a potential', is radically different to the formalism of Just Deserts on issues such as objectivity, fairness and in the self-consciousness of the relativism, and human foundation it offers the notion of 'justice'.

Considering contemporary penal practice, although Just Deserts espouses the rhetoric of return to punishment and strict formalism, other factors ensure that a complementary provisions

to imprisonment are being utilized. In the range of arguments and conflicting perspectives room for experimentation may well exist. Considering the macro-sociological perspectives of Norbert Elias and Niklas Luhmann there are grounds for believing that rehabilitation was not merely a product of criminological positivism or the welfare state, but is reflective of the demands of increasingly differentiated and interfunctional societies. There are grounds therefore, for seeing the rhetoric of Just Deserts as only one facet - the production of post-modern 'selves' able to play their part in complex, differentiated and interdependent post-modern societies demands techniques of installing self-discipline. The catch is that such societies may require less selves, hence there is also the prospect of a developing underclass who will provide the basis of coercive control whilst alternative forms of social control structure the life games of the supra-class.

Introduction.

This thesis is an extended essay in philosophical criminology. Its concern is with distinguishing different modes of conceiving and structuring social thought and criminal justice. It proposes two theses, one methodological and the other substantive. The overall methodological thesis is that in seeking to understand the present state of criminal justice, and to situate change, a reflexive understanding of our present is required. Thus to gain a proper appreciation of the confused terrain of criminal justice, composed only partly of interactions between criminal law and the social sciences, but also by situated human fears, hopes and desires, we need not just attention to 'philosophy', but to the conceiving of and situation of philosophy. That is of the terrain that philosophy occupies and that this understanding necessarily involves a concern with epistemology.¹ The substantive thesis is that of the models of epistemological imagination which could be offered, our present has developed into one which we can call pragmatism; further that the key to appreciating the context for development of the present is a better understanding of what pragmatism is, how it has arrived and what choices it may entail for criminal justice. The presupposition that informs this thesis is that changes in criminological thought (the features of criminological discourse) are directly implicated in the rise and subsequent development of the epistemological structuring of modernity.²

The anchor point for the substantive thesis is the backdrop of the present rise in prominence of 'Just Deserts' as the mainstream model for criminal justice practice. It is contended that in the context of the narratives which criminology presented the arrival of Just Deserts appears an anomaly since according to those narratives the process, which it was thought the Enlightenment had began in criminal justice, a movement in which Classicism first predominated to be overcome by Positivism, was an irreversibly progressive emancipation of man's humanism within

modes of social organization built under the epistemological warrant of impartial science. The advent of Just Deserts then may well be indicative of the demise of that promise: to understand this demise we need to pitch our concern at the epistemological level.³

These two theses will be developed as follows. Part One is concerned to offer some contextualising of criminal justice thought. Chapter One introduces certain themes of the present and two candidates for addressing them: reflexive pragmatism and critical theory. Chapter Two offers an outline narrative overview of certain paths thought has taken to arrive at the present and deals with a number of distinctions, or choices, thought has in structuring its self-understanding. Chapter Three looks at aspects of Michel Foucault who deserves prominence for his particular attacks on the notion of progressive humanism and epistemology.

Part Two is structured around presenting various models, or perspectives of epistemology, and dealing in some detail with a major figure representative of each and his influence upon the imaginative structuring of modernity. Thus Chapter Four presents the three perspectives, rationalism, empiricism and pragmatism. Chapter Five deals with David Hume and his influence, Chapter Six with Immanuel Kant, and Chapter Seven with Ludwig Wittgenstein.

Part Three, "Developing Terrain: towards Reflexive Pragmatism in Criminal Justice", seeks to locate criminal justice within changing forms of modernity. Chapter Eight addresses itself to the traditional domain of criminology and with Chapter Nine (which re-defines 'objectivity' and 'humanism' with the idea of destroying the fallacy of objectivity which sees rationality and objectivity as things divorced from human purpose) presents an account of latent epistemological structures and choices in criminological history and develops some alternative positions for viewing the context and structure of criminal justice. Chapter Ten concerns the social-structural context for criminal

justice drawing upon the work of Norbert Elias and Niklas Luhmann and concludes on some prospects for contemporary penal practice.

NOTES

1. Any understanding, whether of the past, of change, or any 'idea' in the present, is necessarily epistemological. The attribution of ontology, the ability to say what is and what happened, proceeds via epistemological awareness. There is no escape from this state of affairs.

2. This understanding must necessarily involve a recall of the past - an exercise in philosophical history - and a reading of the past which places the act of recognising the past as important. The present interest in reflexivity has, to a limited extent, reinstated an interest in the past which modernity, in key respects at least, had relegated to a minor concern. In pre-modernity, either in the grand narratives of Christianity or in the living substance of traditionalism, the past sustained the present and gave to the present its meaning. Modernity, secular, industrial and capitalist, did not need the past for direct substance. Its rationalities were not those of attunement to the message of the past but rationalities which gave orientation towards change rather than conservation, which stressed exploitation, control and consumption rather than the careful virtues of preservation and the mean. For the methods and processes, the forms of living of scientific, industrial society, the past holds no sanction since modernity's roots are not consciously in the past but in the domination of empirical substance and reason for the purpose of the future. The past is but a curiosity, its value one of nostalgia, a sentimentality, its rhetorical power the fact that it has past and largely relegated in its usage as a comfortable backdrop to progress, studied only in the status of an academic discipline. When it does have an active power, as in its impact in the metaphysics of religion and politics, this is labelled as the power of the 'unmodernised' elements of modernity's totality. Reflexivity reinstates the past in its denial that modernity could replace the use of the past to grant identity by social effectiveness, and in its restatement that human worth and value are placed, not merely uncovered, created by mankind in time, not given by empirical reality or pure reason.

3. Although the general intellectual current of social thought was one of great ferment, for much of the core of criminal justice studies it was business as usual; the search for even more positivistic data and technical efficiency continued. To the world outside 'places of higher learning' the affairs of the common life placed questions of self-consciousness, or reflexivity, which social theorists appeared to become concerned with, as self-indulgent luxuries divorced from the necessary grounding of criminal justice in the real world of containing crime, punishing offenders and rationalising the criminal justice system. But this is to underestimate the extent to which that

'real world' is actually a 'modern world' - constituted and self-apparent only to the heirs of the legacy of that period we call the enlightenment, and whose common sense status as the proper 'grounding' for criminal justice the activity of reflexivity questions and demands be justified anew.

Part One: Contextualizing Criminal Justice thought:
the situation and dilemma of Social Theory.

Chapter One: Dilemmas of the present: critical theory or
Reflexive pragmatism?

I

Reflexive Times?

In 1979 Anthony Giddens characterised contemporary Anglo-American social theory as experiencing a "dissolution of the orthodox consensus". This orthodoxy had comprised three main elements: a substantive 'theory of industrial society', which saw class conflict as having been institutionalised and any large scale debate on this subject transformed into small-scale technical issues; a theoretical commitment to 'functionalism', which characterised the subject matter of sociological analysis in terms of self-regulating social systems which operated on their own internal logic and which, we may add, encouraged a belief in a foundational logic to change which could in time be captured by laws of historical development; and a philosophical commitment to 'naturalism', or the proposition that the logical frameworks of natural and social science were essentially the same.¹ Within this orthodox consensus 'applied social science disciplines', such as those rather eclectic and fluid bodies of studies heuristically titled criminology and penology, were given a place of technical utility. In time, however, a widening credibility gap developed between the promise of applied 'science', as of crime and punishment, which would be a branch of the modern rationally organised society, and the actual performance of those intellectual practices. To Giddens social theory had become a "Babel of theoretical voices". In criminology the field of study became open to deep seated fissures holding diverse views as to the nature of man, human society, history, methodology, and fundamentally differing assumptions as to practice and progress. Doubts, and the tensions they created, could no longer be contained within a 'mainstream' criminology which actively discouraged detailed self-reflection over philosophical fundamentals, or managed selectively to diffuse the full force of that which actually did get through. Although a number of paths developed in the discourses of criminal justice

in the 1980's the most vocal retort to the disunity which criminal justice thinking has experienced since the breakup of 'the orthodox consensus' and which became reflected in policy appears to be the neo-classical consciousness of "Just Deserts".²

In the British context the acceptance of Just Deserts became the central focus of the 1990 White Paper Crime, Justice and Protecting The Public.³ This move was pre-shadowed in the underlying strains of the May Committee Report of 1979⁴ and the later Criminal Justice Act of 1982. The adoption, moreover, of Just Deserts ideology appears common in much of the Western World. It is an orientative change which encompasses both the rhetoric of the 'common life' (for example, as manifested in the "Law and Order" debates), a replacement of "rehabilitation" by "punishment" as the central feature of official discourse and the concern of many intellectuals⁵, and a re-deployment of institutional arrangements of state bureaucracies (for example, a tightening of probation, phasing out of indeterminate sentences).⁶ However, to talk in terms of complete transformations is simplistic and unrewarding for it also appeared that in the majority of the institutional arrangements it was business as usual. In the case of the 1982 C.J.A. replacement of Borstal, for example, the Borstal had already effectively abandoned a 'rehabilitative/reformative' approach.⁷ Indeed few could say for sure what rehabilitative practice ever was, and the critical analyses of the practice which took that name world-wide gave little confidence for mounting a defence.⁸ Instead with regard to the penal system a different rhetoric was used: a crisis of penology which itself mirrored The Coming Penal Crisis⁹ and which demanded its own therapeutic programme. Another dominant theme was shrouded in ambiguity, namely the politicisation of criminal justice and the transformation of criminal justice from an arena of experts to one where 'policy' directives, primarily government policy, increasingly came to influence its day to day operation.¹⁰

The observation that Criminal Justice thought and practice is

subject to historical change has always acted as a key pin of optimism - the narrative recourse to a barbaric past defended the present from self-doubt and gave a banner of 'progress'. Yet much of Just Deserts appears as a return to the past;¹¹ a 'neo-classicism' which appears, even by contrast to much of the discourse of the 60's and early 70's, as sudden as it was unpredicted.¹² Its ideological suddenness may be gauged by the short time span from works such as Karl Menninger's The Crime Of Punishment,¹³ wherein the criminal law was castigated as "a social monstrosity" and organizations or institutions founded on it as being part of "our present stupid, futile, abominable practice against detected offenders". Bittner and Platt were similarly providing narratives of historical inevitability, wherein "in the long run it could not possibly matter whether punishment works or not, for it has been going out of use, not gracefully, but inexorably." Out of phase with the path of moral sentiment.¹⁴

It can be argued that Just Deserts comes at a time of exhaustion. An exhaustion of the 'counter punishment narrative' certainly, but this is not a solitary exhaustion. The time of Just Deserts, primarily the consciousness of the 1980's, is also held, for instance by Alasdair MacIntyre, to be a time of exhaustion for all the socio-political traditions which the creative drive of our modern culture has relied upon.¹⁵ To many commentators it appears that the drive of modernism, manifested in the countries of the advanced West as the Socio-liberal-Democratic axis of social engineering and in the eastern Block as State Socialism was devoid of new ideas. As 'Liberalism' appeared "at wits' end", a libertarian revolt against the modern state looked back to notions associated with the theoretical structures of early modern western societies called classicism.¹⁶ Neo-classicism or neo-liberalism came into vogue throughout western political economy in the late 70's and 80's.

What must not be overlooked, however, is that at the same time as a return to rhetorical themes of the past occurs, the

development of bureaucratic formations is different - no real return to the past is possible. In criminal justice new forms of alternative formations develop in the shadow of the dominant rhetoric - forms which must be a development of the structures of modern society. Formations in criminal justice which are congruent to, and allowed by, the main thrust of the dominant rhetoric: thus in Justice for Children, a neo-classical document explicitly identified by one commentator as "a return to a Gesellschaft legal process... back to justice ideas"¹⁷, we find new sets of demarcations enabled by "the proposed limits to the powers of the juvenile court".

"We propose that there should be a tripart division of sanctions: nominal, custodial and non-custodial".¹⁸

Whole new sets of discourses concerning 'alternatives to custody', 'supervision and control in the community', 'privatisation of institutions' have sprung up at the same time as Just Deserts.¹⁹ The two must lie intertwined - however, their connections may neither be simple nor reducible to the workings of an inner logic of criminal justice development. Instead their location must be seen as operating within the complexity of social change and the development of the ideological forces of modernity. Little work in conceiving of Criminal Justice presents the complex happenings around the return to justice other than a process of dissipation and chaotic confusion, a resurgence of punitive mentality, political opportunism or economic stringency. Within criminal justice one response, which this thesis will go some way to explaining, asserts that Just Deserts is one compatible motif for interaction between Criminal Justice officials and offenders for a social times which can only be described as "pragmatic". Such a label for the present is recognised by many but it is also a theme of this thesis that its use is predominately simplistic and negative. This thesis would assert, in short, that the ascription of our present times as "pragmatic" does not need imply a superficial, rather negative understanding of where theory and social thought has come to in modernity, but calls instead for a wide-ranging reassessment, redevelopment and redefining of our tasks and goals; a task that

necessarily requires an awareness of the past and some conception of development.

As for the discovery of the term pragmatism in criminal justice, when Bottoms, for instance, introduced 'the Coming Penal Crisis' he identified three elements: the realization of the centrality of coercion to criminal justice which rehabilitation had not made redundant; a contemporary crisis of penological resources; and the supposed negative finding on searching current intellectual resources that there was little but a "contemporary air of penal pragmatism, with no clear or coherent philosophical or other theoretical basis". Pragmatism, Bottoms held, is incapable of revitalising the criminological area or producing any "ideal" in the light of which to understand and measure practice.²⁰

Bottoms finds pragmatism implicit in 'official', i.e. state sponsored, texts where it bears a "curious identification with 'realism', and the complete absence of long-term or over-reaching goals". Pragmatism is identified as the state of mind, which, "having implicitly accepted the decline of the rehabilitative ideal, has nothing much to offer in its place". Moreover, even when this 'pragmatic' conception takes up the pressing administrative issues of the present, criticism is voiced:

"this pragmatic preoccupation with current difficulties is by no means ignoble - but it is also no adequate basis on which to rethink the shape of the penal system of the future."²¹

Pragmatism is thus identified as the unwelcome guest at the wake of rehabilitation.

This is not, however, an issue which can be addressed in the context of penal discourse alone. For if pragmatism came to the field of criminal justice discourse (i.e. criminology and penology), it also appears, in guises more or less understood, in forms stronger or weaker articulated, whenever a tradition of epistemological progressivism finds itself questioned.²² Indeed, the questioning which brought the spectre of pragmatism to the

discourse of criminal justice was by no means confined to those disciplines of criminology and penology but endemic throughout the social sciences (and as MacIntyre asserts, socio-political thought in general). Present social science exists in an ambiguous space: on its own terms it fears both impotency, specificity, and totality.²³ Such fears, and the criticisms which create them, have ensured that it has become almost commonplace to refer to the "crises" of contemporary social science. To Hilary Lawson such "crises" are part of the predicament of our time. A predicament he identifies in terms of growing uncertainty and relativism concerning the notion of "truth", and the foundational status of our values and beliefs.²⁴

Lawson draws upon the concept of reflexivity to explain "the predicament" of our times. Reflexivity is a specific form of questioning: a movement to seek self-awareness and understanding by the turning of epistemological action back upon the subject itself. Reflexivity impacts upon the enterprise of constructing social theory by questioning the relationship of ourselves and the traditions of the intellectual projects from which and within which we take our bearings - but if reflexivity was entered into with the hope of providing a simple corrective to ascertainable failings such hope becomes complicated, since reflexivity soon leads to a de-centring and a questioning of important motifs - 'progress' becomes contestable and 'certainty' revealed as a temporal supposition.

There are those who welcome this outcome and announce the opening of an anarchistic range of possibilities.²⁵ However, reflexivity itself is a seemingly paradoxical position - a paradox which flows from its own grasp upon the central claims of those who use it to produce such uncertain freedom. In the philosophy of science Feyerabend, for instance, asks us to destroy the "objective" rationality of modern science by making the claims that all "objective scientific/philosophical discourse" actually consists of fairy tales, moreover, fairy tales which are false; but this claim must on its own terms be included, and therefore

must itself be a fairy tale which is false.

Similarly the claim offered as a scientific critique, that intellectual inquiry has been concerned with the provision of theory, rather than with practice, is itself the provision of a theory. Does it matter? for it is also a practice, but if that is so then the claim was wrong - theoretically.²⁶

II

The "strangeness" of reflexivity: its differing from the tradition of stable de-marcation.

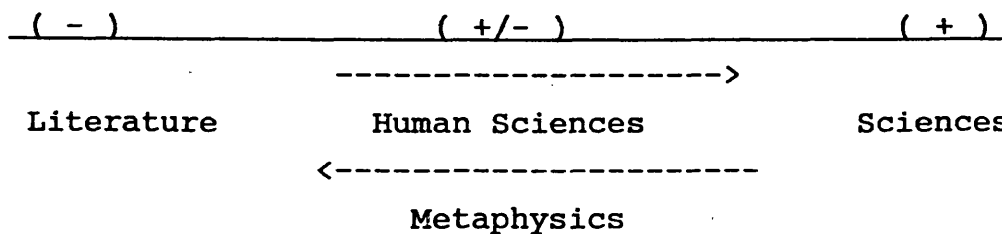
Reflexivity is an unsettling movement, for it amounts to a disregard for the traditional action of legitimation for knowledge - that of a purifying contrast with (an)other, that movement of transfer from fiction to fact, or vice versa, which allows the ascription of 'truth - non-truth' to be made. It is a process of separation, in one form a movement from the opinion of the apparent to the knowledge of the refined, which concomitantly demands a secure positioning or location from whence the labelling, or 'marcation', of discourse can proceed.

Modern criminal justice disciplines, i.e. criminology and penology, took their status from the emphasis upon a supposed scientificity. Such discourse constituted itself by "scientific invitation" - confidently in contrast to the "prejudice" exhibited in the political sphere - and this was a contrast which, avoiding prejudice, also openly limited the inclusion of voices of historically engaged individuals, voices such as Malcolme X or George Jackson, to use as raw material - as opinion, which was, as the basic presupposition, a pre-Parmenidian mode of speech, opinions to be converted into knowledge, and which, though allowed to speak, did not require equality of recognition to the discourse of knowledge.

To gain proper recognition the first order for a discourse is to

establish itself as legitimate and the legitimation of the penological mirrors the action of the dictionary itself which describing 'legitimate' goes to the Latin root, expressing "a status which has been conferred or ratified by some authority".²⁷

Our present rules for such a ratification are outlined via a process Karl Popper termed a "marcation" procedure. This process of (de-)marcation lays down a set of rules for each discursive character (literature, music, science, etc.), which allows certain traits to be present or absent. Scientific discourse is thus set apart from other kinds of discourse because it fulfils certain requirements - symbolic clarity, logical consistency and the possibility of verifying its claims, which are related to a set of meta rules. This broad category can be subdivided upon recognition that certain forms have only some of the requirements- the "formal sciences" only having the first two, the "empirical" all three. As expressed in diagrammatical form:



Two specific categories of discourse are visible, roughly: "literary" and "scientific". The middle compartment contains hybrid discourses showing both the provisional presence and the provisional absence of the mark of scientificity.²⁸ These are allocated by what Popper defines as the "rules of the scientific game", demarcating science from pseudo- or non-science (which Popper calls metaphysics). The process ensures that the legitimacy of discourse must always come from some other source than the act of seizing itself, usually via rules to a source already established. Legitimation is the struggle to associate the source of the authority with the thing to be authorised - it will be done by reference to an external source of value which

gives power to the authority. Popper states that the desire to correctly demarcate is provided by "the strongest (unscientific) motive" - the quest for truth. Popper on this point agrees with the Marxist and the Freudian in locating the epistemologically concerned actor as an individual living in a complex lived-in-world, but for Popper it is possible to achieve a state of objectivity for knowledge which transcends the demands and constraints of time and place or subjective experience. Using the epistemological tools devised over history the subjectivity of the 'context of discovery' can be cleansed and the 'content of discovery' preserved as objective and self-sustaining, protected by the epistemological warrant.

Against this 'world three' objectivity it has been recently emphasised that the human subject exists not only in an environment composed of psycho-material factors of physical, behavioral, economic and geographical constraints but also a "semantic" space, a space composed of the effects of interrelations of narratives. Narratives are stories, fables, the recounting of past events; the rhetorical postulating of what was, is, and will be possible. Narratives tell man what is expected of him and how he is to relate to the lived-in-world. For Lyotard:²⁹

"it is obvious that one of the features that characterises more 'scientific' periods of history, and most notably capitalism itself, is the relative retreat of the claims of narrative or storytelling knowledge in the face of those of the abstract, denotative, or logical and cognitive procedures generally associated with science or positivism".

These grand-narratives or meta-narratives create a social space for science to work within. The very enterprise of "scientific abstraction" occurs and owes its legitimation to the existence of such narratives.

A prominent set of narratives embed the very act of contrast and movement to find truth in the supposition of an 'absolute source', and of the 'founding', and positioning of knowledge-claims via a journey and the coming into a relation with a realm

of absolute certainty.³⁰

The combination of motifs of journey and encountering of the realm of absolute certainty is long standing: Jager derives the aetiology of theorist and theory from the Greek "theoros" which combined "theo" and "eros" to give "he who regards and observes the will of God".³¹ The theoretician is he who becomes the recipient of a divine message, and faithfully transmits this in un-distorted form back to the people. The theoretician must question the speaker and then transmit the response, and this requires a search, a journey to the home of truth.

From the beginning of the western intellectual traditions man and truth were narratively portrayed as involved with a journey, and the life of the mind/intellect/spirit depicted as requiring a way for it to follow for the attainment of truth.³² How was the way itself to be known? Again there existed a demand - a demand for directions.

The motif is that of journeying: but the message also depicts a methodology for 'Reason' to correct itself - reason, it appears, cannot correct itself without looking to the 'other' to do so. There must be some supposition of a realm of absolute certainty for the claim of the particular to make sense and be marcated, to establish its differences, to work its demarcations and to represent the just from the unjust, the foe from the friend, the dangerous from the safe. At the same time this movement is necessary to establish the identity of the just, the familiar, the same, the correct, the true. The advent of reflexivity unsettles this movement for it declares 'could not the story be told differently'? Instead of the Platonic version which narrates that beneath the flux of appearance and the different naming of things there exists a pure ontology, thus allowing language to construct a pure naming, there could have been the thesis of the non-ontological status of language. Narratives which concentrated upon the experience of journeying itself, with the experience of visual and linguistic strangeness, of the unexpected events and

the disruptions of settled expectations, its transient encounters with characters whose virtues were not self-apparent and whose identities were unfamiliar. Such narratives could have resulted in ethnographic relativism. The overall narrative effect could have been one of non-settlement, of homelessness for the human spirit, of an unknowable totality upon which the individual could only look with an improvised dependence. To an extent these versions were told; but the one which conquered held that the whole disjointed series of images in journeying could ultimately and definitively be interpreted and ratified by man with the aid of truth. Conversely, the action of reflexivity claims that life, caught in the narrative form, opens itself to many versions and that it cannot be seen and grasped totally in a unified way, whatever the rhetoric of any one form of narrative. Reflexivity, thus defined, operates to divide theoretically and politically not just between specific movements but inside them as between their confidence and their foundational statements. But after reflexivity becomes utilized in some or other of its variants, it appears that since social theory can be exposed as resting on specific historical conceptions and assumptions as foundations, and since there is no safety of a sociology of knowledge (because of infinite reflexive regress), there is nothing behind it but arbitrariness. The dilemma then is from whence can legitimate guidance come?

However, in Philosophy and the Mirror of Nature³³ the modern 'pragmatist' Richard Rorty retorts that the western intellectual traditions have made the mistake of confusing what is of importance, the need for some "grid or relevance and irrelevance", with a confining and constraining conviction that the proper conduct of social life is dependant upon the central concept of the commensurability of all discourse in a scheme which ideally depicts scientific theory as "mirror of nature". Commensurability, Rorty contends, has given a presupposition that all endeavors are common, obeying a central "truth" function, such that all ideals, such as the ideal of justice or 'truth' itself, are commensurable. That is, that they are

"able to be brought under a set of rules which can tell us how rational agreement can be reached on what would settle the issue on every point where statements seem to conflict".³⁴

The set of such rules Rorty loosely labels epistemology, and with his criticism of commensurability Rorty asks us to give up the concern with epistemology in a move to "hermeneutics". Such a move does not wish to create a successor subject to epistemology, but rather to free ourselves from the notion that philosophy must centre around the discovery of a permanent framework for inquiry. There is, however, more than a little paradoxicality in this demand - for on what basis is it made other than on the epistemological basis of a (true?) narrative of the past performance of philosophy which Rorty's text provides? If we are to accept Rorty's claims then we necessarily accept some epistemological imagination - the concern with epistemology is not destroyed by the specific claim that one is being non-epistemological.

Rorty, perhaps would not deny this for in his 'pragmatic' response he set his target thus:

"The difficulty stems from a notion shared by Platonists, Kantians, and positivists: that man has an essence - namely to discover essences."³⁵

Thus whatever the form of justification which could be built it would have to be non-essential; that is it would have to be a softer justification than those which claim knowledge of essences or that the ultimate aim is to do so. Thus, we should not

"try to have a successor subject to epistemology, but rather free ourselves from the notion that [inquiry] must centre around the discovery of a permanent framework for inquiry... the point is to keep the conversation going rather than find objective truth".

For Rorty 'truth' is still an important factor of conversation since truth, in the traditional epistemological sense, "is the normal result of normal discourse."³⁶ But we are not to be fooled that normal discourse is all. The adversary is

"attempts to close off conversation by proposals for universal commensuration through the hypostatization of some

privileged set of descriptions.... this would be... the dehumanization of human beings".

Theories of language and of knowledge which give the image of one privileged set of meanings, i.e. one master set for normal discourse to cohere to, stand behind the target, and in opposition we are asked to "see human beings as generators of new descriptions rather than beings one hopes to be able to describe accurately".³⁷ The discourse of the edifying philosopher serves to break the confines of the 'truth' of the systematic.³⁸

III

Epistemology and Criminal Justice: outline contrasts.

Rorty's criticism hits directly at the question of what within Criminal Justice was the function of the relationship between philosophy and the operational activity of the "social sciences" called Criminology and Penology. One image was to see them as purposeful: that the adjudication of the 'tribunal' of progressive reason gave a philosophy of punishment which led practice. Thus Bottoms states that philosophy in the time of the consensus enshrined 'the rehabilitative ideal' which strove to give a clear foundation for practice to be labelled:

"In the heyday of the rehabilitative ideal... those at the forefront of penal policy-making formulated with pride Prison Rule No.1, the ideal against which everyday practice in prisons was to be measured.... But now?"³⁹

The status of this relationship was never, however, that clear. In his article on Punishment in The Encyclopedia of Philosophy Stanley Benn commented:⁴⁰

"It is not, of course, the business of the moral or social philosopher to provide justification for any particular act or system or even of the institution of punishment in general. Philosophers are not necessarily apologists for their society and age. They are interested in the procedures and models of argument that we are committed to by our fundamental conceptions of morality and in criteria and justification rather than in inquiries into whether actual institutions satisfy them."

The type of philosophy that Benn envisages appears unable to provide any critical impetus for transformation or change of actual institutional practice. In relative agreement H.L.A.Hart observed:⁴¹

"No one expects judges or statesmen occupied in the business of sending people to the gallows or prison, or in making (or unmaking) laws which enable this to be done, to have much time for philosophical discussion of the principles which make it morally tolerable to do these things. A judicial bench is not and should not be a professorial chair."

Thus it would seem that it is for them entirely proper for philosophical discourse and (paraphrasing Hart) the "business" activity to occupy separate realms with little direct co-penetration.

Contrary to the idea that the "philosophy of punishment" would be the realm of discourse that provided a foundation and discursive "space" either authorising or criticising the actual operation of judicial proceedings, prison, and related procedures and practices, i.e. to operate as a critical dialectic of legitimation, Anthony Skillen, for one, criticises the "philosophy of punishment" for its failure to address the concrete reality of institutions existing, supposedly, in its name. The duality of discourse has abstract philosophy and concrete studies which inhabit separate domains. "It is difficult to find references other than in passing to prison, [community service,] flogging, or capital punishment in the works specifically devoted to 'punishment'".⁴²

This criticism finds echoes in the works of David Garland particularly his essay with Peter Young "Towards a Social Analysis of Penalty".⁴³ These writers openly claim that their projects are also specific attacks upon the very notion of "penology" as an intellectual enterprise, attacks which announce its replacement by a "social analysis".

IV

Correcting the mystification of philosophy (ideology?): towards a social analysis?

To both Garland and Skillen the division of discourse in the penal area is

"a symptom of the fact that what you are getting is not a conceptual investigation of reality but an investigation of concepts, whose relation to reality is not supposed to be a topic of polite conversation".⁴⁴

To Skillen the philosophical discourse of formal philosophers such as H.L.A. Hart and Herbert Morris is "intoxicated by formal equalities and reciprocities", wherein their "only criticism of existing penal systems are formal ones".⁴⁵ To escape "Legalism" (the abstract argumentation of law and punishment linguistically owned by jurisprudential concerns) Skillen declares we have a duty to analyze the discourse of punishment only as it is reflected in actual penal institutions in society.

For his part Garland declares his aim is to replace penology with a "social analysis of penalty", and both Skillen and Garland first oppose the earlier idea of Benn and Hart that the 'practical' results of the business of science can be seen as having an independent existence from the operation of philosophy. In asserting this, however, they choose to create a project which reduces 'philosophy' to 'social thought', to understand which their own guide is primarily marxist in derivation; but since the contributions of William James and John Dewey a demand for some form of seamless web imagery holding together philosophy, social theory and practice has been a persistent feature of pragmatism. It is widely shared criticism, of which Garland and Skillen are examples, however, that apart from the occasional rhetorical flourish it was not until the reflexive turn of quite recent years that the empirically minded social researcher showed any concern in his actual activity with the 'internal' debates of the philosophy of social science. It certainly is fair to ask, 'who were the philosophers to walk the corridors of the rehabilitative institutions?' - 'what philosophical synthesis gave purpose to technique?'. Or the reflective question 'how was it possible to surrender so much to bureaucracy?'

One strand of the answer is the legacy of epistemological progressivism, that is to say a process whereby criminological/penological work was based on a non-reflexive acceptance of its status as an historical progression from a past philosophical-cum-epistemological legitimation of its role, central concepts and objects, and methodological frames (particularly concerning terms of the proper style of explanations and notions of causation). With such a confidence, and in a socio-historical environment of relative stability in ideology, certain themes can assume historical importance, as, for instance, when correctionalism - a technical administrative concern - became the motif at a particular juncture. Part of this relies upon an implicit notion of an epistemological security for instrumental 'rationality' based upon a steady historical progression, and conceiving itself as a superstructure of confidently legitimate 'marcated' disciplines.

Examples of the broad form of the general narratives of progress, of the role of scientific curiosity, and the marcation of sensible discourse, abound in more traditional criminological texts, for example Barnes and Teeters' Horizons of Criminology,⁴⁶ but evidence that this line of structure still persists more recently lies in the preface to Nigel Walker's 1964 work. With Walker for his text to "succeed" as "criminology" it had to adhere to an "ascetic principle"; such that it was to be simply "a study of our present ways of defining, accounting for, and disposing of offenders, regarded simply as a system in operation". Criminology must obey certain prescriptions as to its discursive composition. Thus:

"Criminology is not, and does not include, moral or political philosophy. It does not argue about the right of states or societies to limit the freedom of individuals to rob, rape, murder, or commit suicide; or about the sense in which a stupid or deluded man can be said to be responsible for a crime. At the same time, the criminologist is interested in differences between, and changes in, the views held by legislators, lawyers, philosophers, and the man in the street, on such topics, and the extent to which they reflect the facts established and the theories propounded by psychologists, anthropologists, and sociologists.

Nor does criminology overlap with jurisprudence. To the

criminologist the arguments of Beccaria and Bentham, Hart and Wootton, are flags that show where the wind of change is blowing, not battle standards round which to rally and skirmish."

The criminologist is also to discipline his transformative imagination. For he is not "a penal reformer". Although:

"it is true that he is concerned to establish the truth or falsehood of some of the assertions upon which campaigns for penal reform are based - for example, the assertion that the death penalty is not a deterrent. But since the driving force of such campaigns is not a purely logical or purely scientific appreciation of fact, but a humanitarian motive, it is to that extent non-criminological."⁴⁷

Such a conception of criminology lay deeply linked to the imagery of what Rorty called "the mirror of nature" and what has been called elsewhere the Received View on Theories.⁴⁸ It is a conception of science which holds that its purity, objectivity and progressive nature is safeguarded by avoiding metaphysical entities and concepts through insisting that the only theoretical terms allowed are those that can be provided with correspondence rules to give them explicit phenomenal description. The Received View thought it thus successfully eliminated objectionable, non-empirical entities from scientific theories, and, because science was seen as the paradigm of rationality such a paradigm is the ideal and preferred mode of discussing human affairs. Criminology is simply a recounting: a sophisticated presentation of 'knowledge' concerning a particular field. Knowledge which grows and progresses reliant upon the notion that it is the environment that instructs us and that we must not pollute such instruction. In analyzing the 'Received View' Suppe was rather more narrow than Rorty and identified it with 'positivism', stating that it must be rejected as part of modern conceptions wherein "the last vestiges of positivistic philosophy of science are disappearing from the philosophical landscape".⁴⁹ This was part of a process where "virtually all the positivist programme for philosophy of science has been repudiated by contemporary philosophy of science".⁵⁰ In criminology this was earlier stated in the work of David Matza. Writing in the United States at the same time as Walker (1964) the critique of Matza in Delinquency and Drift was

simple: criminology had not kept up with current developments in the philosophy of science, and in particular positivist criminology's key concept of determinism had to be replaced.⁵¹

Matza thus echoed Suppe's comment that

"it seems to be characteristic, but unfortunate, of science to continue to hold philosophical positions long after they are discredited".⁵²

V

By contrast Garland is clear on his grounding - it is a specific concept of an awareness of knowledge, one which seeks to raise what empiricism has often "subordinate(d)", that is "under what conditions does its specified subject-matter become an object of knowledge?" This is a reflexive move; a turning of the act of consciousness of criminological/criminalological knowledge back upon the action of cognising itself.

Garland claims his approach replaces the "empiricist or positivist version of social science" which, true to the Received View

"proceeds by taking it as obvious or as common sense that what it purports to investigate is naturally, and without further reflection, a genuine and self-evident object of knowledge; that social science proceeds by the gradual and ceaseless appropriation of one natural, empirical object after another." (G.p.1)

The quest for knowledge inherent in intellectual inquiry is viewed as "subjected to a set of theoretical and practical criteria", the authority of which do "not rest upon the correspondence they have with an immutable social world". Rather the impetus is

"the possibility to talk of alternative social arrangements. The prime reason for investigating the social is the desire to change it. The essence of the social analysis therefore can be defined by dual objectives; the need to explain, and the conception that this is irrevocably tied to practice. Moreover, it is assumed that these are unified in the very process of producing knowledge."(G.p.5)

Garland also sees this as purifying knowledge claims, in a sense

a demarcative and reconstructive criteria and this rational reconstruction of penology demonstrates the uncritical nature of the previous as an outcome of what he calls "British Pragmatism" revealing

"the culturally specific nature of penology... British penology is a determinate form of knowledge..[the].. product of a complex interaction between a compromised positivistic conception of knowledge - the hegemony of jurisprudential and philosophical discourse and the pragmatic demands of an administrative framework, on the one hand, and a tradition of voluntary, charitably based, social work, on the other. Out of this complex has emerged a form of knowledge which can, at one and the same time, be both precise and infinitely flexible. British penology has been able to both exclude certain types of thought of social policy as irrelevant, while offering, as an alternative, a type of knowledge which achieves its hegemony by its very obscurity, plurality of purpose, and indefiniteness. In short, British penology legitimates itself both by denying its status as ideology and, more simply, by fudging issues."(G. p.3.).

In these analyses it is pragmatism which is exposed as at fault and a potential critique offered - it is an image of pragmatism similar to George Novack's summary:

"What is pragmatism? First, pragmatism is what pragmatism does. It is the habit of acting in disregard of solidly-based scientific rules and tested principles. In everyday life, pragmatism is activity which proceeds from the premise (either explicit or unexpressed) that nature and society are essentially indeterminate. Pragmatic people rely not upon laws, rules, and principles which reflect the determinate features and determining factors of objective reality, but principally upon makeshifts, rule-of-thumb methods, and improvisations based on what they believe might be immediately advantageous."⁵³

Garland's replacement project for penology rejects what he calls the "question-begging notion" of 'punishment' installing in its place "a less tendentious term", such as the 'field of penal practices' or 'penality', which would signify a complex field of institutions, practices and relations rather than a singular and essential type of social event. Moreover, the possibility of the contrasting space of philosophical concept as a ground for guiding politics is rejected as ideology.⁵⁴ But what then is to guide action and what are our politics to be about? Without directly addressing this issue Garland is specific that

"we must respect that analyses are (and should be) produced in regard to specific issues from specific positions and with determinate objectives in view. But concrete analyses, for all their detailed focus and intent, must situate themselves within more general frameworks, if they are to be well founded. They must have some reasonable conception of the overall pattern within which they intervene. They must have a reasonable grasp of the relations between their specific object of study (for example, a particular sanction or institution, or a specific ideological discourse), and the other elements in the penal complex. They should also be aware of the general contours of that complex and its relations with the 'outside'."

There are several items of importance here. First what Garland achieves is the renouncing of the 'concept' - punishment - that creation of philosophy, originally noted as not being utilised in critique, is now redundant; we are offered instead social theory - in particular a sociology. A sociology which will constitute

"penality as a specific institutional site which is traversed by a series of different social relations. [A whole series of] social relations operate through [penality] and are materially inscribed in its practices. Penality is thus an over-determined site which relays and condenses a whole series of social relations within the specific terms of its own practices".(G. p.21)

Penality is a social institution, an institution determined by an interaction in which the concepts of "punishment", and "crime", function as ciphers of ideology, as bearers and depositors of the material effects of complex social determination.

The analysis firstly overturns the crude individualistic confidence of the methodological individualist camp.⁵⁵ The Garland style political activist cannot rely upon ideals which are only 'abstractions' but must work upon the 'realities' provided by sociology. In renouncing the false light of these abstractions, however, must the political activist inhabit the terrain of theory without the 'other' of philosophic ideal?

From the Garland text, it appears that instead of ideals (at least instead of articulated ideals), guidance is to be had by

a knowledge of the complex and deeply ingrained economic, structural, organizational, and ideological constraints which structure the complexity of the field. The penal is presented as constituted in "penality", part of a deep social framework wherein the concrete is an item in a process, partaking of an overall pattern governed by relations which constitute the 'complex' - a complex which has general contours and set relations with the outside awaiting discovery. Garland replaces the crude institutionalization of the individualist camp with the rhetoric of a socially determined "institutional site" for the understanding of which we have the "frameworks" provided by structuralism, economic marxism and humanist/historicist marxism.

This, however, has its own dilemma: specifically the question of degree of 'determinism' these 'socialised' institutions face. This question takes us to the heart of what is at issue in Garland's text: the modern self-consciousness of "knowledge" itself. The synthesis which the Received View may be said to have relied upon is that the history of science is a cumulative repository of knowledge to which reference can be made to support or complicate tactics of action. Action broadly determined in line with other intellectual deliberations, i.e. philosophies of punishment (the right to punish and the rationale), areas of punishment (the dictates of jurisprudence) and the confidence of right (political philosophy). In line with disciplinary specialization the day to day activity of the scientist or functionary need not be concerned with such broad concerns but involve himself with the task of a gradual accumulation of knowledge and administrative skills as they increasingly come to grips with the world through theory and experiment.

The Garland project attempts a reorientation of this on several levels:

First, complicating the act of conceiving the penal area by unsettling the acceptable categories of thought and presenting new categories.

Second, the question of structuring or guidance for the transformative desire which Garland places as a basis for

knowledge accumulation. Our doubt on this issue is specific, does a purely "sociological" imagination devoid of the "concept" promise to provide one?

One problem is that there is a strand of thinking which treats the abstract as that which separates life and concepts. The conceptual can then be seen as a plot against man - one where real men are imprisoned in a false structure and obliterated by ideologies. And strangely it appears as if both the advocates of praxis and those of rigorous theory hold to a consensus that philosophy as the practice of concepts is not to have anything to do with politics, as the real science of life - as though 'life' were the one non philosophical, or apolitical concept - but what is 'human life' ~~but~~ not the concept to crown all?

An alternative position is presented by Berki who states:

"we have to grasp the point that in the last resort institutionalised punishment is the same, whatever its form and whatever label it might bear: execution, prison, banishment, flogging, fine, psychiatric treatment or community service. In every case it signifies the pitting of the will of the state (of society in the abstract) against the individual..."⁵⁶

For those who clearly defend the 'philosophical perspective' it is the role of the 'concept' to link viable empirical activities and to provide a locus around which classifications and modes of embodiment, intersubjectivity, and the betweenness of social life occur. In this way the concept - Justice, Law, Crime, Punishment, Fairness - is granted some form of transcendental role - perhaps always temporally ideological but viewed as social motifs continually engaged by men in terms of a struggle for (variable) presence which is brought out in human activity and modes of living.

The role of philosophy, or other forms of discourse made illegitimate by the moves to position "penality" as the focus of a new Weltanschauung, i.e. the progressive social analysis, is defended through the suspicion that the new social analysis achieves its progressive nature at the cost of its own

reflexivity. This suspicion is not merely one which fears that the engagement in political calculation which we are offered depends upon the possibility of social explanation, and thus the suspicion arises that our freedom to make and remake the social world we live in is dictated by possession of knowledge as to its function (knowledge now of depth rather than the ideological idea of the superficial which penology had offered), but that from this it follows that our politics are to be led by the expose of the theory. With the successful social analysis,

"criminality and penalty [are] relocated within the matrix of social relations and struggle from which they have long been isolated, and this return provoke[s] social transformation as well as individual corrections." (G. p.35.)

The traveller has returned to his community, the dilemma is now the understanding of his words. Is he now to lead 'enlightened' action, whereby the politics of this action flow from the possession of the logos of the theory - the implication being that it will be true, or correct, politics.

VI

Anti-conceptualization: an excursus.

The earlier text of Rusche and Kirchheimer,⁵⁷ upon which "Towards a Social Analysis of Penalty" explicitly draws, was specific as to the justification of such a guidance by a "social analysis":

"...it is necessary to strip from the social institution of punishment its ideological veils and juristic appearance and to describe it in its real relationships....

the belief that the history of punishment is to a large extent a history of human irrationality and cruelty [is both simplistic and in ignorance of empirical causative forces] cruelty itself is a social phenomenon which can be understood only in terms of the social relationships prevailing in any given period".(R. p.23)

In offering a complete explanation economic reductionism led Rusche and Kirchheimer to declare that the system of production discovers punishments which correspond to its productive

relationships. Thus, the origin and fate of penal systems, the use or avoidance of specific punishments, and the intensity of penal practices are determined by particular social forces, above all by economic and then fiscal forces.(R. p.5.)

Epistemologically, their criticism of penological progress, and their realization of the necessity to develop a 'proper' unit of analysis, is based upon a rather specific type of 'philosophical awareness': a foundation located in most articulate form in the preface of Marx's Capital.

In the preface to Capital Marx declares that his concern is not with the discussion of society "in general" but with one society only, modern capitalist society. His claim is to have discovered the laws of this society and none other - thus Capital holds itself, not as a study of society as such, i.e. of the abstraction, society "in general", but as a study of this particular society; the analysis concerns itself, not with an idea (an ideal object), but a materially determined or real object.

The target is the Hegelian rational basis of reality, the Idea, concomitant with the ability of man to know nature via the belief that the essence of nature is mind, and history is produced by the continuous struggle of mind/spirit/idea to realise itself in a continual process of unfolding from lower to higher degrees of perfection. Instead we are given the primacy of the material order - and guided in our analysis by the axiom of science, that all things behave in accordance with a principle of regularity and predictability and are able to be covered by "the laws of science".⁵⁸

Similarly the politics of Garland demands special and specific knowledges which take cognizance of the "political stragranums" behind "penality"; the indispensable premise for this type of "scientific inquiring" is that there are indeed these "real processes" and underlying objective facts concealed by the

"metaphysics" of *judicio* reasoning. The corrective, offered by epistemological purification giving the proper theory, is seen as the opposing of the ideological by an investigation of society at its true social-discursive-material level, and through this to present the "real basis" of its networks and prevent the dissolving of penalty into an idea.

To the creed of Marx (as per the preface to Capital) and Lenin (as per Collected Works) we clearly cannot have a concrete society without taking a view of nature as controlling the production of things, and man as being the mediating entity controlling distribution; society comprised thus of relations of production and social relations; economic structure and the political-ideological level; structure and superstructure. We are offered a perspective providing a model of explanation which focuses not on treating spirit and matter as separate, but as different manifestations not of an abstract generic idealist notion of society "in general", but rather as aspects of a determinate society, and hence can be held out as giving "facts" and not "abstractions".

The question then arises - what does one do with the knowledge of this actual determinate society? The answer, apparent in the preface to Capital is that Marx is concerned to study the actual concrete, determinate society, for example England, not for that actual society but for the "general" processes which flow through it. The determinate "actuality" is thus only of interest in so far as it expresses the "typical" or "classical" forms of that which comprises it.⁵⁹

But this is more than a little paradoxical. For it amounts to the rejection of an "in general" only to substitute for it in the final analysis another "in general" - but this time a rather specific "in general" the nature of which the theory has revealed, and which without the theory is invisible to the eye but stands above, or behind, or below, perhaps it does not matter where it is, for it is that realm which is elsewhere than the

visible - in effect it is truly the "meta" that one is interested in, and by sweep of the theory the meta is not, nor ever could be seen as, in the realm of speculative reason, but is presented as reality; we are to be persuaded we have done the successful journey within the confines of the one discourse. If we are persuaded we accept "the social analysis" as the overcoming of "metaphysics", for we are now to be guided by rational knowledge instead of metaphysics and false ideology, but this appears an acceptance which in the end can only be done on "metaphysical" faith (including, perhaps, the faith of the 'correct' ideology).

VII

Central to these versions of what we can call 'critical theory' is the double criticism that mainstream theory suffers from conceptual limitation and ideological confusion. Critical theory, on the other hand, we are told, would somehow (normally via giving a statement of its own genesis) resist the ideologically distorting effects of the social conditions of its creation (modern Liberal Capitalism) and achieve a degree of intellectual and social power by giving a more realistic interpretation of social phenomena which would, in turn, provide an emancipatory guide to forms of human action and intervention in the contemporary world necessary to bring about radical transformation.

They target a relationship whereby functionalist social theory and positivist methodology are said to produce static descriptions and explanations of social phenomena which directly reinforce a one-dimensional presentation of the real patterns of social reality and the specific socio-cultural forms it takes; the criminological agenda principally suffers by falling into the trap of attempting to locate the causes of crime in the most observable phenomena, the individual who is apprehended and before us, i.e. the criminal, and of attempting to improve the operational effectiveness of the criminal justice system to deal

with him, i.e. correctionalism; the present system being presented as that best fitted to the prevailing direction of social development (i.e. a functional fit which is thus essentially progressive and mostly irreversible).

As a result, it is held, the mass of individuals are denied the ability to formulate more imaginative visions of social reality. Conversely, certain academic work is regarded as privileged as having escaped the more restrictive confines of an ideological framework which mistakenly biased organizational structures of capitalist society as the universal and functionally required operationality of a rationalised modernity. Thus the knowledge bases of the non-critical are seen as submissive to and feeding into the managerial and administrative 'technostructure' of interests operating to continue the capitalist formation whilst operating under the guise of the universality of modernity. Thus, whilst criminology and penology had gradually acquired the institutional and intellectual trappings of a social scientific discipline, its parasitic dependence upon the social control requirements of capitalism had largely determined both the character of its central concerns and the form of the individual resources by which it had been engaged.

The conception of criminal justice as both an instrumental means of class domination, and as a symbolic expression of the material priorities which it embodies⁶⁰ is based on a specific methodological position which is directly contrasted with the empiricist (positivist) and instrumental bias of the mainstream. Critical methodology rests on the assumption that the goal of social analysis is to identify the underlying 'mechanisms' which regulate social behaviour by going beyond the immediate surface reality and bringing out the structural processes which account for it, such as the fundamental relations of productive activity. The theorist goes beyond the interpretations of the mainstream concentration upon the observable phenomena by developing wider hypotheses about underlying causes. The bottom line, as Bhaskar brings out,⁶¹ is that this methodological process relies upon

the assumption that there is a set of underlying or hidden causal mechanisms which generate observable patterns of social behaviour and which are capturable in a set of analytical categories which distinguish those aspects of social reality (the deep structures) which are causally determining as opposed to those which are regarded as corresponding secondary effects of the primary factors. This deep realist philosophy of science requires the discovery both of regular relations between phenomena and of some kind of mechanism which links them. Thus critical theory ideally must refer to the categories which initiate the process of change (basic formations) and give a description of that change itself (historical categorization). Knowledge is needed both of the underlying mechanisms and structures of the present (i.e. liberal-capitalism) and of the movements in which they generate or explain the phenomena (for example, classical dialectical materialism).

Expressly it is held that critical theory must 'go beyond' reflexivity replacing it with a clear sociology of knowledge, for, although it may well be concerned to give an account of its origins, it is not to become entangled in reflexive paradoxes or sceptical challenges which obstruct its potential to offer a positive solution to the reconstruction of society. Moreover, this reconstruction is rhetorically offered in terms of the realization of human potentialities by the removal of constraints; by destroying the limitations on praxis. The key to the latter is the emancipation of human life when people 'freely and collectively' control the direction of change on the basis of a rational understanding of social progress. The false consciousness which results from unreflective participation within the existing social structure is overcome by making participants aware of the 'unconscious determinants' to which their social actions are subjected. By making them aware of the material, socio-organizational constraints upon their social consciousness critical theory will provide agents with the opportunity to grasp their true interests and, by provision of knowledge as to the deep structural nature of social process, to

see via praxis the manner in which they would be realised.⁶² Such an opportunity, however, is limited to that revealed by the ontology of social existence which the 'theory' reveals. Opposed to any possibility of an overreaching Weltanschauung the pragmatic imagination is linked to the necessity for what Berki has called "multiple perspectives".⁶³

There has appeared something irreducibly puzzling and perplexing about the history of the endeavour of human understanding, a difficulty the pragmatist sometimes places in the context of one of mankind's fundamental problems of understanding himself - the mind-body division articulated in modernity as the Cartesian tradition. A tradition wherein the body is seen in relation to a set of external natural physical laws, while inversely the mind is viewed as consciousness being able to formulate its own relations and laws.⁶⁴

The desire to achieve some set of perfect spectacles to view the entirety of the world or the image of the mirror to provide the perfect spectacle can be seen as correspondingly to the desire to surpass the tension between thought and desire, an overcoming - the dream of reconciliation, for which we take important models from Aristotle the universal Nous, and Hegel's climax of Geist. Yet it is also out of these divisions, perplexities, ambiguities and dilemmas that the pragmatist sees originating the demand to connect institutions and ideals, i.e. 'ideals' seen as expressed conceptual articulations of desire. When a totalizing social theory is offered, implicitly, the mind body problem is offered as solved⁶⁵ - but if that is the case there really is no need of further theory.

Let us be clear of the positivist position: as the Logical Empiricist Reichenbach put it in 1938 we must

"distinguish carefully the task of epistemology from that of psychology. Epistemology does not regard the processes of thinking in their actual occurrence; this task is left to psychology. What epistemology intends to do is to construct the thinking processes in a way in which they ought to occur if they are to be arranged in a consistent system

Epistemology thus considers a logical substitute ..[and].. for this logical substitute the term 'rational reconstruction' has been introduced; it seems an appropriate phrase to indicate the task of epistemology in its specific difference from the task of psychology ...[thus]... I shall introduce the terms 'context of discovery' and 'context of justification' to mark this distinction. Then we have to say that epistemology is only occupied in constructing the context of justification."⁶⁶

For Rudolf Carnap rational reconstruction is

"the searching out of new definitions for old concepts. The old concepts did not ordinarily originate by way of deliberate formulation, but in more or less unreflected and spontaneous development. The new concepts should be superior to the old in clarity and exactness, and above all, should fit into a systematic structure of concepts."⁶⁷

Positivism (both in its Logical Positivism and Logical Empiricism extremes) distinguishes the context of discovery, which is historically embedded and subject to tradition and prejudice, from the context of justification, which seeks to distinguish the 'objective particulars' of knowledge. In the final result it is the truth of knowledge which is the justification for accepting the propositions of knowledge. Reconstruction is the exclusion of all truth-functionally irrelevant elements from a properly reconstructed system. For Reichenbach the reconstruction which

"is given is not arbitrary; it is bound to actual thinking by the postulates of correspondence. It is even, in a certain sense, a better way of thinking than actual thinking. In being set before the rational reconstruction, we have the feeling that only now do we understand what we think; and we admit that the rational reconstruction expresses what we mean, properly speaking."⁶⁸

However, all philosophical theories are dependant upon some form of concealed structuring of epistemological presuppositions - the logical positivist of a purity of induction, Locke's "tabular rosa" theory of the mind, Wittgenstein's early attempt at a basic function of man and language - all assert some "moral empirical" statement about man and the world. As Susan James openly admits in her project to reconcile Holist and Individualist forms of explanation, disputes in social theory appear not to be strictly settled by the success of the "rational reconstruction" of purified epistemology gaining an unquestioned universal

acceptance, but by a "moral variety" of resolution, i.e. that particular versions of epistemological reconstruction will be accepted on the basis of certain self definitions and "moral" conceptions of man and society, "moral" interests unavoidably tied to explanation.⁶⁹

We cannot, however, stress enough how much this conception of at least part of the reason for the acceptance of theory departs from the declared self-conceptions of the actors, for whom it appears anti-theoretical to suggest that "rational" acceptance of a theory can have anything to do other than with meeting that abstract and impartial warrant of truth; or, alternatively other than meeting with the correct social conditions, or historical position. Instead such an acceptance by previous actors in history must always be "irrational", an action in the grip of "ideology" for which the cure is epistemological purification, or, alternatively, an evolutionary 'progression' wherein our understanding of the previous is "corrected" by the 'meta' enterprise of a "sociology of knowledge", whereby the truth of unscrutinised claims can be "relativised" by the understanding given by the knowledge presented by such sociology of knowledge. But not only is this suspect since whatever categories (class, social position) that the sociology of knowledge assigns to the actor are then the first order products (claims) of a further particular form of knowledge, which then requires subjection to another sociology of knowledge, but the very correction of truth statements by a sociology of knowledge requires a purer "reason", for the understanding of which we have either the historicism of reason raising itself to purer levels, or, the continual regress of a sociology of knowledge of a sociology of knowledge of a sociology of knowledge...⁷⁰

How then does one extract oneself from this reflexively self-defeating state of affairs? The pragmatic turn is to assert the essentially 'human' aspect to being 'knowers' - to turn knowing into something which cannot be divorced from the qualities of human judgement. A move which asserts for pragmatism its status

as truly 'modern' and as a non-respecter of the traditional choice of either Plato or the Sophists. As Heidegger put it commenting upon Nietzsche:

"Western history has now began to enter into the completion of that period we call the modern, and which is defined by the fact that man becomes the measure and the centre of beings. Man is what lies at the bottom of all things; that is, in modern terms, at the bottom of all objectification and representability."⁷¹

There are two immediate tactics. First, to turn the concern with epistemological purification away from the search for the absolute foundation or corrected authority onto a methodology of progress in change. This move is also implicit when Popper turns truth into a metaphysical concept equivalent to 'sincerity' as opposed to the correct correspondence language.⁷² Second, to turn the core of intellectual inquiry (philosophy/science) away from the domination of the pursuit of the guarantee of truth into a broader concept in which Reason does not have the task of enlightening itself into truth, as the absolute statement of Reason, but may instead enjoy a critical rationality without the presence of the "absolute", but lives with the acknowledgement of plurality. Indeed, to give up wholly the notion that epistemology is the mechanism for ascertaining the 'absolute', that locus which would guarantee the grand perspective.

In earlier times a recognition of a duality, if not a plurality, of understanding lay behind that concept once labelled "wisdom" and it is as well to consider that Reason once had this alternative concept as its goal. To tie inquiry to the pursuit of truth, as opposed to wisdom, is to give up a breadth of conception. For, at its least, the hold of this other concept (whether or not we can understand the classic term 'Sophia'), is to state that understanding and action require more than pure knowledge (as with our translations of 'Sophia' which contain two aspects, of which knowledge was admittedly one, but the other is good conduct). Wisdom has had a bad press being associated with an even greater 'authoritarianism' than the command of 'truth' since it appears to assert that knowledge-claims must be

themselves positioned in an image of life, and the journeying of life (i.e. the hold of the narratives), the purpose of our communities and our own, social, existence. Thus when these are controlled the socio-political 'closure' of society results. However, this is to argue against one conception, and even Popper's whole approach to epistemology - rational argument and fallibilism as opposed to pursuit of manifest truth - can be seen as an awareness originating in an historical investigation of the 'subject of truth' and its linkage to authoritarianism. Furthermore, whilst the grip of the philosophy of knowledge is profoundly contemplative - the effort to see things as they truly are - wisdom involved a superior contemplative mode for guiding activity - one which not only faithfully transmitted the sights one had seen and so created models which imitated, or mirrored the actuality of nature, but conceived linkages, implications, and achieved a speculative depth which included, but was broader than what knowledge can reveal: the concept of wisdom is linked to contextual imagination for practical life.⁷³

It is the achievement of an imaginative awareness - as distinct from a knowledge,⁷⁴ which characterises the wise man in contrast to the knowledgeable: wisdom calls for more from the bearer of logos than to merely relate reality, it asks for some discrimination. He must make judgments concerning the relative significance of various aspects of "reality". All of reality is not of equal importance to the concerns of man - that is what the critical faculty means. It is in the drawing out of the most significant aspects of reality that wisdom works in its connection between the true and the good.

Hegel had already drawn out the weakness of the philosophy of knowledge, which he himself appeared committed to. That is, a realization that for the philosophy of knowledge, claims as to action, which flow from knowledge (and not from interaction in an irrational fashion with opinion) can only be made by a grand

universality and totalizing of knowledge.

Remembering that Hegel is talking of philosophy as the 'philosophy of knowledge', his explanation in the Philosophy of Right (Law) tells a complicated story⁷⁵ in which he relates how an intellectual consciousness of man committed to a philosophy of knowledge can only achieve its relevance at the end, and come into its own after the end.⁷⁶ Perhaps paradoxically, it has been elements of a growing pragmatic tradition which have in varying ways restated this. Applying such a message one may feel that the predicament of modern social theory is to reflexively become conscious of its weakness and its closure, to have presented knowledge-claims under the authority of an outmoded conception of reality and truth; to have called for practice without an imagination of transformation which does justice to the desire to open theory, consciousness and social institutions and to create revisable and human images of change and development. Such a comment is, of course, prejudiced: its prejudice is to state that social consciousness requires not just a critical social theory, but an adequate imaginative grasp of a foundational epistemology which offers a methodology of judging change and discourse without the either all or nothing of an absolute foundation; yet one which takes seriously the need to offer statements of essential qualities of life and consciousness, that is, to offer continual positive and credible modes to transcend the entrenched dichotomies of positioning without closing off itself into misplaced confidence. There is, however, little chance of present dilemmas being fully understood without a comprehension of the relationship between criminal justice discourse and modernity which we shall now sketch.

NOTES.

1.A. Giddens, Central Problems in Social Theory, Macmillan, London, 1979, pp.235-38.

2. In explanation of this term see P. Singer, Just Deserts, Cambridge Mass., Ballinger, 1979, and our discussion in Chapter Ten. For the decline of the 'ideal' which had preceded it see Francis Allen, The Decline of the Rehabilitative Ideal, Yale University Press, New Haven, 1981. For support of 'Just deserts' as the 'end-state' of contemporary criminal justice see the writings of its vocal supporter Andrew Von Hirsch. In Past or Future Crimes, (Rutgers University Press, New Brunswick, 1985) Von Hirsch charts the recent changes in American Criminal Justice ideals from rehabilitation (backed by criminological positivism), through a resurgence of deterrence (backed by an analogy with scientific economics), into a hope for selective incarceration (backed up by evidence that the majority of crime is committed by a rather small number of individuals for a limited period of their life) into the 'Just Desert' position.

3. Crime, Justice and Protecting The Public, HMSO, London, 1990, Cm 965. Reference to "Just desserts", as they spelt it, appears five times in this document which clearly states its intentions: "The Government's aim is to ensure that convicted criminals in England and Wales are punished justly and suitably according to the seriousness of their offences; in other words that they get their just desserts. No government should try to influence the decisions of the court in individual cases. ..But sentencing principles and sentencing practice are matters of legitimate concern to government, and Parliament provides the funds necessary to give effect to the courts' decisions..."

The government proposes a new legislative framework for sentencing, based on the seriousness of the offence or just desserts. Other common law jurisdictions, for example, in the United States, Canada and Australia, are moving in this direction or are thinking of doing so."(p.5)

Although it is not the place to give a detailed interpretation of the Green Paper certain features are important. It begins with explicit reference to the 'rule of law', thus the £7 billion expenditure in 1989 on the criminal justice services in England and Wales is said to "reflect the Government's strong and enduring commitment to sustaining the rule of law". (p.1)

In sentencing "the aim of the Government's proposals is better justice through a more consistent approach to sentencing, so that convicted criminals get their 'just deserts'. The severity of the sentence of the court should be directly related to the seriousness of the offence."(p.2)

The ethos of the probation service, traditionally seen as a helping service to offenders with a social work approach is redefined: "Preventing re-offending and protecting the public from serious harm should be the objectives of the probation service."(p.2)

Old penal demarcations between custodial and non-custodial measures are placed under pressure, and possibilities for constructing an array of combinations of supervision, penalty and situations in the 'community' which involve a constraint and diminution of liberty are offered. The overall package is said to "provide a more consistent approach, so that victims are

compensated, the public protected and offenders receive their just desserts."

The effect is to defend the sanctity of the rule of law and the visibility of justice:

"Everyone who lives in England and Wales or visits this country is protected by the criminal law, which defines the activities which are unacceptable because they harm, or are likely to harm, other people. Everyone is equally subject to the criminal law: the rule of law is undermined if people decide for themselves that some parts of the criminal law do not apply to them. Moreover, the rule of law will be maintained only if those charged with criminal offences are treated fairly and justly in the courts. There must be no discrimination because of a defendant's race, nationality, standing in the community or any other reason. So the proposals in this White Paper are a contribution to the Government's wider policies for reducing crime and ensuring that justice is both done, and seen to be done."(p.4.)

4. May Committee, Report of the Committee of Inquiry into the United Kingdom Prison Services, Cmnd. 7673, H.M.S.O, 1979.

5. Works such as P. Morgans', Delinquent Fantasies, Croom Helm, London, 1978, criticise social workers for a mistaken softness in language and modes of dealing with individuals, in favour of the 'common sense' normal reactive attitudes of punishment and discipline.

6. Among the features of change which are most evident in the United States but which also affect Britain are major sentencing changes by state legislatures which include longer prison sentences, mandatory incarceration, and determinate sentences, with a reduction of good time eligibility, a more narrowly defined parole eligibility and the removal of certain classes of offenders from parole consideration altogether. In the U.S. there is also a substantial return to favour for the death penalty.

7. The real end was s.3 of the Criminal Justice Act 1961 which made Borstal 'training' the standard medium-term custodial sentence for that age group.

8. Work such as Nicholas Kittrie's The Right to be Different: Deviance and Enforced Therapy, John Hopkins Press, Baltimore/London, 1971, which listed many of the severe impositions which had occurred in the name of treatment or expert advice, and L. Taylor, R Lacey, and D Bracken, In Whose Best Interests, Cobden Trust, London, 1978, which set out the intrusive and 'unjustifiable' nature of the hidden coercion of juvenile welfare.

9. A.E. Bottoms and R.H. Preston (eds.), The Coming Penal Crisis: a criminological and theological exploration, Scottish Academic Press, Edinburgh, 1980.

10. I. Taylor, in Law and order: Arguments for Socialism, Macmillan, London, 1981, argues that the target of this politicalisation in Britain is the post-WWII welfare/Labour/Social Democratic stance. We shall be concerned to put a broader argument.

11. I stress that I include the rhetoric of return to community as expressing a development which can only be understood as closely related to, if not within, a general social framework I label as the time of Just Deserts. This is because, as I hope to emphasise later, the period of classical criminology assumed that they were dealing only with the mechanisms of a specific form of control. The backdrop to Classicism, and the displays of power through state pain, was the un-stated control of the village, familial township and a free flow of knowledge about punishment which meant that such punishment need only be done on a minority. The most recent British Government Green Paper is expressly concerned with "punishment in the community". Punishment, Custody and the Community, Home Office, Cm. 424, H.M.S.O. In the United States at the same time as the return to justice rhetoric gathered force community programmes and diversion were expressly called "the new justice", see D.E. Aaronson, B.H. Hoff, P. Jaszi, and D. Sarri, The New Justice: Alternatives to Conventional Criminal Adjudication, Government Printing Office, Washington: DC, 1977.

12. The high point of 'welfare' in British Juvenile Justice is, for example, given as the 1969 Children and Young Persons Act which put wide discretion and Care orders at the centre of its 'social justice'. The preceding White Paper had stated: "It is necessary to develop further our facilities for observation and assessment, and to increase the variety of facilities for continuing treatment, both residential and non-residential. Increased flexibility is needed so as to make it easier to vary the treatment when changed circumstances or fuller diagnosis suggests the need for a different approach." Children In Trouble, Cmnd 3601, HMSO, London, 1968, p.20.

13. Karl Menninger, The Crime of Punishment, The Viking Press, New York, 1964.

14. Egon Bittner and Anthony M. Platt, "The Meaning of Punishment", Issues in Criminology, Vol 2 (1966), p.79.

15. Alasdair MacIntyre, After Virtue: a study in Moral Theory, Duckworth, London, 1981 [2nd ed. 1985].

16. For a commentary on this see, for example, Stephen L. Newman, Liberalism at Wits' End: the libertarian revolt against the modern state, Cornell University Press, Ithaca and London, 1984.

17. The label is from John Pratt, "Corporatism: The Third Model of Juvenile Justice", British Journal of Criminology, Vol. 29, No.3, 1989.

18.A. Morris, H. Giller, E. Szwed and H. Geach, Justice for Children, Macmillian, London, 1980, p.72.

19. Since the early 1970's there has been a vocal demand for 'community based corrections', or 'alternatives to custody'. Their rationale has varied between arguments which see them as more cost-efficient than custody, or a development of labelling school theories, or suitable to a specific client group in their own right - developments of victim involvement are in a sense also community based.

20. Bottoms was not, of course the first to see the influence of 'pragmatism' in British criminology and penology. In "Criminology and the sociology of deviance in Britain", Stanley Cohen stated: "The pragmatic approach has become an indisputable feature of British criminology". The language was even openly used on occasions, Radzinowicz, for instance had traced the development of criminology through a 'liberal' and then 'deterministic' position to the 'new realism' of the 'pragmatic position' (in Ideology and Crime). But what determines this use of pragmatism and dooms it to simplicity is its non-reflexivity or lack of any grasp of historical development which would give itself consciousness of itself as an epistemology. Rather as Cohen says of this 'pragmatism', "one finds an overall distrust for theory or for some master conception into which various subjects can be fitted." "Criminology and the sociology of deviance in Britain", in Deviance and Social Control, Paul Rock and Mary MacIntosh (eds.), Tavistock, London, 1974, p.8-10.

21. Quotes from The Coming Penal Crisis.

22. The sense in which I use this term will become apparent as we proceed.

23. A British text which makes this point clearly in the case of criminology is D. Downes and P. Rock (eds.), Deviant Interpretations, Martin Robertson, London, 1979. Rock's essay highlights the "mortality" of criminological research, as well as being a critique of the "totalizing" tendencies of the New Criminology; Downes hits out at the ambiguity surrounding action/impotency in his "Praxis makes perfect: a critique of Critical Criminology".

24. Hilary Lawson, Reflexivity: the Post-modern predicament, Hutchinson, London, 1985.

25. In the philosophy of science Paul Feyerabend provides a clear example, see Against Method, New Left Books, London, 1975; and Science in a Free Society, New Left Books, London, 1978.

26. Reflexivity has become a tool of argumentation allowing us to see the circles within which "secure" claims actually move and thereby to undercut the confidence with which such claims are made - but again this turns back upon itself as soon as its own

confidence rises. Thus, the hermeneutical claim that knowledge and meaning is always symbolically embodied and historically situated must itself be part of that phenomena. Although a discipline may recognise this factor, and in hermeneutics there is recognition of the "hermeneutical circle", the question is soon raised as to how someone conscious of this factor can assert the "truth" of what he claims; even if that 'truth-claim' is a claim to be (truly) prejudiced?

27. The Compact Edition of the Oxford English Dictionary, 1971, s.v. "legitimate, adj."

28. Cf. Chapter 11, "Demarcation between Science and Metaphysics" in Karl Popper, Conjectures and Refutations, Routledge and Kegan Paul, London, 1963.

29. Frederick Jameson, Forward to Jean-Francois Lyotard, The Postmodern Condition: A Report on Knowledge, Manchester University Press, Manchester, 1984, p.xi.

30. Charles Goring offers a clear reconciliation of marcation, journey and legitimation when voicing his legitimating urge for his positivist critique. In his survey mentioned earlier Cohen sees Goring as "epitomiz[ing] the whole tradition which followed him". Cohen uses Goring as an example of a certain complex for traditional criminology, namely: 1) pragmatism; 2) criminology as an interdisciplinary science, insulated from sociology; 3) the correctional and reformative positions and 4) the positivist trap. Cohen states: "Goring's approach was totally pragmatic. He belonged to no criminological school and, starting from his day to day experience as a prison doctor, simply set out more systematically to test the claims of Lombroso.... Goring was not just pragmatic, but in his combination of disciplines... he exhibited ... [an] inter-disciplinary approach.... And, as a prison doctor, Goring's interests in doing research were fairly clear cut: one had to find better ways of dealing with convicted criminals, ..." ("Criminology and the sociology of deviance in Britain", p. 6-7.) But, reading Goring in the light of our Ch. Three and Ch. Seven, what Goring actually demonstrates is a non-reflexive and non-pragmatic empiricism. Goring never travels outside of his community, but adopts the problems of that community in their 'common sense' presentation, and of his role i.e. as prison doctor, while accepting the progressive narratives to explain to him how he is to contribute to progress in his situation. Goring never pragmatizes 'facts', but interprets them in empirical fashion to makes sense of the appearances he comes across, i.e. the characteristics of prisoners. Thus he claims: "the ends of criminological science, of all social science, must be approached across facts, and facts only. the collecting of opinion, the exercising of dialectical ingenuity, the referring to authority, the quoting of illustrative cases - these uncharted ways of the old descriptive sociologists have led only to confusion, dogma, and superstition: they must be abandoned. The discoveries of the explorer cannot be recognised until he produces a verifiable map of his journey; if the goal, professed

by the sociological explorer, is to be accepted, he must show that the path he has pursued is one which others may follow.

Now, the road that we have attempted to shape, is paved with statistical facts; each of which, within the limits of our search, we believe to be indestructible by controversy. The credentials of our every statement will be found in the scheduled data, in the tables of analyzed data; and by this aid, our path may be retraced step by step, its bearings tested and its direction criticised. If we have gone astray anywhere, the fault can be logically demonstrated by the critic pointing the error in our data, or in the analysis of these data, or in their interpretation. but he must not dismiss our results because they may be opposed to his opinion, or to current opinion: he must enforce any condemnation he may make by the production of statistics more representative than ours, and related to a more exhaustive and accurate observation." Charles Goring, The English Convict, H.M.S.O., London, 1913, pp.370-1.

31. Bernd Jager, Theorizing, Journeying, Dwelling, Duquesne Studies in Phenomenological Psychology, Volume 11, Giorgi, C. Fisher, E. Murray (eds.), Duquesne University Press, Pittsburg, 1975, p.235.

32. The Poet Philosopher Parmenides of Elea was the first (in the West) to place as central the question: "What is the nature of the true being?" His answer was that we must distinguish "the way of seeming" from "the way of truth". The poet undertook a chariot journey, escorted by the Daughters of the Sun, to the home of the Goddess Justice, where he was told of "both the unshakable heart of well-founded truth, and of the beliefs of mortals, in which there is no true reliability". Ordinary habits of speech and the data of sense perception are warned against, the way to truth is the way of reason. Truth is not alone, for this is also "the way of persuasion, for she is the attendant of truth". A collection of narratives which bear out the resemblance strongly and which include Parmenides is Georg Mische, The Dawn of Philosophy, R.Hull trans.), Routledge & Kegan Paul, London, 1950.

33. Philosophy and the Mirror of Nature, Richard Rorty, Princeton University Press, Princeton, New Jersey, 1979.

34. Ibid., p.316.

35. Ibid., p.357.

36. Ibid., p.377.

37. Ibid., p.378

38. But after this analysis how is it that we have come so far along "the road"? Rorty holds that systematic philosophy actually achieves things by disregarding its own canons: "by perpetually straddling the gap between descriptions and justification, cognition and choice, getting the facts right and telling us how to live". Ibid., p.385.

39. The Coming Penal Crisis.

40. Stanley Benn, "Punishment", The Encyclopedia of Philosophy, Macmillan Publishing Co Inc, Vol 7, p.29. He would seem to disregard this in his very definition of punishment, claiming that "strictly speaking, all that is necessary for a theory of punishment is that human conduct should be capable of being modified by threats." (p.33).

41. H.L.A.Hart, Punishment and Responsibility: Essays in the Philosophy of Law, Oxford University Press.

42. T. Skillen, Ruling Illusions: Philosophy and the Social Order, Harvester Press, Hassocks, Sussex, 1977.

43. David Garland and Peter Young, "Towards a Social Analysis of Penalty", in Garland and Young (eds.), The Power to Punish, Heinemann, London, 1983. Further references to this essay are contained in the text annotated as (G. p.).

44. Ruling Illusions, p.110, at p.118 Skillen goes on to state; "No more than crime, then, can punishment be treated in the abstract; rather do we have to look at specific practices with specific histories, ideologies and effects."

45. Ibid., p.112.

46. Barnes and Teeters, New Horizons in Criminology, Prentice-Hall, New York, 1945.

47. Quotes from "Preface" to Nigel Walker, Crime and Punishment in Britain, 1964, pages not numbered.

48. See F. Suppe (ed.), The Structure of Scientific Theories, University of Illinois Press, Chicago, 1977.

49. Ibid., p.619.

50. Ibid., p.32.

51. David Matza, Delinquency and Drift, Wiley, New York, 1964.

52. The Structure of Scientific Theories, p.19.

53. George Novack, Pragmatism versus Marxism; an appraisal of John Dewey's philosophy, Pathfinder Press, New York, 1975. Novack's critical 'destruction' of pragmatism sets out as 'pragmatism' a Bourgeois mode of thinking fundamentally identical to that image which Garland constructs.

54. See further Garland, "Philosophical argument and Ideological effect", Contemporary Crisis, 7(1983), 79-85

55. This view is founded upon the Saint-Simon confidence that "any institution founded upon a belief ought not to outlive this belief", and is given recent expression by Philip Pettit as the belief that "the purpose of social institutions, where institutions may mean groups or practices, is to serve the interests of individuals and [that] such institutions are intrinsically perfectible: they offer no resistance of themselves to being adapted to individual interests, although there may be other constraints on the adaptation possible. This reformist viewpoint represents groups and practices... as playthings in the hands of people: instruments whereby individuals can better achieve their personal satisfactions. Not all institutions are supposed to have been the conscious product of individual ingenuity, but all are subject in principle to the ingenuity of the political planner." Philip Pettit, Judging Justice: an Introduction to Contemporary Political Philosophy, Routledge & Kegan Paul, London, 1980.

56. R.N. Berki, Security and Society: reflections on law order and politics, J.M. Dent & Sons Ltd, London/Melbourne, 1986, at p. 57.

57. George Rusche and Otto Kirchheimer, Punishment and Social Structure, Columbia University Press, New York, 1939. References contained in the text annotated as (R. p....)

58. When we read Capital we are led into a debate with the forerunners of Marx and, implicitly, with the ideas of the 'early' Marx - those, such as Hegel and Feuerbach who put their analysis specifically in philosophical terms. Now Marx sought to declare the end of such philosophical speculation and asked us to consider: who are those reduced to talking about society in general?, and he presented the answer: those who regard the factor of 'consciousness' as the principal, specific, element of human society and history, and accordingly hold that societies should be investigated exclusively at the level of 'ideological' social relations. Marx claimed this perspective forced us to consider the juridical and political forms of societies as originating from this, or that, idea of humanity - hence, as mere products, or movements, of thought. Of course the early 'natural law' Marx (see Paul Phillips Marx and Engels on Law and Laws, Martin Robertson, Oxford, 1980, for the textual argument for such a distinction.) had framed his own arguments in such a fashion but now Marx held that the trap of such thought was that any analysis based upon the primacy of consciousness cannot engage with a real object, but only an idealised objectivity wherein the relationship between theory and its object contracts into a mere relation of idea to idea, an internal monologue within thought itself, whereby the object of analysis slips through our fingers, and it becomes impossible for us to undertake any study of the facts, of social processes, precisely because we are no longer confronting a society, a real object, but only the idea of society, society in general.

The epistemological canons of the so-called 'scientific' late Marx of Capital labels such discourse as an impure blend of assertion and metaphysics, a discourse which reveals, on

reflection, only that men do not know how to go about the study of facts and, in their shortcomings, resort to inventing "a priori" general theories concerning general covering terms, theories which always remained sterile, substituting, or superimposing, a generic or ideal object for the real object to be explained.

59. In Capital Marx states, in effect, that England is only in the analysis for the reason that it, at an historical time, embodied the historical moment which enabled the model to be seen.

The subject of analysis is not England, as such, but the capitalist mode of production, which, as it developed, worked itself out in the conditions prevalent in England. Similarly, Garland is quite specific. Penalty is important as an area of analysis, he argues, as "in the Penal realm these various relations are actually fused in a serious of condensed and complex relations". Any "individual penal sanction[s] condense[s] a number of different relations". Specifically those of "force.. legal... political... ideological... economic." penal sanctions are "a complex condensation of a whole serious of relations. These relations are neither external nor accidental in relation to penalty. They are part of its structure, of its significance and its effects." (The Power to Punish, p 22-23.)

60. For example the predominance of property offences, see D. Hay, et al., Albion's Fatal Tree: Crime and Society in Eighteenth-Century England.

61. Bhaskar, R. A Realist Theory of Science, Harvester Press, Brighton, 1978.

62. For a sympathetic account of a prominent version of critical theory see Raymond Geuss, The Idea of Critical Theory: Habermas and the Frankfurt School, Cambridge University Press, Cambridge, 1981.

63. Security and Society, p.28.

64. Apart from "God", who is the only truly independent substance, Descartes gives us a division of reality in which man corresponds to two parts - thinking substance called mind, and extended substance which comprises body - a dichotomy which provides the related grounding for the related dichotomies of reason and passion or affection, of theory and practice, and the restlessness of mind in body and the demand for the reconciled identity which underlies many of our concepts (of which alienation is a key one). For Roberto Unger this distinction provides the motor force for social change, see Law in Modern Society, The Free Press, New York, 1976.

65. The pragmatist takes his specific of explanation as arising out of the linking of man, purposive activity and the world - explanation is seen as an attempt to answer a certain kind of problem. A problem is a relation between two objects, a relation which we think deficient, and which we wish to reorganise in some

way which solves the deficiency of the relation. Theoretical problems come about when we conceive that our knowledge of the world is deficient - for example where there is a gap between our desire to do something and our concept of performance, here our knowledge at present is thought to be insufficient for us to achieve our desire, or we have ideals and we observe that the world does not match these ideals but actually frustrates them and we wish to understand how this is so. Or we wish to achieve something, and before we set out to act we wish to see the terrain we are to act upon. For all these we need an explanation to reconcile our desire, or thought, with the operation of the matter we are to interact with. Similarly we may need knowledge to reconcile what we had previously had thought to be the case with events that appear to demonstrate to us that 'reality' is different. Theories and explanations offer manifold reconciliations of the mind-body division - they mediate between the relativity of the mind of man and the variability of matter into a closure of understanding which grants solace at the cost of reflexivity.

63. Hans Reichenbach, Experience and Prediction, University of Chicago Press, Chicago, 1938, pp.5-7.

67. The Logical Positivist Carnap declared that the task of reconstruction is probably the most important task for philosophy, and with this "the main problem concerns the rational reconstruction of the concepts of all fields of knowledge on the basis of concepts that refer to the immediately given." Rudolf Carnap, The Logical Structure of the World, trans. R.A. George, Routledge & Kegan Paul, London, 1967, p.v.

68. Reichenbach, op. cit., p.6.

69. Susan James, The Content of Social Explanation, Cambridge University Press, Cambridge, 1984.

70. We should bear in mind that there is a commanding rationale for the positivist position (justification of theory by 'truth' alone) - that is, the prevention of the issue of the acceptance of theory as being a plaything in the hands of demagogues who would subvert the issue of truth to their desire. This ideal deserves not a weakening, but for us to deepen our understanding of it - for reflexively it is a "moral" rationale. From our position the disputes over the truth or falsity of criminological or penological theories is unavoidably also a discussion of values. The claim that when one criminology or penology [albeit a social analysis] criticises another and reveals its 'false consciousness' in the name of its succeeding truthfulness it is actually confronting its own values with another's. Such a contest is not a "refutation" in the Popperian sense, but a rejection and a movement away from the terrain of the other. This is so even when the formal criterion of refutation is satisfied. Such criterion are easier to utilise in the social sciences but this is not done so that they will develop into a "harder" more

"natural" science as Popper implies, but because of their basic moral unit of analysis.

71. Heidegger, Nietzsche: Volume 2, The Eternal Return of the Same, quoted in David Kolb, The Critique of Pure Modernity: Hegel, Heidegger, and After, University of Chicago Press, Chicago/London, 1986, p.137.

72. Popper may deny such an interpretation and certainly his use of a Taskian meta-language may on some interpretations suggest the possibility of arriving at some closed book of God wherein a list of all the true statements about the universe and man are written - some full account of how things really are. But his oft quoted 'humanization' of knowledge effectually equates truth as sincerity in argumentative discourse. Popper asks us "to give up the idea of ultimate sources of knowledge, and admit that all knowledge is human; that it is mixed with our errors, our prejudices, our dreams, and our hopes; that all we can do is to grope for truth even though it be beyond our reach. We may admit that our groping is often inspired, but we must be on our guard against the belief, however deeply felt, that our inspiration carries any authority, divine or otherwise. If we thus admit that there is no authority beyond the reach of criticism to be found within the whole province of our knowledge, however far it may have penetrated into the unknown, then we can retain, without danger, the idea that truth is beyond human authority. And we must retain it. For without this idea there can be no objective standards of inquiry; no criticism of our conjectures; no grouping for the unknown; no quest for knowledge." Conjectures and Refutations, p.30.

73. Cf Nicholas Maxwell From Knowledge to Wisdom: A Revolution in the Aims and Methods of Science, Basil Blackwell, Oxford, 1984. Note that Rorty also sees his project in these terms, see Philosophy and the Mirror of Nature, p.372.

74. "Phantasia".

75. "To comprehend what is, this is the task of philosophy, because what is, is reason. Whatever happens, every individual is a child of his time; so philosophy too is its own time apprehended in thoughts. It is just as absurd to fancy that a philosopher can transcend its contemporary world as it is to fancy that an individual can overleap his own age, jump over Rhodes. If his theory really goes beyond the world as it is and build an ideal one as it ought to be, that world exists indeed, but only in his opinions, an insubstantial element where anything you please may, in fancy, be built...

One more word about giving instruction as to what the world ought to be. Philosophy in any case always comes onto the scene too late to give it. As the thought of the world, it appears only when actuality is already there cut and dried after its process of formation has been completed. the teaching of the concept [Begriff], which is also history's inescapable lesson, is that it is only when actuality is mature that the ideal first appears

over against the real and that the ideal apprehends this same real world in its substance and builds it up for itself into the shape of an intellectual realm. When philosophy paints its grey into grey, then has the shape of life grown old. By philosophy's grey in grey it cannot be rejuvenated but only understood. The owl of Minerva spreads it's wings only with the falling dusk." G.W.F. Hegel, The Philosophy of Right, T.M.Knox Trans., At the Clarendon Press, Oxford, 1953, p. 11-13.

76. Guidance by knowledge is the highest form of "theoria" which has the telos of interpreting, understanding and contemplating reality: but this task, which can only end with "the world apprehended in thoughts", leaves man the laggard drifting behind the natural cunning of history.

The impotence of theory (as pure knowledge) is that it cannot guide practice - it can only apprehend the actual. The drive to change, constituted in man's actions, sprang, for Hegel, "from their needs, their passions, their interests, their characters, and their talents", was central to Geist. The spirit of reconciliation between thought and desire, theory and practice, wherein the "theoria" of Geist was the reflexivity of man's consciousness of the rationality of life itself. But without such awareness the geist of transformation, the harmony between the task and the aptitude for the task, collapses into incoherence - reflexivity cautions social theory, then, by forcing it to question itself repeatedly, not simply about the means of the task, but about the task itself.

Chapter Two: Knowledge and the Construction of Modernity: an outline narrative overview.

I

Central to any understanding of modernity is the Enlightenment¹ and for heuristic purposes we may assert that modernity is the product of the transformations which the Enlightenment begins. The Enlightenment is most commonly described as a strange sort of "coming out" party. A party where there is a great deal of behind the scenes preparation, confusion on the night, but, once over, its subject "man" has "come of age", and is free to go out into the real (the true) world, a free man to make his own destiny.

In a sense stories of the Enlightenment and its resultant "freedoms" appear inescapably linked to certain spatial metaphors also found in earlier writings. The orthodox narrative of our progress portrays the crucial transformation of the Enlightenment as follows: Plato had depicted men as living in a cave, prisoners of their inability to use reason, governed by ignorance and myth; Plato, aided by Aristotle, had formulated an awareness of the glorious potentiality of reason, but this, in its turn, was surrendered to the forces of organised Religion and subjected to the politics of absolutist Authority.² Without the proper use of reason, man looked out into the world and saw strange and complex things, and, afraid of mystery, constructed new and even more elaborate mythologies to make the events of the world appear meaningful. In the Enlightenment man thrust free of the hold of those mythologies and the domination of that Authority, to bring light to the cave - alternatively, he left the cave to construct a home outside in the light of the continuing knowledge he obtained of the real causes and springs of nature - he was no longer subjected to the illusions and personifications of the realm of mystery but became possessed of the capabilities of scientific reason. From then on his continuing battle was to separate opinion from knowledge, politics from engineering.

Requiring a place to inhabit, man set out to develop social theory and to use this to construct a citadel in which cohabitation would be possible. The enemies of successful cohabitation were strongly identified with politics and metaphysics. It was felt that social and individual freedom would flow from proper social arrangements, and man could only discover these when the logos of discussion was freed from the illusions of metaphysics and the arbitrariness of politics.

We summarise thus: the aim of social theory was to create a building of objective knowledge that would not be at the mercy of metaphysical speculation or of political storms. Modernity was a constructivist project. Bacon, an epistemological empiricist, and one of the strongest figures in the early construction project, identified the task thus: "Knowledges are as pyramids, whereof history is the basis...³ The History Bacon had in mind was a "well-ordered Natural History [which] is the key of all knowledges and operations". Little progress was possible until this had "been prepared and constructed". Without this secure grounding of ascertained fact as to man's past and the historical process he found himself in, intellectual endeavour would be a mixture of unreliable and abstract theories, where everyone would have his favourite fancy and would philosophise "out of the cells of his own imagination, as out of Plato's cave". New and solid structures could be raised upon "a true and copious history of nature and the arts", the building to be guided by this "first philosophy.... [being] a receptacle for all such axioms as are not peculiar to any of the particular sciences, but belong to several of them in common." This was a methodology for use also "in civil business", and including not only "natural philosophy", but also "the other sciences, logic, ethics, and politics". In this process, the illusionary fancies of the imagination (the constructions of metaphysics) were the enemy, and, thus:

"The formation of notions and axioms on the foundation of true induction is the only fitting remedy by which we can ward off and expel these idols."⁴

Bacon proposed an anchoring as the archimedean point of truth

itself - not now an external vantage point from which to survey the reality of the cave but an inherent entity in the nature of the central subject (man), and his relation to the external object (the world).

"Truth is not sought in the good fortune of any particular conjuncture of time, which is uncertain, but in the light of nature and experience, which is eternal".⁵

Descartes, a philosophical rationalist, while differing from the empiricist approach of Bacon, openly reduces the terminology of wisdom to the project of construction through knowledge. Descartes first makes a classical statement of the aim of wisdom: "the end of study should be to direct the mind towards the enunciation of sound and correct judgments on all matters that come before it", but he then goes on to state that "the sciences taken together are identical with human wisdom". The task is to combine the various disciplines to achieve a comprehensive edifice for the purpose of secure life. Thus:

"if, therefore, anyone wishes to search out the truth of things in serious earnest, he ought not to select one special science; for all the sciences are conjoined with each other and interdependent: he ought rather to think how to increase the natural light of reason, not for the purposes of resolving this or that difficulty of scholastic type, but in order that his understanding may light his will to its proper choice in all the contingencies of life."⁶

The activity of choice, however, is seen as directed by "what we can clearly and perspicuously behold and with certainty deduce; for knowledge is not won in any other way". Progress is assured for man if he applies the scientific method to attain knowledge of every sphere of human life, and the foundations of our project are secured by the benevolence of God's gift of basic innate ideas. Hence the transformation of wisdom into knowledge is for Descartes a part of an imaginative grasp of the "order of things" in which God provides the anchoring point - man comes out of the cave by the grace of God.⁷

Whether guided by the empiricist or the rationalist approach, concomitant with man coming out of the cave into the light of true knowledge he also slowly comes out of the social relations

which the German theorist Tonnies was later to label as the *Gemeinschaft* and into the *Gesellschaft* - this transformation replaces the legitimations and ideologies of the *Gemeinschaft* incorporating domination-submission as the habitual acceptance of tradition or the authoritarian stipulation of the significant relations of the world, and the centrality of the exercise of parental responsibility with its accompanying submission to parental will. The growth of *Gesellschaft* law and rationality is inimical to set relations of dependence and status and the transference of supposed hierarchies from nature requiring a new way of relating to the world - a way in which the hold of tradition and authoritarian stipulation over practice gives way to a new style; of openness to truth and to 'problem' as the drive of practice.⁸

Modernity breaks from the grip of the past via an act of self definition wherein it conceives itself as a 'problem': a complexity which determines both the nature of the structure of being - the problem of the 'what is it?', and the methodology of action, 'how is it/the other to be done?'. Modernity becomes a series of problematics, and the achievement of this status is itself the harbinger of modernity. The symptoms of modernity, are thus the very things which bring it about.

The problematics of modernity stand linked and indicative of the constructivist project. The 'solution' of the one impacts and interacts with the nature of the other and the framing of the construction of the future. The life of the cave of the *Gemeinschaft* rested on the 'social space/terrain' of a perceived harmony constructed out of the ties of friendship, tradition and the habitual/common acceptance of religious ordering and a telos of nature; the destruction of that 'natural harmony' throws open the 'nature' of modernity's 'nature' as a problem to be resolved. The problem of modernity consists, among others, as the problems of:

- 1) how is one to conceive of society - the methodology of vision and understanding?;

- 2) how is one to organise society?;
- 3) how is one to control power?;
- 4) how is one to achieve social control?;
- 5) how is one to understand oneself?

where the solution of each relates to the others.

II

Mystery and Problem: a background contrast.

For modernity to place prominence in 'problem' as the modality of conceiving of the relationship of man and existence may result from a latent choice; other possibilities are at least dreamable. For the French existentialist philosopher Gabriel Marcel there were two paths to follow in pursuing the question "what am I?", or "what is X?" Under the first the answer is sought in the reduction of the question to a problem and the analyzing of its parts to produce a solution. A 'problem' implies that we lack some information or knowledge and that all we have to do is look for this, engage in 'research' and thereby overcome our temporary ignorance. The question of relating is secondary and is directly led by or responsive to the product of the first. What is important is the provision of knowledge, and, almost as an invisible transformation, the arrival of this knowledge is seen as itself guiding the solution.

Using these concepts our model of 'problem' lies within the confidence of ongoing epistemological purification orientating man to take on a 'societal' organizational mode of development in which progress is closely related to attainment of knowledge. Applying this model to the development of social theory we see post enlightenment man as actively reasserting Plato's distinction between knowledge and opinion so that he may use knowledge to relate to the world via the mediation of 'problem' - thus side stepping the realm of politics with its inherent need to decide between opinions - and building an epistemologically secure social order.

Methodologically, to produce such explanation it is absolutely crucial that the pursuit of truth must be separated and preserved from those various psychological, sociological, economic, political, moral and loose "ideological" factors and pressures which directly affect the process of thought in society. Obviously such factors will influence the creation of thought, but this can be transformed into reliable knowledge via the distinction between the context of discovery and rational reconstruction and further understood by the various critiques of the "sociology of knowledge". Moreover, the model of 'problem' is self-sustaining since problem solving is seen as the justification of taking action based upon theory - but this is in fact determined already by the bind of truth - for truth is what justifies the acceptance of the theory and if we have truly stated the conditions of the problem, i.e. set out the entities to be correlated, then a topology of solutions can be set out - and that which most closely corresponds to the nature of the entities rationally accepted.

Under this model the grasp of 'problem' is to constitute certain profiles of reality as its object; to state the determinants of its view of the object at any one time, and to seek out the laws which cover the operation and 'being' of this object with the criterion of 'solvability' paramount. There are in principle no areas beyond the scope of problem. Success for this path lies in the resolution or attainment of control over the determinants which "caused" the specific sub "problems", and total success will be achieved only when the totality of the conditions and the laws governing the realm of 'problem' can be arranged into a logically connected whole. This activity, which corresponds to the overcoming of such separations, will be the intellectual, and in turn by praxis the actual, coming-together of what-is with the what-it-was, and the what-it-will-be (the full knowledge of covering laws). Theory combines with practice and upon achieving this man will obtain a stable home, a permanent order allowing an harmonious existence.

The style and history of 'mystery' on the other hand is different. 'Mystery' grants itself a situational context the nature of which can never be fully known, nor controlled. The journeying of 'problem' is engaged in for an outcome (a conclusion) which ideally can be specified with the proper knowledge, but, with 'mystery' there can be no finite conclusion to this journey, only a temporal direction, and, rather than guidance by concentration upon the method of 'problem', a style which involves the continual exercise of judgement, wherein discretion is used and choices made, in the recognition of the impossibility of the perfect dwelling. Instead, for 'mystery' any stoppage is but a breaking off, an arbitrary interruption in an open-ended process. Explanation is not seen as the search for the definite answers and the allocation of the correct words, but an interaction with knowledge-claims and opinion, which, correspondingly, requires meaningful interpretation and clarification of the possible significance of their aspects.

The existence of man is seen as in a world of immediate problems, but throughout that world, and above the resolution of the immediate, will always be the fact that the world is to be a lived-in-world. Conditions of relation supersede in importance the perspective on the gaining of secure knowledge. The advocates of 'mystery', state that concentration on 'problem' can only ever produce knowledges linked to a temporal-spacial position, which indeed may appear adequate to the task in particular, but which are necessarily narrow in their scope and should not bear claims to universality. Almost in paradox, it will be argued that the more harmonious order will be that made possible by renouncing the idea of the completely understood and ordered state of the world demonstrating a 'truthfulness' visible to all men. As Marcel put it:

"Perhaps a stable order can only be established on earth if man always remains acutely conscious that his condition is that of a traveller. Does not everything happen as though this ruined universe turned relentlessly upon whomever claimed that he could settle down in it to the extent of erecting a permanent dwelling for himself."⁹

Man's uniqueness for Marcel was that "the essence of man is to

be in a situation", and with this concept of situation comes a recognition of the moral dimension of existence.¹⁰

'Mystery' states that any statement of "final reality" is the reality of 'mystery', for we are never to be absolute "knowers". Herein lies the dilemma: for if we are to be of necessity (and this is an 'of necessity' that we cannot give the reasons for - as that would be to give a vision of a final reality that we cannot know), and to all eternity, never to set out a system which locates the 'objective' position of man and the cosmos, and mirrors the complete being of man, then what is the role of the multi-various words, groups of words (sentences, paragraphs, texts), theories and explanations, and 'knowledges' in human activities? Furthermore, what is the proper relation to those "descriptive frames of reference" which 'problem' constructs, and tells us to use as guides in social arrangement and practice?

III

Linguistic mediation on 'mystery' and 'problem'.

On the one hand the voice of 'problem' declares that even if we were forced to renounce the security of some absolute or God given foundation, we are safe in the resulting frames, we need not despair nor despise them, for these products of 'problem' are our constructions, not those of 'God' or any other, but made by us, in partnership with the tool of language as we relate to the external world. For Vico the fundamental security of the descriptive frames of social theory was that "minds are formed by the character of language, not language by the minds of those who speak it". The independence of language allows us to concentrate upon the reality of the world, the impartiality of language enables 'problem' to resist arbitrary domination, and understand both the natural and the historical-social. The latter is open to our understanding as we are men and therefore can understand all that men are and have done and postulated, including history and the content of history. We can discuss and

rationally resolve our particular situations - men as men wherever we temporally stand. As a modern interpreter of Vico, J.L.Gorman, put it:

The only way of avoiding the problem [i.e., despair at the prospect of viable not universal foundations] is if the principles have an independent ground of support, and this...is provided by the fact that man made the world of nations - 'men' not as they but as we - and we have privileged access to its principles, which we may rediscover within the modifications of our own human mind. Although man is historically conditioned in large part, we know, in a way which transcends any empiricist skepticism, what we are like, and this provides the ultimate rational constraint. This last is our substantive commitment...the epistemological foundation [of Vico is] when the theorist understands himself, he may understand others".¹¹

By contrast Nietzsche argues that this reliance upon the self as stable or knowable is reflexively open to 'perspectivism':¹²

"But how do we recognise ourselves? How can a man know himself? He is a dark and hidden thing; whereas the hare is said to have seven skins, man can take off seven times seventy skins and still not be able to say: 'That is you as you really are, that is no longer mere external appearance'".¹³

This later move not only denies the transparency of consciousness to itself and the existence of an absolute 'common-sense', but also leads to the denial of human consciousness to make knowledge-claims as to the 'objective' reality of the human condition, other than trapped in the historical nature of its varying world views.¹⁴

This reflexive concern is not new; the understanding that the conception of the self and its powers of cognition structured the perception of the 'object', and thus the resolution of the choices of relationships was a target to be contained. Kant, for example, to bring forward aspects of our later discussion, sought to remove the use of reason by the human self from any necessity to be founded upon a particular empirical theory of human nature. As human desire was empirically subjective Kant declared that a danger came with 'problem's' myopia or partial blindness, in his words, "die zweckvolle Zwecklosigkeit" - the aimful aimlessness. Against this Kant held it was possible to construct, on the basis

of certain key tenets (for example that we must treat "nature" as "formally purposive" with respect to empirical laws, and that we can make sense of nature not only in general but also in particular) an edifice of purity. Reason was strictly systematic:

"but there is yet another consideration which is more philosophical and architectural in character, namely to grasp the idea of the whole connections and therein to view all... parts in their mutual relations."¹⁵

From Kant onwards the idea of living in a building of knowledge is linked to Reason taking charge of the quality control of the construction and the materials used. Tasks are distributed - surveyors, architects, and builders - people to ensure that the land is not likely to subside, the requirement of strong foundations, and that the structure knits firmly together but all are guided by the impartiality of 'rationality'.

That is not to say that man is not deeply involved. For Kant the construction of the building was a 'critical task' - man could not passively rely upon deciphering the word of God - but instead must become actively and critically involved usurping the central position in a process wherein his powers of creating scientific theory come as an extension of the cognitive powers of the human mind and logical inference.

Kant divides reality into two - a phenomenal realm which science can cover, and a noumenal realm about which we can never have knowledge. Man can only have knowledge about the phenomenal and the ordering of that knowledge is related to the essential conditions of man's contact with this phenomenal realm.

Objective knowledge is the creation of the interaction between the direct sensations we receive from the outside world and the object, transcendental conditions of cognition - the mind of the scientist is crucially involved, as an operative source, in the production of the universal laws we discover in nature.

Further, this is no chaotic, arbitrary form of subjective experience, but an objective experience to be reflectively

understood at the level of man's 'universal' interaction with the world. Thus for Kant 'the a priori conditions of experience are also the conditions for the existence of the objects of experience.' An absolute frame of reference exists now which structures the mind of the subject (man) himself. The object (the world) no longer unfolds its written laws for man to correctly interpret, but man as active cognitive subject moves to the centre and the world is understood in the language of that subject's cognition. Science does not simply take receipt of nature's script but neither does it dialogue with nature; it imposes its own language upon it. Still it must discover, in every case, the specific message expressed in this general language - simply knowing the a priori concepts is pointless. The construction process is legitimated upon the foundational belief that nature is rightly subjected to the laws that the scientists succeed in creating - whatever the area of investigation, whatever the relevant question science asks, it will obtain a commensurable answer, i.e. one translatable into the master language. The basic certainty is that there exists a single universal syntax which includes all possible answers.

There can be no need for political reconciliation of differing conceptual schemes: for science now can claim to have found the definite form of all possible positive knowledge, while at the same time philosophy takes at best an epistemological function with respect to science. It is no longer necessary to look for the philosophic significance of the results of scientific inquiry - because from a transcendental perspective those results cannot lead to anything 'new'. It is the proper conduct of science, not its results, that is the subject of philosophy; science taken as a repetitive and closed enterprise provides a stable foundation.

'Problem' seizes upon Kant's 'Copernican Revolution' to use philosophy to ratify the results of science - alternatively the realm of the noumenal can be the area of philosophical 'speculation', but that is all it can be, abstract speculation which cannot produce positive knowledge.

Individual men are active in cognition - but their active role is in interaction with others to conduct experiments which must all have their results subjected to the critical analysis of a philosophical purification utilising the a priori principles - thus any diversity of possible scientific points of view must only be temporary. The diversity of presuppositions will be corrected in the rational reconstruction of theories.

The mind is in partnership with language, but the Kantian mind is after the unique language with which science covers nature; a language to which man is essentially joined via the unique set of a priori principles on which science is based and which are identified with the categories of human understanding. The Kantian project unifies the sub-projects: the vital subject man is in the centre imposing the design of his cognition, and the world relates to the language of this subject. Thus science can describe the world from an external, almost divine point of view, and basing his construction upon such knowledge man can create a citadel which not only 'is strong' but which is correct for man.

IV

Differing conceptions of language are crucial to the distinction between 'problem' and 'mystery'. 'Problem' took a particular conception of the Aristotelian definition of man as the rational animal. It down-played the fact that Aristotle's actual definition, in terms of man as that animal which possesses/uses logos (i.e. the rational use of words), was open to a range of meanings. It created a reading whereby the destiny of man was to become possessed of the correct words (and knowledge of the right usage) - then, and only then, would man live up to the promise thought implicit in his possession of logos. This notion sides with a set of theories about language called "designative". These theories explain the meaning of words, and sets of words, solely in terms of their correspondence to things, or states of affairs,

in the "objective" world. The acceptance of these theories is the enemy of 'mystery', as they make the meaning of language, and the items words concern, something entirely assessable and unpuzzling. Words simply have the meaning of signifying, or pointing to, the things they are about. There can ideally be no mystery about what language conveys, and, when the correct way of speaking is engaged in, there can be no mystery about the world. The alliance with 'problem' is demonstrated in the expectation that true knowledge will be the correct correspondence of a set of words to a set of things in objective reality. On this view:

"True knowledge is that knowledge which the knower would have if the proposition which he formulates about the objective reality were exactly isomorphic to the reality."¹⁶

A clear illustration of this alliance is seen in the mainstream reading of the early work of Wittgenstein. This reading holds that in the Tractatus the positivist phase of Wittgenstein sought to prove that the constructions of science successfully banished metaphysics. The role of the philosopher was as a sort of police officer who ensured that everyone used language correctly and engaged in the construction of a sensible world. The building methodology distinguished between "the sayable" (science), and "the unsayable" (das mystische), and was premised on the nature (designative) of language itself. Thus:

"The correct method in [construction] would really be the following: to say nothing except what can be said, i.e. propositions of natural science - i.e. something that has nothing to do with [this process of building] - and then, whenever someone else wanted to say something metaphysical, to demonstrate to him that he had failed to give a meaning to certain signs in his propositions. Although it would not be satisfying to the other person...this method would be the only strictly correct one."¹⁷

For Wittgenstein: "What can be said at all can be said clearly, what we cannot talk about we must consign to silence."¹⁸ The propositions of which language consists are essentially pictures of reality, of states of affairs in the world, and the truth or falsity of a proposition consists in the agreement or disagreement between the states of affairs which the pictures

purport to cover, and the actual states of affairs. Once this quality criterion is established it becomes clear that

"most of the propositions and questions to be found in philosophical works are not false but nonsensical".¹⁹

Mankind is causing itself pain and confusion by misusing language and engaging in nonsensical speech-acts - the implicit meaning of the Tractatus is that once mankind understands the proper use of language it will recognise that it is suffering from "the bewitchment of language" which it will throw off and proper social engineering will proceed. This is the dream of 'problem' and its domination has enabled adherents like Hobbes to think that "clear definitions actually uncover what justice is, because they remove the ambiguity which grows onto a word in vulgar usage and restore to it its proper or necessary meaning."²⁰ On this view the proposition "human nature", necessarily relates to a state of affairs in the objective world, and, once known, it follows then that the "true" meaning of propositions such as "human rights", or "human needs", can be conclusively established.

'Mystery', is linked to those theories about language called "expressionist". With expressionist theories, meaning is not reducible to a correlation, but is something inhering in the very practice of expressing itself. The meaning involved with an expressionist concept of language can not be explained by any analytical reduction. Marcel partly meant by 'mystery' the inability to translate aspects of man and the experiences of being in the lived-in-world into objects "out there", as these experiences always include the subject and cannot be captured in objectivity. Similarly, the technique of isolating terms and tracing correlations cannot be successful when we are dealing with expressive meaning. Expressive theories side with 'mystery' and undercut the claims that science will produce objective accounts of the objective world divorced of subject-related properties. Under the designative conception of language, when it is claimed that the logos of science is objective it is meant that it is able to give an account of the cosmos, and the

entities in the cosmos, in terms that do not involve subject-related properties, that is, to use properties that things have without the experience of subjects and which would exist if the subjects of experience did not exist.

By contrast the expressive account, and the path of 'mystery', cannot avoid subject-related properties and a subject-related account and process. Moreover, because expression is the ability of a subject, and the process of expression is a process in which a thing becomes manifest, both the process and the resulting things refer us back to the subjects for whom the process and the things manifest were important. Crucially, those things which come out of expression, the resulting manifestations of expression, owe their existence to the process of expression, and their meaning cannot be accounted for independently of that process of expression. Acceptance of these theories gives a totally different orientation in any consideration of the ontological status of words such as "crime" and "human rights".²¹

In this later, pragmatic, conception the crucial consideration is the use we make of words and sentences rather than some supposed capacity language has for picturing meaning directly from reality. Instead of guarantee by pure reason, or essential features of reality, the basis of such meaning becomes the socio-historical methodologies by which such uses come into existence and the human desire and activities which create and defend them.

VI

The Dictate of modernist authenticity.

To see man as basically creative, as the central instigator of social change, is an enlightenment perspective. The constructivist project of modernity relies on a creativity which locates itself in the self. As Taylor has put it:

"the modern subject is self-defining, where on previous views the subject is defined in relation to the cosmic order".²²

To Morse Peckham the changes of the Enlightenment heralded

"the power of the individual mind to create, on its own, a vision or order, to discover by itself a true ground for the sense of value, its own source of identity."²³

The self is to be stripped, laid naked from social role or structured ends, free to begin the task of realising its true desires and facilities. By contrast, the pre-enlightenment, intellectual endeavour of medieval Christendom, demonstrated a use of reason grounded in the acknowledgement of doctrinal texts and beliefs, and one which sought to offer man the reconciliation of a scheme of life with the cosmos (albeit reconciliation predominantly in obedience to authority). The cosmos was a text, a text provided by God for man to read and relate to; movement was limited, there was no question of man being able to reshape the world contrary to God's design. Rational interest by man in man and the world observed the creatures of the world as God's creatures, acting in good or evil, threatening or reinforcing, the correct order of things.²⁴ Important requirements were the demands of communion and connection, or attunement with the cosmos; this in turn reinforced and yet also controlled the desire to attain an adequate picture of the true state of affairs. Conceptual schemes were in essence controlled by the certainty accorded to either authoritarian pronouncements of the true state, revelation, or enshrined texts; but even as they did this they also served to back up the central task of man - to live well, that is, in accordance with the rhythm of the cosmos, the terms of the grand narrative of design and purpose whose syntax lay around us in the ontology of the world. Post-Enlightenment theories of human nature and the constitution of man, have as their backdrop the continuing decline of Christianity.²⁵ Neither was man any longer able to describe his reason as engaged in seeking out the beauties of the mystery of God's creation and purpose - man could no longer see the world as God's textual creation - instead man's curiosity was tied to a new conception - the idea that man could take control of his own fate and the actual world of his future issue. Crucially he thought himself free to arrange language to mirror a non-

theological universe. At the same time however, he did not give up a reliance upon an external authority whose truth was indubitable.²⁶

Creative authenticity came from varying factors, among them: the freeing of man's reason from the authority of religion (Voltaire's cry to crush the infamous thing - "écraser l'infame", aimed not only at the practice of torture but at the epistemological legitimacy behind it); the freeing of nature from God's control, rendering nature neutral; and, quite dramatically, the notion of progress changed to become tantamount with the idea that "we" are going somewhere, and this was a somewhere within this world. Previously man had believed the future of the world would either repeat the past (Plato, Aristotle, Epicurus, Cicero, Lucretius, Vico, Ibn Khaldun), or that there was a "golden age" from which progress was regression (Christian fall from grace, Hesiod, Ovid), change in this life being for the worse, with the possibility of radical change suddenly occurring by supernatural intervention.²⁷ Hope for the betterment of the human condition was expressed in salvation from this world, rather than salvation within it. By contrast the new conceptualising combined the old images of journey with a new practical interpretation of progressive ascent through knowledge.

Part of Christianity's previous constraint on 'problem' was the narrative holding of this life as preparation, a lesser ante room to the realm of true, meaningful existence. It is valid to claim that the theology of Christianity gave to the official ideologies of Europe a common frame of reference with a sense of overall meaning, and provided them with a pattern which gave substantial form to life. Those who moved to forms of atheist humanism desired, and predicted, secularization, not merely in the sense of the abandonment of religious belief and practice, but also in the sense of a transformation of the verbalization of human goals and hopes from 'other-worldly', into 'this-worldly', and, thus, the present could be judged and transcended, not by the expectation, or seeking of justice in heaven, but by looking to

the justice of "our" world future. The hope of glory in unity with God was sought to be replaced, and, in many respects was replaced, by the hope of Utopia.²⁸

Moreover, after the optimism of Bacon and Descartes, progress became a participatory event.²⁹ With all the flush of Eighteenth century optimism Saint-Simon declared:

"The Golden Age of the human race is not behind us but before us; it lies in the perfection of the social order. Our ancestors never saw it; our children will one day arrive there, it is for us to clear the way".³⁰

Two versions of the methodology arose. One was a structure founded upon the model of Newtonian physics. It was a vision of the slow, steady progress in scientific knowledge and culture. Culture was seen as linked to progress in science; progress in scientific knowledge leading to progress in moral affairs.³¹ This quite secular vision found an alternative version in the more openly transcendental scheme of Hegel, where a total unity was the final goal. The power to mobilise both individual and collective experience and offer commitment could be founded and united around the modern concept of 'progress'. This coherence was obtained specifically by the narrative technique since to contain the diverse outcomes possible, disaster as well as emancipation, demanded a created past in order to position the development of the present and gauge the movement into the as yet only latent future.

VII

The ambivalence of the reaction to Voltaire's cry "écraser l'infame" illustrates the concern with social control. What authority could control the mob with the power of the church destroyed? This fear had been voiced before - Machiavelli in "The Prince" had defended Religion as a social bond, even if, he stated, it be a false one.³²

The issue of social control in modernity is one of the most

ambiguous issues - cast free of a settled framework, i.e. the will of the other as in Christian models, or tradition, the issue of freedom appears to have discipline and control as its flip-side. In the backdrop to the freeing of reason in the Enlightenment sixteenth and seventeenth century Europe was developing a concept of good government which explicitly required techniques of establishing predictable, steady, obedient and industrious behaviour among its citizens. Policing, in the sense of a formal body of investigators and supervisors specifically charged with maintaining good order via the criminal law of the society was not so much at issue, instead policing in the sense of developing a knowledge led technology for establishing and maintaining a good order for the society and every person in it was developing.³³ Hobbes' dicta was simple: "Man is not fitted for society by nature, but by discipline".³⁴ Recently, as we shall see, it has become the fashion to see these moves as solely instrumental in creating a disciplined and manageable, docile social body. This line of thinking critically analyses what has previously been taken as progressive enlightenment. Thus those voices which opposed the direct reference of developing a formal technique of external control (i.e. a police apparatus), and argued for the path of moral and educative reform which would follow from increasing knowledge and the power of this knowledge, which claimed that the authority of knowledge of truth would be impartial but secure, are seen to be ideologically in the grip of power. But this revisionist approach may be too post-modern in its conception,³⁵ it may take too seriously the instrumental effects of self-conscious social engineers such as Bentham, and underplay the effect of being inside the meta-narratives of modernity. Late modern revisionist perspectives, such as Bauman, may simplify in reducing the range of desires and emotional states which the inhabitants of early modernity experienced, and in reducing the power of the grip of the progressive meta-narrative to a strictly instrumental project - modernity has non-instrumental, romantic and tragic aspects to it as well. Progress by science may well have been believed in to a degree and in ways not reducible to 'a grip of ideology thesis'. Rousseau's dicta

that "vices belong not so much to man as to man badly governed" allowed the promise for a science of government which could be both humanitarian and romantic as well as demanding a rationality for government. Certainly however, although seeing government as an object of political philosophy was nothing new what was new was that government could in many respects become a question of 'facts'; a question of normalcy and social health. The development of social statistics provided a power to be employed and encouraged the notion of governmentability; governmentability depended upon the assumption that technologies of social organization and control could be developed, and this flowed from improving our knowledge of the lawfulness of natural phenomena.³⁶ In this way the spectacle of the mob could be overcome; man's evil, it was argued, was not original but consequential. It did not flow as a result of man's past or present acts in relation to God, but from present conditions in the natural world. As Foucault summarised this it was the birth of "man" as an object of study, for now man stood complete, no longer part of God but a full being by natural composition, knowable by the 'human' sciences.

But governmentability had to overcome the implicit threat of anarchy and relativism latent in the notion of the individual being free to product his own 'grounding' for judgement and value. Government in at least some of the Greek conceptions, Plato in particular, was closer to the rule of the wise, and such wisdom could be led by the concept of the happiness of man, the fulfilment of the virtues linked to man's nature; the Christian could also be led by happiness as the fulfilment of God's purpose, the enlightenment appeared to offer the concept of freedom - freedom itself as the virtue, the co-partner of knowledge. Indeed, could truth really be 'truth' if man was not free to allow the presence of truth alone to bind him? One of the greatest scholastic and practical studies of antiquity - the study of rhetoric - was conclusively abandoned by the eighteenth century. Truth was expected to be self-sufficient.

The key concepts are objectivity and tolerance - it is the duty

of the individual, when forming a moral judgement or opinion, first of all to observe, assemble and examine the facts similar to the scientist. This objectivity is not Nietzschean perspectivism but an understanding that the individual is to 'distance' himself from the object under consideration. He or she should take the greatest care to allow no taint of evaluation to infect the factual description of the situation. If this essentially scientific method is followed, it should be possible for all concerned to agree on the facts of the situation, to look out upon the very same mirror of the world, and thus narrow down the room for potential disagreement to a limited "question of evaluation". Even with the supposition of individual grounding for judgement the chances of moral consensus are vastly enhanced since it is felt that many moral disagreements spring either from ignorance of the full facts, or from a mistaken conception of definition (i.e. a misuse of language), and will, therefore, disappear when a more rational and scientific approach to the formation of moral judgement is widely adopted. The resulting edifice of knowledge can be made even more empirical and scientific, and create the almost paradoxical location of individual yet common grounding which 'problem' achieves, by accepting that the scientific approach can also reveal fundamental objective data about the central subject 'man', as individual and species member.³⁷

VIII

Reflexive revisionism.

One reason for reflexivity is that even on its own terms the foundational claims of the enterprise of developing an epistemologically secure citadel of knowledges has become doubtful. The first difficulty is reflected in some of the language of the directive metaphor - the need for solid materials, firm ground, and so forth. It seems that certain aspects of the diversity of human experience, together with their associated fields of "knowledges", lend themselves to inclusion

into any potential structures of "justified true beliefs" much better than others. Thus any edifice of knowledges will be prejudiced in favour of those which mesh into the 'already existing part' of the construction. Indeed, once the first stage of construction of the edifice has been undertaken, only compatible material will be seen as fitting in, or suitable. Types of knowledge that are solid, objective, and visible according to the lines of inspection employed, will be used. Doubt arises in our present situation, as varying theses vie with each other as to the nature of this process. On the one hand, it is thought that the gate-keeping, or suitability criterion which grants relevance to possible knowledges, has been that of historical naivety, of the materials doing the gate-keeping themselves, of their own performivity and so forth. On the other, an array of ideas are held, often carried to a contrasting extreme, speculating that the development of these bodies of knowledges, of the disciplines, has been controlled by the interests, and their compatibility with, specific human groupings or supra-human structure.³⁸

One objection is the question of power - who or what controls the process of inclusion, or non-inclusion, of possible candidates in that edifice? Another takes an almost aesthetic form; it is that the resulting structure lacks a sensitivity to a range of language we have used, in various forms, to describe motivations and feelings we associate with "man"; language that some wish to put back in (among these are faith, hope and love). Could dignity still be 'dignity' in a fully rational language?

Certainly the structure did not deny the question of embodiment but, in doing so, the risk is ever present of reducing man to a collection of physical properties, and nothing else. At least nothing that it is allowable to talk about, or have a commensurable language of. Thus statements in more 'general' languages describing 'man' become reducible and translatable into those of a more specific 'scientific' kind; as the logical positivist Carnap once said, "because the physical language is

the language of Science, the whole of science becomes physics".³⁹ This issue of reductionism cuts in differing ways; in the hands of the crass analytical methodological individualist, for example, it appears to mean, that not only is talk of social entities and holistic forms of explanation outside the allowable discourse of uneducable entities, making individuals the only truly discussible units of society, complete, of course, with their relevant brain states, but, these individuals are only a mass of sensory nerves, responses, and brain states, in effect, an electrochemical complex.

Then there are those mixed bags of 'motives' previously restricting curiosity and the free flow of technology - motives which did not simply flow from a demonological framework, but may have made a rough kind of human sense. Motives such as conventionality, respect for tradition and the experience of elders, the fear of hubris and excess, the longing for proportion, loyalty, and a general awe at the mysterious 'otherness' of nature. One may feel these fitted a certain kind of 'betweenness'; one which allowed human positioning in a form of personal milieu and that the surplus of impersonal, rational safeguards, hypothetical role exchanges, veils of ignorance (or whatever else can be 'rationally' constructed in freed contractual ethics), in their place produce a profound ambiguity and tension. As both Nietzsche and, implicitly at least, Durkheim pointed out, the ambiguity of the modern conception of freedom is the ambiguity of the unsupported, backgroundless, individual, but an individual who was also, Janus faced, always supported, acting against some background, facing another - where moreover, to take one's home in the dwelling place of rational knowledge, was to live within the dilemma of promise and performance, and where both the ideal and the actual were 'this worldly' and where the grounds were discovered by man.

This ascetic objection is reinforced by the attack on the security of progressive epistemological certainty itself. One of the reasons why recent writers, such as Foucault, Althusser, or

the Frankfurt School, seemed so foreign to Anglo-Saxon sensibilities was the quite different approach to epistemology which they, in their varying ways, presented from the Anglo-Saxon. The Anglo-Saxon tradition has been dominated by the logical empirical tradition; a tradition based upon the designative legacy of sense-data theory (the Received View on Theories) which was designed to represent the content of science as maximally constrained by the nature of its external object as those objects are empirically revealed. No proposition not sustained by the available empirical evidence, or logically derivable from propositions that, in turn, may be so sustained, can count as scientifically validated on this normative conception of science. Thus, in so far as science can be said to have a history, it must be thought of as a process of gradual, piece-by-piece, accumulation of validated propositions, approximating ever more closely to a complete representation in propositional form of the structure of empirical reality. This has been the organising principle for mainstream criminology.

The drive to accumulate valid knowledge claims' reinforces the primacy of epistemology as the results of the search for knowledge must pass the accountability test of the canons laid down by epistemology, thus epistemology will also, to a large extent, determine much of the form which any successful inquiry must take. Concerning this the Anglo-Saxon tradition has in the main held that within epistemology there are two intersecting concerns in operation. One is how we gain knowledge of the material objects of the outside world; the other is what goes on inside the mind of the individual knower. The route to knowledge lay within a combination of the as yet unknown, external world, and the capacities of the knower's mind and body. Everybody agreed that the knower set out endowed with sensory receptivity, the rationalist also gave him a set of innate principles of inference (i.e. the instinctive skill to comprehend that which is given to the senses), the empiricist to a large extent denied this. The empirical knower had to be more industrious, having simply to rely on the senses and his ability to use the simple

rules of logic to build up, via the activities of construction and inference, a body of theory. However, the reflexive turn complicates self-description and introduces uncertainty. One can, in a sense, see that the empiricist foundations of theory have gradually been caught up by a developed consciousness of their assumptions; a self-awareness which has tended to weaken the foundation of what, in retrospect, appears as contestable 'a prioris'. The empiricist cause, particularly, has been driven back to see how deeply the legitimacy of their scheme rests upon assumptions concerning the relation of the subject, and his sense organs, to the world. This has had the effect of converting key questions into a form of philosophical psychology. In this respect, however, the whole idea of using epistemology as the tool for evaluating our knowledge-claims becomes compromised: for, irrespective of how good a supportive argument can be raised from within philosophical psychology, the very fact that such a course is necessary destroys the arbitrator status of the epistemology empiricism relied upon. As, to be an impartial arbitrator of knowledge claims epistemology would have to be capable, of itself, to show what they are founded upon, and to evaluate what these foundations truly establish. It seems that the process of epistemologically verifying can only get operational on the basis of massive assumptions about the nature of experience, i.e. the subject man, his mind and relation to the world. These assumptions cannot, however, be tested by the canons of epistemology, for they have to be held steady for the very enterprise of generalising these claims to get under way. The position is further complicated by the realization that these assumptions, far from being established and stable, are themselves problematic concepts and open to differing interpretations. Thus recourse to epistemology as a neutral, totally encompassing enterprise demonstrating the non subjective 'objectivity' of foundational claims appears hopelessly flawed.

IX

Epistemological criticisms of the 'scientific' constructionist projects and thoughts as to the present situation.

Progress in the construction project inherent in modernity has traditionally been seen as a piecemeal accumulation, and this process can be loosely described as the cumulative account of scientific growth. This view, which we have loosely labelled progressive epistemology, is still the common sense view of science, sees the process of growth as one where new theories refine the observations and conclusions of the old, and build upon the strength of the old theories. The underlying assumption is that our theories and observations refer to an external reality which exists independently of our vision, and that theories succeed each other as closer approximations to the whole truth (Realism).

Criminology texts normally follow this pattern in explaining their scientific growth. Specific individuals, or closely connected groups, are attributed with substantive new discoveries or the creation of new insights. For example the Classical School is linked to Beccaria, the Positivist School to Lombroso, Symbolic Interactionism with Mead and Becker. Sometimes disputes concerning such attributions flare up, as with Leonard Savitz's pleas on behalf of Franz Gall as the "founder criminologist",⁴⁰ but this only reinforces the notion of the scope of history as being the interrelation between inquirer and objective terrain. To read one's way through a student criminological text, and J.E.Hall Williams' Criminology and Criminal Justice may serve as an example,⁴¹ is to undertake a reading of names, labels, i.e. Sociologists/Psychologists, British/American, dates and knowledge claims. "Contributions" to criminology come either from individuals or from other disciplines, for example 'Sociology'. The terminology used reflects the construction idea; "building up", "expanding our understanding" (p.5.), "careful and patient exploration" (p.7.); the process of specialization is expressly noted as being an implicit consequence of advancement from a "past, when knowledge itself was more limited but what was known

was more generally shared" (p.8.). Earlier approaches give way to "a more sophisticated form", although they still may contain "vestiges" (p.12) of the former. Building methodologies are presented, wherein earlier false visions appear as obstacles which the criminological enterprise had to surmount, to defeat to gain access nearer to the truth. "The Lombrosian doctrine has been relegated to the status of a myth", quoted with approval from Radzinowicz (p.12). The history of criminology becomes "littered with corpses of dead theories about crime" (p.5). True to the Popperian route of falsification, this overcoming is seen to be beneficial. "Even negative kinds of knowledge, i.e. knowing that such and such is not true, provide some assistance in building up a picture of the nature of crime and expanding our understanding of offenders" (p.5).

This we may safely call the autonomous theory of knowledge-growth. It postulates that criminological theory develops via the creative process of the interaction between the Inquirer, observations deriving from a 'real' reality, and epistemology. Ideologically such a process accords both with the liberal position and the corresponding postulates made possible by the Kantian synthesis. Such a position also provides a view of the individual as able to overcome the dictates of ideological distortions, i.e. able to separate knowledge from mystification, able to subject official knowledge, such as propaganda of a totalitarian state, to the powers of critical reason. The individual is cognitively autonomous. He achieves this autonomy when he as an individual has achieved the capacity to criticise both authorities (i.e. previous theories, statements or testimony) and his own personal beliefs. Although his basic tools in this process have themselves been learnt from authority, i.e. both the rules of the language used, and the principles of logic, they do not depend for their validity upon the status of those who taught them, as both language and logic are neutral. Although knowledge has a social aspect, in that it exists in society where it is used by social beings, and also by reason of the fact that, at any one time, most of what the individual may

hold as knowledge has actually derived from others, as is the methodological tradition he exists in, nonetheless, the creation of knowledge (as opposed to opinion and beliefs) is independent of society.

This version of the "game of individual knowledge" has, however, been severely challenged. The view that scientific development represents a basic continuity with previous positions finds critics in the language of so-called 'scientific revolution' (Kuhn⁴²), or 'total transformations' (Foucault⁴³). In these schemes the originality of the individual is taken from him, and instead of asking why the individual made a breakthrough, or, what occasioned the new view, we might just as justifiably ask, why he could not see in this way before, or, what prevented this way of viewing. Discovery is thus the intersection of two forces, the intersection of that which was preventing, with that which allowed and brought about the new view. Such positions appear to present quite a holistic conception of intellectual discovery and "knowledge" production and present the 'inventor' as the plaything, or mediator, of underlying forces, elevating claims for general or collective phenomena which instigate and shape the viewing of the individual. Combined with the logic of determinism, the directional dictates of holism becomes productive of a web of total causality. Within this system for the identification or arrangement of theoretical entities, the reader is conscious that the individual ceases to be a relevant "scientific concept" (Althusser⁴⁴) in the development of knowledges, neither as a unit of theory, nor in the epistemology of the developing sciences (Levi-Strauss⁴⁵).

Within the sociology of knowledge, the main stream of reaction to the individual conception was derived from Marx, whose statement in the Introduction to the Critique of Political Economy, set the scene for the strongest version of the Marxist anti-individualist positions. The world divides up into two with a clear contention; the material forces of production which comprise the base determine changes in the superstructure, i.e.

in knowledges, or political ideology, which themselves have come about from a previous determination by the base. This view, endorsed by Engels in his speech at the grave-side of Marx and elsewhere, became enshrined as the "fundamentalist" position within Marxism. Although the notion of economic determinism has always been criticised and developed in Marxist circles with the advent of relative autonomies and like arguments, the original analysis of Marx provided the starting point for the modern contention of the social determination of knowledge. At once truth becomes problematic; for if society totally, or even only partially, determines knowing and thinking, how can we obtain an objective stance so that we may gauge the validity of knowledge claims? In this line of argument traditional individualist epistemology seems replaced by forms of social epistemology, with attempts to create differing epistemologies and species of truth for each theorist, depending on which seat he wishes to claim on the determinist, relatively autonomous, or autonomous, merry-go-round.

In contrast to the central positions of Marxism, the French structuralists, or post-structuralists as evidenced by the example of the enterprise of Foucault, present a different proposition. Foucault set out to transcend the weaknesses of those methodologies which made explicit their epistemological and ontological propositions. He attempted no delineation of his base ontological or epistemological claims, but held such discourse "suspended", "displaced" or "in abeyance", in favour of, allegedly, philosophically non-committal analysis. To declare and base the writing of the text on an epistemology, would, to Foucault, be only to imprison the subject within another bind of commitment. His practices of "Archaeology" and "Genealogy" occur without any reference to the foundational stance of the critique - but it is apparent that the exercise of staying "suspended" cannot but be part of a trajectory. Further, his implicit resolution to the problem of the change of epistemes and of the motor of social change, what some has described as a form of "beyond hermeneutics and structuralism"⁴⁶ seems to allow the

existence of a totalising social mechanism, and hints at an epistemology. Foucault openly sought to avoid Marxist determinism, yet he could never espouse individualism, nor the centrality of subjective consciousness, he provided the seeming paradox of concrete critiques which also had as their internal contrast an all-embracing vision derivative in its heritage from the Nietzschean will to power. But in this he risked walking the tightrope between Nietzsche and Hegel, between individualism and a journey of The Universal. He offered the paradox of what in effect, if not in rhetoric, was a 'critical reason' which did not see the necessity for a position of its own, but which claimed it could journey at will alighting variously to appreciate the internality of differing epistemes without stating the difficulty of translaterability.

Foucault declares himself an "archaeologist", and yet denies the necessity to explain the position of this archaeologist, or of his role. But this denial of reflexivity regarding his own role in his explanation is caught, for, by being non-epistemological one is being epistemological, and in not stating one's position one's text moves and does it for one. The very tactic of genealogy itself, and, as the Foucaultean practice of genealogy demonstrates, a multiple of readings are possible - irrationalism the danger, if not perhaps, the goal.⁴⁷

We must also note that, in an important sense, neither do any of these approaches give up the enlightenment tradition of placing the pursuit of knowledge before all else. All approaches show the applicability of "scientific analysis" and the presentation of 'recognised claims' - individualism to the utilitarian science of Bentham, Mill, and so forth, or to the rational economist. Causal to the structuralist, or historicist; the spiritual almost appeals to the vitalists, yet still feels the need to cast its speech in "scientific" terms, even if this is a "new" science of genealogy or "epistemes". And Foucault's refusal to position the 'archaeologist' appears as highly symptomatic of the fetish to cleanse the post-enlightenment projects of any subjective

elements, of any inclusion of the desires and feelings of the inquirer in the production of knowledge.

The security of the constructivist project was also shaken when investigations over structuralism reached an emotional level of debate, when it was seen as other than "questions of method" as Sartre labelled it in 1961. Earlier Karl Popper,⁴⁸ and I. Berlin⁴⁹ had attacked historicism for its social repercussions (i.e. the appeal to either extremism or inactive submission). From his own perspective Nietzsche had done likewise. Structuralism was, however, not a simple historicism as the hysteria held, but sought to position the individual, who believed he was acting in a rational fashion, within a wider mechanism. Levi-Strauss defined its aim as "a sort of super-rationalism",⁵⁰ and Merleau-Ponty had said: "thus our task is to broaden our reasoning to make it capable of grasping what, in ourselves and in others, precedes and exceeds reason".⁵¹ Others talked of it as the "unconscious of society." Foucault's all-persuasive power plays a similar role, bringing in both the rational and the irrational, the mistake as well as the success, all the Janus face of the spirit (for example the claim of failure being built into the early prison).

As with the aesthetics of the structures of knowledge, opposition to structural explanation was to focus on the deriding of the status of man. Not 'man' but 'structure' was decisive! Man was forgotten, he was redundant, man no longer walked the streets of his own land! This objection assumed the humanist mantle in response. On the one hand it was now attempted to take the insights of a multiple of approaches and to combine them into a multi-facet vision of man - Freud, symbolic interactionism and phenomenology, were purportedly fused to peer into the individual's world and create a science of interpretation; man as the interpreting subject. To a large extent these still called themselves sciences, but, from the Hume-Mill-Hempel approach the term seemed strained to breaking point. On the other hand there existed a demand to renounce the very

possibility of a science of human conduct. Within the broad rubric of intellectual thought, a substantial theme became the contrast between the attempting of a deductive system of universally applicable propositions (i.e. science as, at least, the opposition defined it), and an open, 'non-scientific' account. This took many forms - in history the attack upon the covering law model was central, but it was wide spread. Even economics, the "Queen", joined the rest of the social sciences "in crises".⁵² In political 'theory', now simply called "thought", a focus with the development of "ideas" became more important - works such as The Foundations of Modern Political Thought,⁵³ (which sought to locate the grounding of the 'humanists' and their opponents freely stepping outside of the notion of epistemological rational reconstruction in giving primacy importance to the context of 'theory'/thought; Wealth and Virtue⁵⁴ which revised the foundations and formation of classical political economy; and The Noble Science of Politics⁵⁵ which threw into focus the operation of nineteenth-century 'political science'. All were examples of attempts to institute a self-conscious and non-scientific account of human behaviour. In the criminological area attention also focused, albeit almost as an aside, upon the historical foundations in early modernity of punishment and social control. At the same time critical thought displayed a concern with the 'meaning' of language. Especially in French thought, the power of discourse was placed at issue, and this ranged from the re-interpretation of psycho-analysis, at the hands of Lacan, to the rise of discourse in importance in a 'politically' related sense via semiology, which, by attempting to reveal the heterogeneity of signifier and lived experience, claimed that much of the hold of institutions over individuals could be traced to the ascendancy of language (Foucault et al).

X

Criminology and penology were directly implicated in this partly revisionist, partly reflexive, questioning, but so was law. The

practice of legal theory was now analyzed as an ideological entity. First the contradiction was announced between programmes for a legal science, and an acceptance that such a thing cannot be achieved. The rationalist epistemology of natural law and the rights of man had been largely replaced by the broad tradition of legal positivism as variously expressed by Bentham, Austin, Kelsen and Hart which, although each theorist perused vastly differing projects, their epistemological foundation was substantially based upon the empirical methodology of scientific positivism. Latterly, the developing hermeneutical approach argued that these theories of law were incapable of giving an adequate picture of the process of interpretation which is a prominent aspect of our experience of law,⁵⁶ and recognised that they were limited by a failure to examine the preconditions of 'problem's' designative theory of the meaning of words. In addition, it was argued that traditional legal theory failed to recognise the historical and social position of the interpreting subject. Even survivors of rationalism (for example Dworkin's early rights approach to law⁵⁷), were held to be similarly afflicted and, in addition, were claimed to be methodologically incapable of giving a coherent account of rules and principles. The lesser version of the criticism argued that by contrasting scientific positivism with hermeneutics, it was possible to see plainly the deficiencies of scientific and legal positivism. The stronger version implied that law and legal theory, happy in their existence within the confines of a supposed shared and universal language, obscured the domination and falsehoods underlying its operation. The earlier attack mounted in the name of sociology under the banner of "legal realism" having been successfully swallowed by the dominant positivist tradition in jurisprudence, at times a new appeal was to "de-construct" even the language of legal theory. Law and legal institutions were to be seen as texts - texts now 'understood' as without a stable meaning but capable of many, diverse, and conflicting readings demonstrative only of a core of non-stability.

XI

At such a time there is the asking of the question - what is the result? Does all this discourse and knowledge make any difference? Has the journey which the Enlightenment began a coherence, or has it - and any text which investigates it - become a maze without meaning. The question has been a perennial one since the Enlightenment with the lament for a fixed foundation of meaning arising as the counter desire to autonomy.⁵⁸

What those who earlier asked the question highlighted was that philosophy, the sciences, and man were interrelated, and with the destruction of the epistemology of the Aristotelian cosmos man was cast into a world where he was to construct his own values within a cosmos which was in itself simply an 'inhuman objectivity' devoid of value; beneath the individualism early modernity espoused to counter tradition was the first sight of the metaphysical "abyss" of moral emptiness. It was Nietzsche who reminded us recently of this abyss and his words are repeated today: as Marshall Berman stated in a book on modernity he entitled All That is Solid Melts Into Air:

"To be modern is to experience personal and social life as a maelstrom, to find one's world in perpetual disintegration and renewal, trouble and anguish, ambiguity and contradiction; to be part of a universe in which all that is solid melts into air."⁵⁹

What is also apparent is that specie of epistemology, or, alternatively, the claims which comprise the epistemological imagination, have crucial, if opaque, political implications. The rise of a 'politics of semantics' and textual deconstruction relies upon the notion that if such a foundational security is questioned then so too are the related styles of politics questioned. The space is then open to the doubts of the post-foundationalists and the questioning of universal politics - a new dialectical space of hope, despair, and tortured promises.

XII

Without a confidence in foundationalism coherence is problematic. Praxis is at issue. Rationally, the choice of action depends on the imaginative grasp of the human enterprise; a grasp which is increasingly divided and often only united amongst those who turn critically against the modernist constructivist programme or deny foundationalism by the rhetoric of the "post".⁶⁰ Politically, this analysis, that is to say, this definition and positioning by the rhetoric of the 'post' is problematic in many senses. Firstly this very way of defining may be a product of reflexivity, that is it recognises the present as living in the aftermath of something which now can be coherently expressed as an entity as a project which has not so much finished but which has realised itself as incapable of fulfilment. The very ability to speak of 'modernity' as something, as a project, indicates the difference - since it indicates that sufficient distance exists between action and comprehension to speak in these 'objective', or distanced terms. But if that is so then modernity lives on since post-modernity can only define itself by the inclusion of modernity in its status and thus may be seen as modernity reflexively aware of itself; of modernity becoming aware of the impossibility of its own projections. But if the narrative projections of modernity are abandoned, if the projected goals stand empty, if the times require a new "public philosophy" rather than what was now 'exposed' as the "faith" of the Enlightenment, where are the styles of collective goals that would give the human enterprise a form and meaning to be generated from?

Without religion or confidence in epistemological universal foundationalism what truly was the nature of the "in common"? Recourse to individualism is problematic also - for the "narratives" of emancipation have more than succeeded in crying that the "self" must be free to be its own creation and have gone on to offer an array of choices - the times, if we may use another spatial allusion, can be seen as suspended between Hegel and existentialism - a position which gave the "self" the curious paradox of being both empty and the site of a totalization - both

lacking a stable identity while also sharing in the socialisation of all the available identities.⁶¹

Liotard diagnosed "the postmodern condition" in terms of a lack of a grand unifying theoretical discourse; an absence of commensurability whose earlier acceptance had only been possible due to the grip of "grand narratives" providing the legitimacy for modernity. Postmodernism is ushered in via the crises of such legitimating power.

"The obsolescence of the metanarrative apparatus of legitimation [arises as] the narrative function is losing its functions, its great hero, its great dangers, its great voyages, its great goal. ...it is being dispersed in clouds of narrative language elements - narrative, but also denotative, prescriptive, descriptive, and so on. Conveyed within each cloud are pragmatic valencies specific to its kind. Each of us lives at the intersection of many of these. However, they do not necessarily establish stable combinations, and the properties of the ones we do establish are not necessarily communicable".⁶²

With the meta narrative relationality questioned another dilemma of our late modernity becomes that we develop more and more "knowledge" about the social world, and that "knowledge" helps change it, and continually offers technologies which claim to allow us to control it, yet a successful methodology of relating appears unattainable.⁶³

Conversely, the desire for lineages of relations, means that the motif of a stable dwelling, becomes either subjected to the grasp of a "historical destiny" which the deep structure of the world has for the chosen,⁶⁴ or converted into a form of disassociation from the course of time, producing the modern feeling of lurching, of history and man's use of reason as an erratic course,⁶⁵ which reflexively demonstrates our present inability even to coherently characterise the nature of the social journey.⁶⁶

Thus it is possible to argue that "the old pretensions of comprehensive knowledge and social control"⁶⁷ are defunct. In the face of this, however, there are a number of paths which

various voices urge us to take: we shall refer to these options as (a) the retreat to the common life; (b) the recourse to religion; (c) the new minimalism (both deconstructive and de-statist); and (d) to come to a self-conscious understanding which enables us to preserve much of the hopes for rationality inherent in the enlightenment and yet develop our social imagination in more fruitful and 'human' ways.

The theme of the common life is very much in modern times the property of David Hume,⁶⁸ and we may characterise the type of social participation relating to this option as part of his legacy. This is symbolised in the actions Hume himself took when faced with the 'end of his personal journey of rationality', i.e. the resort to "backgammon, the playing of cards, dining and talking with friends".⁶⁹ As we shall see, for the legacy of Hume that movement is partly linked to a narrative perception of the cosmos, i.e. some notion of a 'current of nature', but without that narrative support it accepts a working rationality of the common life; a rationality of common sense it defends against a politics of philosophical concepts.

The recourse to religion and, implicitly, authoritarian metaphysics, takes many forms. Perhaps, after all, modernity never left the security of its embrace. It seems apparent that even some strong founders of the individualist conception of the journey, via judicious social engineering, relied upon the tacit assumption that this enterprise would be contained and guided by the traditional Christian idea of a higher moral law.⁷⁰ The project of criminology is partly guided by an axis deriving from Hume, Kant (who took a related and somewhat similar view on the matter as Locke), and, in its more dialectical forms, Hegel, whose totalistic pantheism makes the Marxist input highly religious in its underlying emphasis.⁷¹

Of the sociological father figures, Durkheim is increasingly resorted to for his assertion that religion is essentially a symbol of the consciousness of society, and that social meaning

arises out of the cleavage between the realms of the sacred, and that of the profane. The Durkheimian thesis is taken as holding that the true decline in religion does not refer to the institutionalised churches, but the dissolution of common frames and effective linkages. Thus the area of shared norms, particularly of the moral, and the capacity to partake in widespread symbolic understandings, is effectually curtailed.^{72/73}

This turn to religion makes much of the difference between religious and secular cultures; Bell held that the religious

"has a greater unity than most because all the elements of the culture are directed towards some common end: to emphasise mystery, to create awe, to transcend. This unity, emphasised in mood, runs like a thread through the architecture, its music, its painting, and its literature - in its spires, liturgies, litanies, spatial representation of figures, and sacred text. Secular cultures rarely have this conscious design."⁷⁴

We may summarise Bell as calling for the revitalization of "a new sense of the sacred", in the task of "saving modernity from meaninglessness". On this option we shall not spend time but accept Habermas' analysis that this form of "neoclassicism" hopes

"religious faith tied to a faith in tradition will provide individuals with clearly defined identities and existential security.. [It is to] recommend a return to some form of premodernity, or throw modernity radically overboard."⁷⁵

To defenders of modernity, conscious of the latent incompatibility of modernity and community, the appeals to the authority of tradition and the religious methodology of secure community is both populist and reactionary. In the cultural sphere the rejection of the stark architecture of modernism in favour of the 'neo-classical' which reasserts the central power of church architecture (see the Prince of Wales' vision for London's skyline) is labelled by critics such as Frederic Jameson as reactionary anti-modernism. Nor, in the return to community and tradition perspective, is the question of power structures, interests and influences in modern societies substantially addressed.

The new minimalism ranges from a quasi-religious withdrawal from the politics of the state, combined with a form of opposition (as MacIntyre's 'tradition plus locality' solution in After Virtue can lead us to) to a form of new fiddling whilst one hopes those aspects of modernity which one has sufficiently "deconstructed" fall apart (as in the 'playful' elements of "deconstruction" theory). The danger with this minimalist position is that in dancing to the tunes of a localised relativism, while denying the need to offer any reflexive contextualising of its position, its playful, ironic relativising cannot offer any opposition to the exercising of power becoming the actual arbitrator of truth and praxis. Independent of modernity minimalism denotes the retreat from any universalist claims for reason, and gives up much of the hope of the Enlightenment without being able to offer any replacement.⁷⁶

The fourth option involves a speculative grasp of the traditions in which we find ourselves and of the use of reason in them. Further to this, the demand of self-consciousness entails a comprehensive reappraisal of the nature of the journey the world has taken since the Enlightenment came about, and its meaning. Such reappraisals are beginning, and it is not the intention of this work to give a comprehensive account of them, however, in the midst of the collapse of the meta-narratives (Marxism, the citadel of knowledges, historicist social evolution, the unveiling of "nature", etc.,) the terminology of pragmatism, and of the epistemology which is associated with it is becoming more frequent. That is to say that we come to face recognising one's necessary placement within a conceptual scheme and that the rationality of action comes out of our inhabiting such a scheme. Pragmatism, moreover, specifies the dangers in the neglect of implementation, which, assuming a universality to foundationalism, we have tended to relegate to a separate compartment from knowledge itself and to assume followed successfully. However, pragmatism is in an ambiguous stance as to its own 'self-consciousness'. For, adopting an historical consciousness, it necessarily re-supposes that which it states

cannot be; i.e. when reflexivity turns itself upon pragmatism it cannot solve the reflexive paradox, the foundation is always 'soft', not absolute. With Lyotard, after all, where his portrayal of the collapse of the grand narratives creates in its mechanisms a fairly 'grand narrative' with its own vision of utopian function. It may also be understood, in its retrospective, that the epistemology of pragmatism has actually been part of the operative epistemology of much of the past (i.e. mistaken as rationalism and empiricism by its adherents). However, this is not a popular notion, for to many pragmatism is a defeatist banner, utilizable in textual rhetoric as the straw man "pragmatic", the taken for granted space devoid of a critical empiricism or rationality. Pragmatism stands condemned as that position man is forced into either through lack of application and integrity in perusing the use of reason, or, as a cautions, self-serving and cowardly response to the difficulties of the times. Such commentaries are, however, misplaced and the label pragmatism needs a far better hearing; it may well be a better 'space' than its detractors would have us believe. Its own utopia, implicit in its denial of utopia, is apparent in the hope which Lyotard found "in the pragmatics of language particles". Namely, that

"postmodern knowledge is not simply an instrument of power. It refines our sensitivity to differences and increases our tolerance of incommensurability."⁷⁷

That is to say it is a utopia of journeying and not one based upon the idea of finally coming to rest.

NOTES.

1. Still the best overview of the history of social theory written with the Enlightenment as its central theme is Geoffrey Hawthorn, Enlightenment & Despair: A History of Sociology, Cambridge University Press, Cambridge, 1976. This chapter will present a narrative in a more universalistic rhetoric of enlightenment that Hawthorn's more detailed and analytic investigation of "progress and despair". This chapter's rhetoric is, thus, somewhat 'de-contextualised'.

2. Although pre-Enlightenment understanding was not devoid of 'traditions of rationality' and of dialectic between them, it is an appropriate referent to roughly accept that "in Medieval European thought, the epistemological authority was the word of God as revealed through the teachings of the Roman Church". Enlightenment and Despair, p.8.

3. Francis Bacon, Collected Works, Vol 3, p.356. Following references unless indicated are from this volume.

4. Francis Bacon, "On the interpretation of nature and the empire of man". In Curtis and Petras (eds.), The Sociology of Knowledge, London, Duckworth, 1970. p.89.

5. Ibid., p.93.

6. Descartes, Rules for the Direction of the Mind, in Vol.I, The Philosophical Works of Descartes, Edited and trans. by Harldane and Ross, Cambridge University Press, Cambridge, 1931, p. 1-2.

7. Bernard Williams locates the absolute foundationalism of Descartes in Descartes: The Project of Pure Enquiry, Penguin, London, 1978. Bacon also incorporates God, as Hiss puts it, Bacon identifies Nature as "bear[ing] the signatures of, and it is these, the true forms of things, which are the goal of natural philosophy, and not the false images imposed by man's mind". M.Hesse, "Francis Bacon", in D.J.O'Connor (ed.), A Critical History of Western Philosophy, Collier-Macmillan, 1964, p.143.

8. This contrast is the terminology of the German Social Theorist Ferdinand Tonnies (1855-1936) and stems from his Gemeinschaft und Gesellschaft (Community and Society, first published in 1877). This terminology is admittedly European and the conceptual differentiation behind it central to any understanding of European social theory. In his recent The Philosophical Discourse of Modernity [Polity Press, Cambridge, 1987.] Jurgen Habermas, for instance, places it as the pivotal distinction determining the character of modernity. The motifs, feelings, and the "life world" experiences incorporated in the notion of the Gemeinschaft are seen as closely expressed "in the Aristotelian tradition". Habermas is dealing somewhat in 'conceptual history' seeing that "the old European concept of politics as a sphere encompassing state and society was carried on without interruption into the nineteenth century. On this view, the economy of 'the entire household', a subsistence economy based on agrarian and handicraft production and expanded through local markets, forms the foundation for a comprehensive political order. Social stratification and differential participation in (or exclusion from) political power go hand in hand - the constitution of political authority integrates the society as a whole. The conceptual framework no longer fits modern societies, in which commodity exchange (organised under civil law) of the capitalist economy has detached itself from the order of political rule. Through the media of exchange value and power, two systems of

action that are functionally complementary have been differentiated out. The social system has been separated from the political, a depoliticized economic society has been separated from a bureaucratized state".(p.37) In this analysis of modernity, the Enlightenment posed, from the very beginnings of its attempts at self-consciousness, the need for wholeness in a world torn asunder: a quest, which for Habermas, led Hegel to provide a "philosophical solution for the self-grounding of modernity" in the encompassing development of "Reason" as the "power of unification". As well as this concern with the image of modernity as particularities in need of unification, as opposed to a unification in need of particularities, post-Enlightenment European social theory (and Jurisprudence) is also written in the context of the struggle to overcome the old patriarchal, traditional society in the task of constructing the 'modern'. In this respect American social theory does not have the concomitant struggle to overcome, but has the task of construction over the image of the frontier and the abyss of the state of nature.

9. Gabriel Marcel, Homo Viator, Harper and Row, New York, 1969, p.153.

10. Marcel contended that Nietzsche had discerned man's fundamental moral phenomenon in his contention that "man is the only being who can make promises"; which for Marcel highlighted the qualitative difference of man from an object and meant that man must always live his life under a certain usage of non-objective reasoning. With Marcel this took the form of a 'rational' reliance upon a sort of faith in unknowable aspects of existence which allow the relations of trust and fidelity of man to man. Marcel, Creative Fidelity, Noonday Books, Farrar, Straus & Cudahy Inc., New York, 1962. [Although Marcel wishes to make a rather Kantian point (and ultimately a Christian one) out of this ability which Nietzsche seized upon, it is as well to remember that Nietzsche had given a social evolutionary (and cultural) explanation for the creation of this ability. Nietzsche held that the ability to keep promises was a creation of the 'civilizing' of man. Promises enabled men to keep to the regulated and predictable aspects of modern life (contracts, timetables), but to create this western societies had utilized draconian methods of punishment and ascetic procedures. The German civilization, to acquire "trust, seriousness, lack of taste and matter-of-factness", had resorted to stoning, breaking on the wheel, piercing with stakes, trampling with horses, boiling in oil, flaying alive and cutting off strips of flesh. The Basic Writing of Nietzsche, Walter Kaufmann (ed.), Modern Library, New York, 1968, p. 498.] Through fidelity man continued to use his subjective powers to shape his life in the expression of a faith that he is open to the radical otherness of existence - an otherness always the opposite to the reduction of Being to an object.

11. J.L. Gorman, The Expression of Historical Knowledge, Edinburgh University Press, Edinburgh, 1982, pp.112-113.

12. At stake is the grounding of the transformative imagination. The passage of Vico actually ran as follows: "...in the night of thick darkness enveloping the earliest antiquity, so remote from ourselves, there shines the eternal and never failing light of a truth beyond all question: that the world of civil society has certainly been made by men, and that its principles are therefore to be found within the modifications of our own human mind. Whoever reflects on this cannot but marvel that the philosophers should have bent all their energies to the study of the world of nature, which since God made it, he alone knows; and that they should have neglected the study of the world of nations, or the civil world, which, since man have made it, men could come to know". [Vico, The New Science, T.G. Bergin and M.H. Fish (trans.), New York, 1968, par, 331.] The passage provides fruit for varying interpretations. In one the radical openness of the possibilities of transformation stem from the idea of civil society as an artefact created by man - thus man is radically free to create and change his social order - but this is tempered if it can be shown that man has an absolute 'human nature', particularly if it can be shown that this human nature is embedded in the natural process of history, a history subject to the laws of science. Fundamentalist marxism is a clear example of the tension which holds man the creative force of society but places social organization as distinct stages of a determinate historical process. Thus we are left with the theoretical vision where man's creativity is only the expression or mediation of deeper forces. From another perspective the solution to the Cartesian dualism is to give the unacceptable dilemma of an infinite spiritual entity temporarily residing in nature - thus man is crucially not part of the natural world - but his is to deny the linkage of man and nature. The hints of a resolution to this dilemma can be seen in the modern philosophies of nature which present a new picture of the very creativity of nature itself. Hard science is talking of "creative dialogues" within nature. For a recent argument of man's creativity within our ideas of evolution see Tim Ingold, Evolution and Social Life, Cambridge University Press, Cambridge, 1986.

13. Friedrich Nietzsche, Merold Westphal gives an indepth examination of this and related statements of Nietzsche in "Nietzsche and the Phenomenological Ideal", The Monist, April, 1977.

14. Reflexively, however, there is an inherent difficulty in the absolute denial of any secure claim, for upon what terms is this denial made? - only from the position of such a claim. This denial of man's ability to know himself is actually a claim of that very knowledge. What then must be asked is what sort of enterprise is it made to encourage?

15. The Kant referred to here is the Kant of the Critique of Pure Reason. [See our Chapter six for detailed references.] In the recent analysis of Jeffery Berger, the crises in the Social sciences and the rise to prominence of a "Sociology of Knowledge" come about because of social sciences' failure to perform the Kantian task and create what Berger calls an "archetectonic" social science. Berger Jeffery, The Origin of Formalism in Social Science, University of Chicago Press, Chicago, 1981.

16. Gerard Degre, Science as a Social Institution: an introduction to the sociology of knowledge, Garden City, New York, Doubleday, 1955, p.165.

17. Wittgenstein, Tractatus Logico-Philosophicus, Routledge & Kegan Paul, London, 1961, p.74.(6.53) This is seen as a growth from the Kantian position earlier outlined.

18. Ibid., p.3.

19. Ibid., p.19.(4.003.)

20. John W. Danford, Wittgenstein and Political Philosophy, University of Chicago Press, Chicago, 1978, p.42. Danford takes as his main theme the relationship of language in the political theory of Wittgenstein and predecessors. We may note that Bentham shared the dream and attempted to construct a universal encyclopedia of moral terms, the acceptance of which he thought would lead to clear speech and meaning, and thus the avoidance of politics and opinion. The dream reaches its high point with Bertrand Russell and the search for a pure language - the aim for Russell is peace on earth.

21. The centrality of language to man's social existence is recognised in a wide range of theories which provide an evolutionary perspective on the emergence of language. Monod, for instance, in Chance and Necessity asserts the development of language is the key event which "changed the conditions of selection for the human species". [J. Monod, Chance and Necessity, Collins, London, 1972, p.150.] Popper agrees with the central significance of language but argues against versions of the 'linguistic turn' taken by 'structuralists' and those in the Anglo-american context who have spent vast energy in analyzing the way words are used and the various meanings thus engendered. For Popper such time would be better spent considering the various "functions" of language, in particular what it enabled us to achieve rather than in worrying about the medium. The contrasting emphasis upon the medium is influenced by the latter Wittgenstein's move from a 'picture' theory of language to a 'spectacle theory'. Whereby, depending upon the conceptual frame or scheme the viewer inhabited, the world took on a radically different set of meanings - man could be said to inhabit different social worlds depending upon his spectacles. Social life conducted with sincerity and good faith could not be

universalised in all its meanings so that one master frame could be ascertained but must be conceived as an array of differing conceptions and projects - language games. For Wittgenstein and the pragmatic imagination it was a valid intellectual task to bring to light the internal sets of meanings and life forms of these games but one could not construct a master set of spectacles - one could clean spectacles but not do without one or other - such was the 'therapeutic' consolation in the demise of the 'absolute'. For Popper, however,

"one shouldn't waste one's life in spectacle cleaning or in talking about language, or in trying to get a clear view of language, or of our 'conceptual scheme'. The fundamental thing about human languages is that they can and should be used to describe something; and this something is, somehow, the world. To be constantly and almost exclusively interested in the medium - in spectacle cleaning - is the result of a philosophical mistake....." [Quoted by Magee in "Conversation with Karl Popper", in Modern British Philosophy, Secker and Warburg, London, 1971, p. 138.]

Instead we should have concern with the functions of language. These Popper lists as on two levels: a lower level of basic functions namely 'symptomatic' or 'expressive', and 'releasing' or 'signalling'; and a higher level of 'descriptive' and 'argumentative' functions. The lower level functions are characteristic of all linguistic activity and are always present; the higher functions are coupled with the evolution of reasoning and rationality, with the development of knowledge and the growth of science. They are concerned with the making of "descriptive statements; and these statements would be factually true, or factually false". Science depends upon the descriptive function as this is what allows the abstract formulation of descriptions of the world, of actual and possible states of affairs, and in turn leads to concern with concepts of truth and falsity. Every genuine report contains within it a moral commitment - to tell the truth. The argumentative function allows the criticism and evolution of theories - it allows the distinction of validity and invalidity to discussion and modes of action which proceed from such positions. Thus language forms a system of responsible and critical intellectual activity: problems are objectively formulated in language, particularly in propositional form, and most often arise out of descriptive propositions. Language can be used in its descriptive function without the argumentative function, but when reasons are given for or against the truth of descriptive statements, the argumentative function comes into play. This is the picture of the 'liberal' approach to rational discussion. Ultimately change will be led by the world; the pragmatic concern is with a more radical conception of transformative and creative ability which is human centred.

22. Charles Taylor, Hegel, Cambridge University Press, Cambridge, 1975, p. 6.

23. Morse Peckham, Beyond The Tragic Vision, p.69.

24. We repeat the narrative referent already used in reference to Hawthorn, Fay states: "A Christian understanding of natural events, as well as Human history is one which views phenomena as episodes in the story of God's relationship with his creation, so that to understand these phenomena is to grasp their meaning in terms of this story, is to see how they fit into the pattern of revelation, consolation guidance and judgement which are chapters in God's overall plan for mankind". Brian Fay, Social Theory and Political Practice, George Allen and Unwin Ltd., London, 1975. Similarity, Michel Foucault's argument in The Order of Things, Tavistock, 1970, London, is that the Middle Ages in particular looks upon the world as a text waiting for its proper allegoresis. See Chapter Two, "The Prose of the World".

25. It is, for example, the central thesis of Peter Langford that modern conceptions of human nature are not mainly the result of methodological innovations but primarily stem from the decline of Christianity. Cf. Peter Langford, Modern Philosophies of Human Nature: Their Emergence from Christian Thought, Martinus Nijhoff Philosophy Library Vol.15, Martinus Nijhoff Publishers, The Netherlands, 1986..

26. See our earlier reference to Bacon and Descartes for instance.

27. Cf. Charles Van Doren, The Idea of Progress, Frederick A. Praeger Inc., London/New York, 1967, for a comprehensive survey for ideas on the nature, properties, and man's relation to 'progress'.

28. There is much to be said for the Popperian reading which gives the history of the developing disciplines of social theory, i.e. sociology et al., as strongly linked to utopianism, if not necessarily Popper's claim of "radical utopianism". Popper's writings on this point are scattered but see The Open Society and Its Enemies, Vol.II, The High Tide of Prophecy: Hegel, Marx, and the Aftermath, Routledge and Kegan Paul, London, 1945.

29. Henceforth the darkness of the mind was to be viewed as temporary, to be filled in the process of participation and acceptance of the gradual building of the structure of knowledges; a vision given substantive confidence by the scientific discoveries of the time: Lavoisier expounded his theory of the elements, Dalton reformulated the atomic theory of nature, and Wohler synthesised organic material from inorganic, thus demonstrating that the organic and inorganic were not, as previously thought, two entirely different worlds: social science could be seen as an offshoot of the "natural".

30. Henri Comte Saint-Simon, Selected Writings, F.M.H. Markham (ed.), Basil Blackwell, Oxford, 1952, p.68.

31. The rationale for this is stated by the voice of Godwin, for whom "everything must be trusted to the tranquil and wholesome progress of knowledge", for man's "moral improvements will keep pace with his intellectual". The intellectual is solely the advance in knowledge. William Godwin, An Inquiry Concerning Political Justice and its Influence on general Virtue and Happiness, quoted in The Idea of Progress, p.337.

32. Branson traces the fact that a substantial proportion of later sociology specifically seized upon the problem of collective behaviour (eg. Le Bon, The Crowd, 1895; Gabriel Tarde and others) in response to the fear of nineteenth-century conservatives that populist democratic movements would unhinge society and result in chaos and disaster. He, therefore, provides a conservative explanation for at least some of the rise of the social sciences, and provides an alternative to the Popperian. However, the main features of the Enlightenment project are unaffected. Popper is basing much of his approach as to the basis of the social sciences in the optimistic Eighteenth century writings, whilst Branson looks more at the nineteenth century fears and the battling with specific 'problem' issues, particularly social control. See L. Branson, The Political Context of Sociology, Princeton, Princeton University Press, 1961.

33. See our discussion on Foucault, as well as Discipline and Punish other texts which have reference to this theme include "On Governmentality", Ideology and Consciousness, Vol 6 (1979); "The political technology of individuals", in L. Martin et al. (eds.), Technologies of the Self, Tavistock, London, 1988; P. Pasquino, "Theatrum politicum: police and the state of prosperity", Ideology and Consciousness, Vol 4, (1978).

34. Quoted in Governing the Soul: The shaping of the private self, Nikolas Rose, Routledge, London, 1990, at page 222. See this text, in particular Part Four "managing our Selves" for the positive aspects of this process, Rose is clearly of the opinion that the managing of the self is tied to the project of autonomy and freedom which modernity gives various permutations to. Other work which also draw upon Foucault take a more critical view of control. Zygmunt Bauman, for example, in Legislators and Interpreters: On Modernity, Post-modernity and Intellectuals, Polity Press, Oxford, 1987, directly argues that the narrative of modernity, that of bringing knowledge to the people, to restore clear sight to those blinded by superstition, to pave the way for progress, is ideological cover for statist, authoritarian and disciplinary forces. Bauman sees the substance of enlightenment radicalism as the drive to legislate, organise, and regulate, rather than disseminate knowledge. The project of the Enlightenment was two edged: simultaneously reorganizing the state around the function of planning, designing and managing the reproduction of social order and creating an entirely new, and consciously designed, social mechanism of disciplining action, aimed at regulating and regularizing the socially relevant life of the subjects of the teaching and managing state.

35. Since the spelling of this term in the literature is so inconsistent the expressions 'postmodern', 'post modern', and 'post-modern' are used interchangeably throughout this thesis.

36. European Positivism (in particular French Positivism) emerges in the context of the struggle over "constitutionalism", and the nature of the social order which will replace the ancien regime. Its particular manifestations arise thus as a result of criticisms of contemporary practice and seek to overcome (surpass) rationalist idealism by building new schemes with the opportunity presented by the data of the developing forms of social institutions (for example, the prison, the census, the examination room), the result is to link rationalist conceptions to a belief in real data, thus giving a reduction of expressive outcomes (for example "crime") to a misdirected empiricism based on a designative theory of language. Its submission to the ends of the state which appears to quickly befall its 'knowledges' was partly due to the fact that the productive site of data (for example the prison) was state-sponsored and thus already in the context of state ends.

37. Utilitarianism is one 'scientific' result: human behaviour is revealed as determined by human desires and appetites, and liberal "wisdom" now becomes the recognition that each person calls "good" that which he or she desires. But the potential anarchic and relativist direction of this finding actually strengthens the approach of 'problem', for it vastly simplifies the substantive content of "morality" itself. Morality now becomes totally anti-'mystery', and is perfectly soluble by the scientific technique of ascertaining the objective weight or importance of one desire or aversion relative to others, and the adjustment of each person's satisfaction to those of all others. Given the possibility of translating all desires and aversions into terms of sensations of pleasure and pain, then both of these questions become matters for essentially empirical and quantifiable calculations. This receives its most open program in Bentham's Introduction to the Principles of Morals and Legislation where the matter of the first principles, the foundation, receives scant but confident preliminary attention as a prelude to the task of chronicling the material. If we ask where do values go when they leave their embedment in the cosmos? the answer appears to be the very process of scientific rationality itself. It becomes the only master value - acceptance of the virtue of freedom under the approach of reason leads to scientism, the philosophy of knowledge provides its own internal and uncritical 'wisdom'.

38. This is at the root of the argument between the neo-rationalist Habermas and French 'post-structuralists' such as Foucault and Derrida. For Habermas language is a medium of communication and through communicative action the truth of statements can be conclusively adjudicated. Consensus, which is both the universal humanly desired end state and essential requirement for social harmony, requires an agreed functional status for knowledge - ultimately 'truth' has philosophical foundations independent of humanity. Conversely for Foucault

there are no philosophical foundations instead truth becomes established ultimately through power; for Derrida there can be no edifice of objective knowledge possible, no positive constructive project with a coherence knowable to itself, instead there are only texts, and 'knowledge' is but a product of 'intertextuality'.

39. Rudolf Carnap, The Unity of Science, p. 97, quoted in Susan James, The Content of Social Explanation, p. 18.

40. See Leonard Savitz et al, "The origin of Scientific Criminology: Franz Joseph as the First Criminologist", in Theory in Criminology, Contemporary Views, Sage Publications, Inc. Beverly Hills/London, 1977.

41. J.E. Hall Williams, Criminology and Criminal Justice, Butterworths, London, 1982.

42. Thomas Kuhn, The Structure of Scientific Revolutions, Chicago University Press, Chicago, 1962.

43. Especially M. Foucault, The Order of Things: An Archaeology of the Human Sciences, Tavistock, London, 1970. In this text Foucault holds: "it is no longer possible to think in our day other than in the void left by man's disappearance". p.342.

44. Louis Althusser, For Marx, trans. B.R. Brewster, London, 1969. The denial of men as subjects. Cf. pp. 227-230 of Enlightenment and Despair, for a brief critical summary.

45. For example Claude Levi-Strauss, The Savage Mind, London, 1966. For Levi-Strauss social practices should be treated as activities in which "messages" are constituted through the means of a "code". Structural anthropology seeks to reach these codes and to demonstrate their homology. Ultimately the aim is to reduce the diversity of human cultural practices to the flow of one universal "depth-grammar". The idea of the central role of the conscious subject is "decentred" from all areas of social practice, and with this goes not only the epistemology of the cognitive interaction between the subject and the world, but any semblance of mystery (ultimately) about man. The human sciences can objectify man as can the natural, only the path is different.

46. Herbert L. Dreyfus & Paul Rabinow, Michel Foucault: Beyond Structuralism and Hermeneutics, University of Chicago Press, Chicago, 1982.

47. Foucault is the subject of our next chapter, his place in our scheme demanded by his reversal of 'progressive epistemology'. Foucault's writings, concerning the relation between power and knowledge, arose out of his attack on the visions of the post-

Enlightenment architecture of knowledge, and the optimism which put salvatory faith in the emancipatory power of knowledge with its instrumental conception of the power/knowledge relation. Foucault injects dialects into the usual liberal and Baconian reading that knowledge gives power, transposing this to read power gives knowledge; and, in wishing to avoid total dialects, reserved resistance for the micro. Thus "strategies of power" are those which formulate cognitive discourses, and, in turn, are thereby constituted as "regimes of truth". Moreover, for Foucault, power produces its own obedience; the disciplinaries lead the individual to "inscribe in himself the power relation, and become the principle of his own subjection". One can only resist, but resistance cannot ever break out of the regime of truth but only construct another regime, another economy of power and truth, another hostile spiders' web impossible to transcend. From within the universalistic notions for epistemology of the enlightenment it is hard to read Foucault. Foucault wished to upset confidence, and did so with sophistication, but also at times appeared to act in obedience to the unwritten canon of social epistemology that if the theoretical scheme wishes to avoid a pluralist, and possible interactionist approach similar to the market, and yet reach a totalisation than an implicit total formation is required. With Foucault, in the absence of reading in some conspiracy theory, this comes close to the implicit postulation of some "spirit" responsible for the "articulation of knowledge on power and power on knowledge". However, he then comes close to being labelled under the category Philip Pettit called writers who see "a spirit pervading and directing the society although it were the soul imagined by the vitalists to be the principle of life in the organism". Judging Justice, p.66. Alternatively, one reads Foucault as the 'objector', as the voice which cries for a life without the security of an epistemological regime.

48. Karl Popper, The Open Society and its Enemies, Routledge & Kegan Paul, London, 1969 (first published 1945), and, The Poverty of Historicism, Routledge & Kegan Paul, 1961.

49. I. Berlin, Against the Current, Hogarth Press, London, 1979, (reprint of earlier essays).

50. Tristes Tropiques, p.50.

51. Signes, p.154

52. Cf. Daniel Bell and Irving Kristol, The Crises in Economic Theory, Basic Books, Inc. New York, 1981.

53. Quentin Skinner, The Foundations of Modern Political Thought, (in 2 Vols), Cambridge University Press, Cambridge, 1978.

54.I. Hont and M. Ignatieff, Wealth and Virtue: the Shaping of Political Economy in the Scottish Enlightenment, Cambridge University Press, Cambridge, 1983.

55.Collini, Burrow and Winch, The Noble Science of Politics: a study in Nineteenth-century Intellectual History, Cambridge University Press, Cambridge, 1983.

56.An example is Reading and the Law: a critical introduction to legal method and techniques, Peter Goodrich, Basil Blackwell, Oxford, 1986.

57.Ronald Dworkin, Taking Rights Seriously, [2nd ed.] London, Duckworth, 1979.

58.The question is visible at the very stirring of the Enlightenment changes; Donne asks the question as a contemporary of Francis Bacon and asks his question as he laments the passing of the Aristotelian cosmos destroyed by Copercus, and in anticipation of the rise of Bacon-Newtonian scientificity. Donne is specific that the social consciousness of man and his science of the cosmos are linked, and that with the destruction of the Aristotelian science man was cast adrift in a sea of meaningless random activity. As he put it in The First Anniversary:

"Tis all in pieces, all coherence gone;
All just supply, and all relation:
Prince, subject, father, son, are things forgot,
For every man alone thinks he hath got
To be a phoenix, and that there can be
None of that kind, of which he is, but he".

John Donne, Complete Poetry and Selected Prose, John Hayward (ed.), Nonesuch Press, 1962.

59.Marshall Berman, All That is Solid Melts Into Air. This quote from Marx was selected as the theme quotation for the recent Channel 4 Television series Voices on the subject of "Modernity and its Discontents", the transcript of which was published as Voices: Modernity and Its Discontents, B.Borne, U.Eichler and D. Herman (eds.), Spokesman, Nottingham, England, 1987. What took up the strain of Doone was the confidence in epistemological progressivism which the Bacon/Newton configuration bequeathed. We may now be standing upon a similar transition, for it is not only in the social sciences that find its epistemological basis questioned, since even that most certain of sciences, mathematics, finds a loss of certainty. See, for example, Morris Kline, Mathematics: the Loss of Certainty, Oxford University Press, Oxford and London, 1980.

60.In Daniel Bell's The Coming of Post-Industrial Society, New York, Basic Books, 1973, a spectacle is presented of a space that is essentially defined as being "post". A process of labelling and categorising on the basis of what had gone before, not on the basis of a continuing programme, or assured

development into a future. The compilation of historians, philosophers, sociologists and literary critics could only define the times by a procedure of placing a post in front of the labels that had previously served to designate the times.

61. See Durkheimian legacy on the latent anomie of socialisation in conditions of a complex division of labour. Again it was Nietzsche who took this furthest in contrasting extremes of the supra-moral strong individual who totally stylises and creates his self devoid of the forces of socialisation (the Super-man or Overman) or, and this was the majority, the individual who resents his own lack of strength in combatting socialisation but who is merely a site to receive social impulses (the herd).

62. The Postmodern Condition, p.xxiv.

63. In this way it becomes possible to see the entire philosophical basis of the post-enlightenment concentration upon knowledge, in the security of epistemological foundationalism, as a disregard for 'wisdom' (the essential question of relating and imaginative grasp), making double edged those successes which knowledge gives. Medical science, for example, has provided information, successfully accepted as knowledge, which has allowed us to control disease but when this comes to the human sciences, and applied to human interaction and relations between men, as in the discipline of criminology it means the control of men by men.

64. As in Heidegger's Inaugural Lecture for instance. See the analysis in S. Rosen, Nihilism: a philosophical essay, Yale University Press, New Haven/London, 1969; also Habermas, The Philosophical Discourse of Modernity, pp. 155-60.

65. Fredrick Jameson gives one aspect of "the crises of modernity" in its account of time - the demise of the grand narratives entails that we lack an ability to locate ourselves in a meaningful history. This leads, he suggests, to a diagnosis of postmodernism as "schizophrenic" or characterised by a collapsed sense of temporality. Cf. "Postmodernism and Consumer Society", in Postmodern Culture, Hal Foster (ed.), Pluto Press, London/Sydney, 1983, pp. 111-125.

66. Interestingly, many of the voices appear to agree with Foucault on the difficulty of diagnosing exactly what the social and epistemologically disruptive features that we should be ranged against are, (the failure our moral and 'social' imagination to grasp the need to relate is central to the analysis of MacIntyre, where it is "a part of that which has been governing us for some time and our lack of consciousness of this constitutes part of the predicament". After Virtue, Concluding Chapter. Hawthorn ends his work with a tale wherein "disillusion has piled upon disillusion". Enlightenment and Despair.

67. Enlightenment and Despair, p.259.

68. Donald W. Livingstone, Hume's Philosophy of Common Life, University of Chicago Press, Chicago and London, 1984.

69. This surfaces today in many guises, but nowhere is it represented more subtly than in the style of criminology provided by works, such as Nigel Walker's Behaviour and Misbehaviour: explanations and non-explanations, Basil Blackwell, Oxford, 1977, a work on the philosophy of explanation for criminology. Much of the usual analysis of why correctionalism and positivism dominated in penology and criminology for so long rely upon a theory of ideological consensus. However, there are reasons inherent in the 'Reason' of positivism itself. Positivism is not simply empiricism but a particular development which links into the common life and a particular form of curiosity which determines the type of knowledge (or depth) which will suffice.

70. As with this quotation from Locke in *Ethica*. "If man were independent he would have no law but his own will, no end but himself. He would be a God to himself and the satisfaction of his own will the sole measure and end of all his actions". Quoted in John Dunn, The Political Thought of John Locke, Cambridge University Press, Cambridge, 1969. My source is William Sullivan, Reconstructing Public Philosophy, University of California Press, Berkeley and London, 1982.

71. Richard J. Bernstein in Praxis and Action: Contemporary Philosophies of Human Action, University of Pennsylvania Press, Philadelphia, 1971, holds "that the more one penetrates to the quintessence of Marx's thought, the more one can see the presence of themes (in secularised form) that have preoccupied religious thinkers throughout the ages - the severity of human alienation, the apocalyptic sense of the imminence of the coming revolution, and the messianic aspiration that infuses much of Marx's thinking. Even the temperament and outlook of Marx are in the direct vein of the Biblical prophets". He sees Marx's early "humanist" writings as "not only expressing the dominant themes of the history of western culture, it also speaks to our deepest aspirations and hopes - that the day will come when man will be freely and creatively fulfilled". p.77-78.

72. Daniel Bell, for instance, turns to Durkheim in an attempt to locate the "contradiction that lies at the heart of modern society [American]". As in p.28 of The Cultural Contradictions of Capitalism, New York, Basic Books, 1978.

73. An example of this tendency and one which William Sullivan analyses in Reconstructing Public Philosophy, is the contribution of Robert Heilbroner. In a sense Heilbroner asks us to reframe the mandate that the constructivist project of knowledge gave Cultural Anthropology in the Nineteenth Century. That was to search the world and report back on the ways men lived with all his customs and thereby to demonstrate "the natural". However, as is well known, the results did not go quite

so easily to plan - not much it seems can be seen as conclusively or implicitly natural. What was viewed as natural in one society may elicit a different response in another, and sometimes practices were culturally specific. Heilbroner sees only two options for us: to construct local communities about which he is probably pessimistic; or to learn from the knowledge of anthropology how to order our societies through tradition and religious authority. Sullivan notes "how this is to occur Heilbroner does not tell us. So his analysis points towards a picture of civilizational entropy, another gloomy coda to the West's faith in progress". Sullivan discusses Heilbroner at pp. 45-51 of Reconstructing Public Philosophy.

74. Cultural Contradictions, p.99

75. From "Modernity - An Incomplete Project", in Postmodern Culture, pp 7-8.

76. One of the arguments in this strategy is that no alternative should be offered since that activity must necessarily be bound into the outdated modes of thought being deconstructed. Yet there is controversy as to whether 'just gaming' is 'just playing' or not.

The image of MacIntyre referred to is the exhortation to turn away from storing up the 'imperium' of modernity and adopt a sort of Epicurean care of virtuous settlements whilst the whole dissolves; his actual endeavour (the writing of After Virtue and so forth) is very much in the forth category as far as telling the narrative of the impotence of modernity. Yet he criticises modern liberalism for a failure to address substantial inequalities and for its inability to come to a solution. Liberalism is incapable of "arriving at substantive conclusions, and more and more [resorts to] continuing the debate for its own sake". (Whose Justice? Which Rationality? p. 342-44.) But in After Virtue is 'waiting for a different St. Benedict' actually to be taken seriously as a response to the power of Nietzsche's critique? And why in Whose Justice? Which rationality? is 'Augustinian Christianity' not subjected to the same critique as liberalism?

Deconstruction has many interpretators who both criticise it as the abrogation of reason, and of being part of the enterprise of a "post-Nietzschean irrationalism". There are others who seem to claim Derrida as a new Kant and stress his work as part of a tradition going back to Plato. It may be too early to tell and my categorization can be seen as for heuristic effect.

77. Postmodern Condition, p. xxiv

Chapter Three: Complicating Progressive epistemology: Michel Foucault.

I

The great success of the post-Enlightenment period is surely science - and science is aided by instrumentation. The relationship is dialectic. The progress of seventeenth-century science was conditioned by such tools as the telescope, microscope, thermometer, and so on.¹ Correspondingly the instrument which developed with criminology/penology was the prison. Whilst the image of an institution is found earlier (schemes for 'prisons' were proposed by Plato, for instance, particularly with reference to religious re-education), the Enlightenment saw the predominance of public physical punishment, press-ganging, and transportation, which temporally co-existed, incorporated and then gave way to placement in the solitude of the hulk, the penitentiary and the prison. The debates which so enthused the late Nineteenth century, as between those who wanted the system of Elmira or Auburn (New York), or those who wanted the Panopticon proper, cannot hide the central configuration which was the rise of the institution as the embodiment of progressive penology. The relationship cannot but be complex and it is not our purpose here to seek a determinate story of its conditions.² However, it is as well to note that for David Rothman the penal change of the Nineteenth century expressed the rise of an idea that it would be the experience of punishment in the institution which was to matter as much if not more than the likelihood of punishment. This rhetoric of progress stated that the effects of the well ordered prisons with their routines of bell ringing, punctuality and steady labour would reduce and in the view of many eliminate crime. The well ordered penitentiary was a panacea in just the sense that every form of deviant behaviour could be corrected within its walls. This 'methodology' allowed the institution to be free from requiring that those sent to it display a limited set of 'particulars' to act upon. Thus sentencing could still focus upon the 'crime', while acting upon the criminal could become the internal subject of the prison.³

It was a 'subjection' which was to be of profound consequence and debate.

In producing knowledge about crime the criminological positivist openly acknowledged the prison as the main data resource - the site of the investigation of the 'criminal'.⁴ As this became subjected to the criticism of a limited data base the refined positivist preserved the confidence of early positivism through requiring epistemological allowance for the effects of such imprisonment upon the data and corrections to be made for selection processes. This text will not consider the positivist debate, instead we shall take briefly some strands of the recent Foucaultean analysis of this institutional dialectic with knowledge; an analysis which took aim at the vision of the institution as the embodiment of progressive epistemology.

II

Foucault states that his analysis of the "birth of the prison", its placement in the social body, and its historical instrumentality in the service "of the power of normalization", is "a chapter in the history of 'punitive reason'". Panopticism, or the grip of a social control/punitive "discipline", is the outcome of modern rationality applied via 'problem' in one arena. Its effects, however, are penetrating, ambiguous, and far reaching.

Foucault is specific that Panopticism does not flow from capitalism: we are to adopt instead a Nietzschean/Weberian analysis, wherein modernity finds itself in the bind of a social rationality which both allows and gives rein to capitalism, and also allows and gives rein to Panopticism. Thus as

"the economic take-off of the West began with the techniques that made possible the accumulation of capital... the methods of administering the accumulation of men made possible a political take-off in relation to the traditional, ritual, costly, violent forms of power, which soon fell into disuse, and were superseded by a subtle,

calculated technology of subjection".⁵

Foucault develops his narrative making great use of the Panopticon, the 'model' institution of Bentham. Bentham designed the Panopticon as the institutional partner for the instrumentality of 'problem': it was a mechanism providing multiple and multi-purposive solutions to the social problems of the day: it was not simply for 'criminals' but an adaptable institution for the demands modernity made in the name of utility.⁶

For Foucault "the Panopticon functions as a kind of laboratory of power",⁷ it is more than a model, for "it must not be understood as a dream building; it is the diagram of a mechanism..."⁸ constitutive and productive of the ensuring reality of our late-modern social body. We live in a 'social reality' which itself is produced in the life of the panoptical city.⁹ It is a grand transformation which reinterprets the enlightenment replacement of the arbitrary, coarse power of tradition and opinion by the scientific patterns of rationality and disciplinary knowledge (psychiatry, penology, sociology).

The routine of the planned panopticon, and lately of the prison and reformatory, corresponds to a materialization which feeds upon the nature of modern science, the grasp of rational reconstruction upon reason, and its partnership with 'problem' productive of a 'crime/delinquency' knowledge spiral. The converse side of 'problem' is the kingdom of control, the establishment of order: it is a feature implicit in the modern construction project from the beginning and implicitly acknowledged by Bacon and others.¹⁰ As Fay brings out, the desire for control is the key constitutive element in the scientific enterprise itself: the link between science and control draws upon a link between explanation and prediction. Prediction is best when it is unconditional, and if longer term unconditional predictions are the aim then these are only possible if the systems to which they apply are well isolated, preferably stationary, and recurrent. The closer one's objects come to this model, the greater the power of prediction. The openness of the social order, which

counters this tendency, results from a continual state of change and adjustment, due to its variable and often chance filled inter-relationship with natural phenomena, the interaction of social units with other social systems, and the growth of knowledge and changes in ideas and values of the constituent members: to cover this observation is crucial. The continuing success for the enterprise of science is tied up with establishing a relation with vision: Comte put it plainly; "From science comes prevision, from prevision comes control."¹¹ Graphically, the structure of the panopticon perpetrates this emphasis. A slim central tower, from which can be seen all of the surrounding segmented prison cells and their occupants, but whose occupants themselves cannot in turn be seen by the prisoners provides the ultimate in the art of surveillance, an act of continual demarcation founded upon the space of its own law of power:

"power should be visible and unverifiable. Visible: the inmate will constantly have before his eyes the tall outline of the central tower from which he is spied upon. Unverifiable: the inmate must never know whether he is being looked at any one moment; but he must be sure that he may always be so."¹²

The panopticon spreads in those aspects of science, and the scientific approach to the activities of everyday life, which mark out the "world" as a world of observable phenomena subject to the coverage of general laws, and able to be localised in the determinate co-ordinates of time and space, and in so doing it thereby re-constitutes the "world" from the viewpoint of maximising control.¹³

Since this new order declares itself as founded on principles of disinterested rationality, the rationalization of constitutional governability, and the grappling with "criminality" via 'problem' (under the influence of 'justice' and moderation instead of arbitrary desire), it offers itself as engaged in the progressive spread of the good of all men (and even in its rhetoric the good of those it exemplifies - for instance, the criminal) - the self-consciousness which the panoptical vision of this eye holds out as its public manifestation is therefore benevolent.

From every point in the life of the city "approving eyes" and "protective glances" will come to proliferate, yet these are also the eyes of suspicion as well as benevolence; a double vision in which the apprehended concurs in the joint creation of 'normal stability'. The stability of a social linked to a 'common sense' and a common vision which is answerable to the law of power since in the public space the common vision can but see objects in the pervasive light which makes them visible - a 'light' which is a double for the individuals own stare, itself reflecting and bound up with the desire of the gaze.¹⁴ Individuals from all social "classes" internalise the objectifications of the gaze, and in their differentiations, their movements apart, the typologies of the social are created.

The normalcy of the social body produces its social 'order', an order which is not legitimated and laid down by the will of an external figure (God, Sovereign) but is the "will" of a social life productive of that order. The co-ordinates which every individual relate themselves to are transformed - they no longer reflect the 'will' of any traditional sovereign but the disciplinary co-ordinates of time and space which flow out of and reflect the growing expectations of the properly cognised, and thus 'normalised' social. On the one hand, in the time table of the disciplinary institution (the reformatory), comes the meridian of science's political function - unprecedented precision is granted to the valuable political component of time itself. Time is freed from the cyclic rhythm of 'nature' and the timetable becomes the ultimate political instrument, insofar as it grounds, and gives form to time, the necessary stability and referent for proper mapping. Further, this time which is the institution's, is necessarily altered time, as Cohen and Taylor put it in their study of long term imprisonment, the prisoners' "own time has been abstracted... and in its place they have been given prison time. This is no longer a resource but a controller. It has to be served rather than used".¹⁵

On the other hand, the panopticism of moral consensus arises;

Foucault implicitly presents an antimony to the view that freedom is better served by emphasising sanctions employed by peer groups and social intermediate functionaries as opposed to the formal agents of police - specifically such panopticism entails that people in modern society may be more closely controlled by new intermediate groups than they were by the old repressive hierarchies of power.¹⁶

The executive functionaries of Imperial Authority become transformed into recorders concerned with tracking down information and tracing movements - the bodies of those whom they watch become dissected, and posited into an arsenal of information as do their own - the triumphs of seemingly disinterested science concern in action the double eye of benevolence and suspicion embedded in the modes of surveillance and the uncovering of secrets: this knowledge is power, but it is power which gives knowledge.

III

But why? Why the rise of, or the need for, panopticism, how has this come about? The answer lies in the breaking out of the classical (including Christian) episteme in the transformations to modernity and the establishment, by the 'reason' of the new episteme itself, of a mechanism of social order.¹⁷

Centrally the Humeanised object released in the 'birth of man' of the Enlightenment is linked to the destruction of the regime of status, role, character, and possession by man of good and evil, that existed inside the total configuration of the classical episteme and which enabled "structure to be ordered as character". By the mid nineteenth century a new "philosophical space" has emerged in the place of the set ordering of the objects of classical knowledge which has dissolved. In classical thought,

"man does not occupy a place in nature through the intermediary of the regional, limited, specific 'nature'

that is granted to him, as to all other things, as a birthright... in the general arrangement of the classical episteme, nature, human nature, and their relations are definite and predictable functional movements.... The modern themes of an individual who lives, speaks, and works in accordance with the laws of an economics, a philology, and a biology, but who also, by a sort of internal torsion and overlapping, has acquired the right, through the interplay of those very laws, to know them and to subject them to total clarification - all these themes so familiar to us today and linked to the existence of the 'human sciences' are excluded by classical thought".¹⁸

It is a transformation from "classical language [which] excludes anything that could be a 'science of man'"¹⁹ Classical language, and the discourse it engenders, i.e. the expressional of that episteme, held itself out as privileged in being able to present the order of things - under the accepted grammar of essentialism things obeyed the laws of essential representation, and the grammar of teleos. The societal mechanisms largely in place by the nineteenth century danced to a transformation of episteme - an episteme which, disowning teleos, and creative of another total structure needed to avoid a self-consciousness of its moving to the linguistic tunes of a complex nominalism - instead it offered a regime of 'positivities' wherein things seemingly obeyed laws of universal flows of development, and man took his place in an alternative relationship of words to things, i.e. the 'positivities' caught and isolated by science.²⁰ This modern episteme resolved the potential crisis of the absence of confidence in essentialism by the detailed division, and creation, of grids - time and space co-ordinates which subjected entities to constant surveillance and marcation as 'positivities'. The rational 'imprisonment' of individuals in modernity is as a corollary to individuals positivistic location in the time and space co-ordinates of this science. The inability of man to become mysterious - what we can recognise as a possible alternative outcome of the demise of the classical episteme - and simply privately anonymous, is the result of a world where peoples' behaviour, and presentation is subjected to scientific scrutiny as a key to their composition as publicly verifiable types: delinquent, insane, psychopathic, average (normal).

Correspondingly, the line between private individual and public type becomes blurred, and the stability of identity de-categorised from the capacity of 'character' - and this, in turn, contributes further to the acceptance of the surveillance to ensure adequate 'knowledge' of the positivities of a 'post-character' age.²¹

The link between 'social control' and panopticism is revealed at the beginning of Foucault's discussion of panopticism in the description of seventeenth-century measures traditionally taken to deal with a town stricken with the plague.²² The strict partitioning of space into quarantine, the constant surveillance and routine questioning of all the families in the plague town, were all techniques employed as responses to the plague situation. Responses already in existence but not central to the government of the social. The social is ordered by other, traditional, methodologies. The nineteenth century turns these fringe responses into a social technique with an ambiguous difference, for the daily application of these techniques entails the further consciousness that the 'plague' can spread to anyone. The question as to what the plague consists of, whether actual disease, criminality, or insanity, is less relevant than the fact that this 'problem'-condition is increasingly viewed as the one to be assumed. The social rationality which spreads the urge to total surveillance, is based not only on the understood possibility that others might spread the plague but, also, in the recognition that everyone is susceptible to contamination; that the boundaries between the healthy and the diseased members of the society can not be simply drawn as a permanent categorization.

The crucial change is at the level of social epistemology, and in a milieu where anyone can be a criminal, or an informer (later policeman), and where the public space is primarily recognizable as a one way gaze (i.e. a place of concealment of the focus of the gaze, the seat of power), the need to fix people in both time and space, and so establish a regime of "docile bodies" increases

in direct attack upon the possibility of mystery which individuals try to cultivate.

Above all it is 'mystery' that is feared - the desire is to subject motives, human personalities, the unplaced potentiality of decision, to arrangement within the grid of panopticism. There are different levels of influence, more or less open to signification and analyses. On one level the fear of the surveying gaze is to be turned into the internalisation of the rational calculator, not an individually transcendental conscience - for that would be to escape the co-ordinates and technologies of tracking - but the calculating fear of the scientific, yet benign, rational encompassment of modern penology and utilitarian ethics. This calculation, the calculation of penological deterrence, moves site from the public executions of the eighteenth century which took place as a form of *theatrum mundi*, functioning as a dramatic presentation of the place of sovereign's power in the order of things, through an emptying of that space, and blurring of the order of things, wherein the very terms 'punishment' and 'criminal' fall into the various ploys of nominalism, to another positioning. Executions may continue, but they now take place in a calculated secrecy, open to the reportage of the media, coexisting with the technologies of reformation. The technologies of deterrence, for instance, employs, and engages within, a different space. This space is no longer the overtly political domain of public life and the open spectacle, but, rather, the mind of every private citizen. The gallows no longer inhabits the 'famous site' but, instead, the pages of the newspaper, entering the thoughts of the interior theatres of the populace. Henceforth, the power of deterrence no longer draws upon the severity of punishment but the ever present possibility/inevitability of detection and outcome. The deterrent equation shifts to a new theatre, with new actors - the possibilities of jury acquittal, or public rebellion against the enacted spectacle, exit, in their place enters the spread of police and the inducement to reportage aided by the panopticism of moral consensus and the stabilization of the 'normal'.

The technique of the reformatory aids in its attempt to inscribe on the minds of its inhabitants the template of 'normal' action; this site of the disciplining of individuals combats the potentially anarchistic effects of nominalism, and, by so doing, produces in the common 'social epistemology' the essential subject itself - the criminal is again constituted in the order of things, this time, however, linked to the institutional configurations of penology as a social subject - 'the delinquent'.²³ While the new 'disciplines of the self' socialise the 'normal' individual into a modality of 'normal' reactions and expectations, creating a knowledgeable desire which disciplines itself according to the canons of 'self-discovery' and 'self-advancement'.

Thus Foucault unpacks the dominant mirage of criminology and penology. It undercuts the understanding that penology's historical development mirrored the growth of a body of criminological theory, which itself had been derived from the logical structure and methodological conventions found within the natural sciences. Thus Foucault directly contradicts the notion that these applied sciences are merely putting into practice the potential for a rational society via its organizational technology (developing bureaucratic organization of criminal justice with associate mechanisms of functional differentiation and hierarchical co-ordination focused on the foundation of an entity being better developed via knowledge). Penology's positive legitimation was ideally founded in criminology's ability to formulate typologies of knowledge, factual law-like generalizations which would provide the knowledge reserves for the modern fonctionnaires to control and develop the social environment.²⁴ Foucault seeks to demonstrate that criminology and penology are themselves social activities through which, it implicitly appears, those who are not directly involved (i.e. the normal, the non-delinquent) are led to act in routinised ways which further particular interests under the guise of acting in accordance with rational and open general interests (the scientific organization of modernity) and technical imperatives

(solving crime, preserving the peace, dealing with the criminal), or are mistakenly impressed into following the routines and expectations of a social vision which provides, without critical scrutiny, the normative foundations of the institutional relations which dominate.

IV

The wider cutting edge of the Foucaultean analysis lies in his ascription of modernity as 'positivistic' society. Man is "heralded in positivity"²⁵, 'the mode of being of life', the fact of life, and of the mode of being produced, are presented in 'the empirical positivities'. And the things which indicate themselves "as a concrete limitation of man's existence" are finitudes betraying a

"limitation expressed not as a determination imposed upon man from outside (because he has a nature or a history), but as a fundamental finitude which rests on nothing but its own existence as fact, and opens upon the positivity of all concrete limitation."²⁶

This progress of modernity is founded upon the demarcation of the (+) from the (-), a demarcation which asserts the 'facticity' of the (+) and the limitations thereby exposed, at the same time as it leaves unrecognized the act of marcation itself. Marcation is held as self evident due to the nature of positivity instead of being seen as actively processurally engendered and, in turn, engendering 'positive' outcomes.

The progress of penal reason is but a new form of marcation procedure - a new form of the rational reconstruction of the penal subject. For post-enlightenment Europe the symbolism of the physical marcation of torture and execution was becoming 'uneconomic'. "In punishment-as-spectacle a confused horror spread from the scaffold". The post-enlightenment transformation achieves a certain distancing whereby

"the scandal and the light are to be distributed differently; it is the conviction itself that marks the offender with the unequivocally negative sign".

The site of demarcation shifts

"to the trial, and to the sentence.... the execution is like an additional shame that justice is ashamed to impose on the condemned man; so it keeps its distance from the act, tending always to entrust it to others".²⁷

Justice distances itself from the punishment it imposes through the "autonomous sector" of "a bureaucratic concealment of the penalty itself". The position of marcation must remain out of sight:

"the prison, that darkest region in the apparatus of justice, is the place where the power to punish, which no longer dares to manifest itself openly, silently organises a field of objectivity... inscribed among the discourses of knowledge."²⁸

Discourses which contain and constitute the transformative imagination within the structured sense allowed by epistemological canon. The transformative imagination need not obey the boundaries of the sole discipline allocated to it to be constrained by positivism. To so confine it is to confuse the power which discipline exercises through the canons of explanation and the power of disciplinary boundaries which is only superficial. The positivist actually admits this: "The confusion which needs to be cleared up is between the subject matter of a discipline and the subject matter of explanations".²⁹ The positivist admits the two are not identical - instead it is the canons of proper explanation which guide - not the 'labels' of discourse. The 'reason' apparently internal to a discipline is shared in social epistemology.

When discourses contest social terrain it is not the grasp of one discipline but the structured coverage of explanation and the internal "correspondence rules" of positive science which is at stake. The human sciences are the site of a marcation, of an establishment of identity and difference where the archaic potentialities of the 'other' (the allure of metaphysics) is separated out being pushed to the (-) side. Discourse is subject to an interrogation concerning the generation of meaningful statements. All ambiguity or paradox must be exposed and the

movement to the right (i.e. the (+)) made. Such demarcation is the epistemological task of philosophy where it takes its role to operate under the image of the philosophy of knowledge and thus of marking discourse as positive knowledge by a specific set of rules - conversely it de-marcates those (-) discourses by the withholding of the positive mark. The structure of correct social discourse becomes the structure of such marcation.³⁰

Such a philosophy which guarantees epistemology creates a split in the heart of potential knowledge, which contrary to such marcation may be subject to the immanent norms of its community; of its production as a medium of communication and guidance of practical action for a given communal setting.³¹ Modern marcations give a positive knowledge which transcends the community, is openly anti-traditional and which is public, verifiable, and universal - it creates a universalistic split between scientific knowledge and the pseudo-scientific or non-science. The accumulation of positivities becomes viewed as the growth of knowledge; as the course of progressive epistemology. The product of this progressive epistemology is a structuring of zones of inclusion and exclusion within the realm of knowledge, which is, however, but one instance of a general structure of modern western thought and practice. Consequently, science as a specific character of reason, is no longer created and responsive to, but nor is it restricted to, the guidelines and norms of a living community and arising as a response to that communities' needs, since from this time on discourse can only be called science once it has submitted to the impartial regulation of the proof of demarcation; a proof whose impartiality is indicative of its universality, of its characteristic whereby it becomes a chief purveyor of modernity's structuring of sense; a modality characterised by the structure of inclusion and exclusion.

The fate of metaphysics (reflection on the nature of being not caught by positive science) is already sealed since the character of judgments which it invites appears paralogical, for they lead to unsolvable antinomies, and create arguments which seek to go

'beyond the limits and conditions of human experiences'. This seems an abuse and the creation of illusions. Thus metaphysics is denounced by the prosecution counsel of philosophy

"as a pseudo science that tends to set forth on a 'shadowy ocean' where reason goes astray and, once it has gone beyond its own limitations, dissipates and disappears."³²

The epistemologically acceptable is given a green light and channelled towards further development, the "unacceptable" is passed over. This is two-edged, however, for how is "being" known, if not by that which it-is-not. The existence of the (+) also requires the (-). To achieve the coherence of the (+), the presenter of the (+) must already, albeit engaging in a situated temporality, have an idea of what he takes to be non-science or pseudo-science and some form of accounting for their externality. The internality of the grouping and activity of the (+) makes sense in comparison to a shadowy "other", and a notion of the other is constantly occurring - the various attempts to overcome metaphysics,³³ in fact safeguard it and keep it alive. It is needed, for without it how can the sign of science be distributed; the ritual needs the reference point of the other to enact the self.

The control of the structure leads to a continual transformation and zoning of knowledge and society rather than progression - for Foucault the very term 'social progress' is impossible to utilise. The image of domination and freedom are structurally implicated, but under the domination of the path of the (+) we cannot think of alternatives other than as a vague questioning wondering what would a 'free culture be like if those discourses which are passed over in silence were allowed to be sharing with us their dangerous knowledge?'. Philosophical awareness can only attain a guiding force too late, for our social awareness is but a superstructure, which fits not upon the classical economic base but the base of economy like epistemological production of knowledge. Social consciousness is incapable of 'correct' direction being concerned with the raising to the conceptually acceptable that which has already been created or to propound

what is already accepted if only unconsciously. The prospective range of our rationality is limited in obedience to the dictates of the (+). What then are the consequences of the strength of the (+)? Specifically what is the function of the split other than the granting of signification?

One function is social determinism - similarly to the central incest taboo the act of prohibition has perscription as its flip side. Law enables as it prohibits.³⁴ The effect of the structuring is the creation of 'social-cultural reality'. A reality it appears difficult to oppose since the realm of the (+) also presents apparently rational action for modern man. In a related analysis of "Positivism" Bryant argues:

"The opposition of the positive to the negative.....take(s) three forms:

(a) The ontological: the positive is equated with the scientific and is marked off from the metaphysical, i.e. there are right methods and techniques of inquiry and there are wrong ones.

(b) The epistemological: the positive is equated with the scientific and is marked off from the unscientific, i.e. there are objects which are accessible to science and there are objects which are not.

(c) The practical: the positive is equated with the constructive and opposed to the critical and destructive."³⁵

The semaphore points the road ahead, obedience to the rules of the (+) leads forward. The overcoming, indeed the sublimation of reflection leads society to value highest:

mixed opinions ---> knowledge --> scientific knowledge S1 -->
scientific knowledge S2

As Trias presents this Nietzschean analysis this is the prerogative of the West. The social evolution of the West's social-cultural complex has occurred by the sublimation of the values of the "other" via the logic of binary opposites and the placement of one side as the positive and the other the negative. Nietzsche's hypothesis points to the doubling of norms - this structure is the maintenance of the path for the West's "highest values"; but these are only the values which correspond to the 'positive'.

Other societies: nature ---> culture.

The West: nature ---> culture C1 ----> culture C2
(where C2 is the totality of highest values, i.e. the greater abundance of the products of the (+)).

The binary logic relations of inclusion and exclusion are emphasised by the logic of modernity - as the early positivistic Wittgenstein put it. "Every proposition is essentially true - false". This is because contradiction is the "outer limit" of propositions.³⁶ The imposition of logical form is at base the rule of non-contradiction - simply put, you cannot have both 'A' and 'not A' simultaneously. Thus there cannot be the possibility of more than one of the same form being present simultaneously. We cannot think these possibilities and the world cannot contain them. This results in the splitting of all realms of human existence into dualities.

<u>Realm: Western Culture</u>	<u>Included</u>	<u>Excluded</u>
Sexual liaison	Exogamy	Incest
Social behaviour	Normalcy	Deviance
Personal behaviour	Health	Madness, illness
Psychology	Waking life	Dreams
Religion	Sacred	Profane
Legality	Prescribed	Illegal
Penal	Accepted	Prosecuted
Knowledge	(+) science	(-) non science
Cognition	Sense	Nonsense
Writing/discourse	Utterance	Silence

The determinism of social epistemology thus interacts with a sociological insider - outsider opposition (established - outsiders). The implicit emancipation apparent in the structure of marxist class analysis - that is of the prospect of freedom in the overcoming of the dominant class, the destruction of the dominant class and consequent elevation and spread of the oppressed class - cannot be engaged in since there will always be a system of demarcation and preferential action (an establishment - outsider) inherent in the logic of western knowledge and practice. At the end of Foucault's analysis emancipation can only become "the care of the self".³⁷ On the

personal level we are asked to avoid, to disrupt avowal of one's person in already patterned ways. To deny the expression of the self and of one's theory as a mode of social regimentation in which ultimately the power of individuality has no part. In the later works Foucault appears to offer more than simply projects of resistance whenever a patterned set of expectations and a claim of progress is made but projects of what may be called 'pragmatic creativity'. The self is not something which is completely given to us, but neither can it be made, Sartrean style, out of freedom; instead it is made in the games of bondage.

Life is part of games of bondage and the role of theory, analysis, and activity as a result of analysis, is to uncover the modes of group domination and subjection as well as the distinguishing features of types of domination. Thus action can be entered into, action and practices of life, but life must always be some or other form of practice, and one is always constrained in that practice. There is no escape from this, no innocent space. The text of the writer too is bound: the binary oppositions which bind us to the constructions of rational - emotional, mind - nature, and which Foucault turns against still appear to bind the texts of Foucault. As Minson points out Foucault, compared to the knowledges other social historians give us, makes a tactic of "essentialising the sovereign power in the legal instance", and presents at times "dubious continuities" and "essentialising tendencies, with their torsion towards a unified past pitted against an equally unified present".³⁸ Much of the Foucaultean narrative technique consists of setting up antagonisms and oppositions within which action proceeds; yet much of the aim of this tactic is to alert us to the dangers of any totalizing. Even the aims of 'genealogy' were itself to allow us to

"entertain the claims to attention to local, discontinuous, disqualified, illegitimate knowledges against the claims of a unitary body of theory which would filter, hierarchize and order them in the name of some true knowledge."³⁹

The analysis of panopticism is one aspect of the new technologies

of social control. To Foucault there are two aspects: one is 'discipline'; the other is surveillance. These roughly correspond to two distinct sites of 'will'. One is the will of the individual considered individually, the other the will of individuals considered 'en mass' as the social body.

The disciplining of the will of the offending individual is one technology displayed "directly through the mechanics of a training",⁴⁰ another is the administration of the will of the individuals in society. The grasp upon the individual who has already offended is but one application of penal reason, the other is the 'societal' grasp of individuals in society. Penal reason is a subset of disciplinary reason which is implicated in the constitution of the normal for modernity; the avenues by which it permeates modernity flow both from the common-sense of modern reason and the fear of the conditions of modernity.⁴¹

The common sense of modernity plays a game in that it expresses itself through the empiricism of the 'common sense' philosophers - those who ultimately trust to the truth of individual desire and sensuality. Foucault's attack on sexuality as the focus of modernity's language of truth, authenticity, self-expression and empiricist sense undercuts the narrative which progressive epistemology told of the freeing of the techniques of self-knowledge from the religious into reason by replacing the submission to the religious to a submission into a medico-scientific power-knowledge framework. This, revisionist, "history of sexuality" is subversive since to the modern consciousness the concept of the self has changed from that which befits office and strategies of honour to the position where "the conception of the naked self, beyond institutions and roles, as the 'ens realissimum' of human being, is the very heart of modernity".⁴² Yet how can the self be naked? Is not the nakedness of modernity only the clothing of a self-knowledge and desire stimulated and mediated by forms of modern 'self' and 'other' consciousness? Foucault points us to the historical creation of the 'truth' of any such notions.⁴³

The basis in 'common sense' is crucial since social control is more than the containment of types of conduct, it also is the source and acceptance of the power of normality. On the stylised narratives of developmental legitimation the Gemeinschaft village, to borrow the terminology of Tonnies, was ruled primarily by custom, its towns ordered by personages enjoining a status legitimated by religion and authority (personal/charismatic). There was little emphasis on any abstract, formal criteria for concepts such as 'justice' - references to 'justice' have specific connotations. The will of the Gesellschaft individual is "freer", its subjectivism demanding subjection not to traditional subordination but rational understanding and the dictates of authenticity. But this is a freedom to be subjected to the requirements of rational choice in a framework of rationality and knowledges which will apply equally well in Paris, New York, or London. The organizational problem of social control is seen as essentially similar - social order is divorced from the confines of any particular society or any particular locality - instead penal consciousness must become transformed into concepts of modernity which resulted in the images of solutions pertaining to modernity per se, rather than conscious of being localised temporal constructs. This task is contextual also in that it must find new theories and visions of society which face the scene of the consequences of the individualism necessary to underpin industrial capitalism's growth. The obverse of confidence in the self as the core of modernity's 'methodological individualism' is the fear of chaos. In reviewing recent histories of punishment Ignatieff states:

"the massive investment in institutional solutions would have been inconceivable unless the authorities believed they were faced with the breakdown of a society of stable ranks and the emergence of a society of hostile classes. This diagnosis of the malaise of their times in turn suggested an institutional solution."⁴⁴

An institutional solution conducted, ultimately in England after 1879, by penal 'authorities' in the name of 'society', to a problem divorced from the 'pragmata' of a social setting in a

specific community location but transformed into the abstract 'rationalization' of modernity's scientific knowledge, the image of which Foucault sees in 'individual pathology'. A pathology which could play a game with fear inviting the visage of an 'other' as target and which standing in the presence of so much developing knowledge as to 'pathology' did not need to question its own foundations, or to acknowledge the possibility that reflexivity would undermine this image of society 'objectively' correcting itself through impartial knowledge.

The demand for new forms of control is repeated today,⁴⁵ a similar dilemma is faced, but now the confidence in the power of the 'black-box' of the institution to effect change has gone, and even amidst demands, such as the Dahrendorf demand for concentration upon citizen rights and civic participation as revitalised social democratic responses to the late modern reformulation of social order, the institution is in danger of being forgotten as a site of 'progressive penology'. Interestingly Foucault points us into a realm of practical politics: a politics aimed at the institution as a central site. Foucault's use of the Panopticon is pragmatic in a strong sense; for it is the claim that knowledge is so linked to practice in its 'meaning' that the distinction is largely irrelevant.⁴⁶ Conversely, the narrative paraxial interaction of the panopticon producing the normalcy of modern life points us to is the question of the possibilities of usage and constitution of the institution in 'post-positivism'. Are the regimes, conduct, and the pragmatics of the modern institution to be hidden from articulation and investigation, or could there be an attempt to place the institution as a site and example of a different modernity? To function, that is as a expressional indice of the most extreme structures of the exclusion - inclusion polar opposites. The regimes and ideology of the prison offer a critical site of reflection and action. For if 'discipline' is a modality for creating parts of social order the prison cannot be seen as outside the flows of the normalcy of that order - the regimes of the prison are a necessary participation in the social order and should reflect it. Such a

demand would follow from the modern pragmatism of social theory's (non)confidence - it was also reflected in the day to day concerns of the life of Michel Foucault.

On others, however, we are led to expect the medium of the prison as the expression of a different form of inclusion/exclusion with the changing demands for the usage of the institution under the discourse of Just Deserts where nothing 'positive' is demanded of it.

NOTES

1."Historically, the thesis can be maintained that more fundamental advances have been made as a by-product of instrumental (i.e. engineering) improvements than in the direct and conscious search for new laws...Witness: (1) relativity and the Michelson-Morely experiment, the Michelson interferometer came first, not the reverse; (2) the spectroscope, a new instrument which created spectroscopy; (3) the three-electrode vacuum tube, the invention of which created a dozen new sciences; (4) the cyclotron, a gadget which with Lauritsen's linear accelerator, spawned nuclear physics... etc", Robert A. Millikan (Nobel Prize winner in atomic physics), quoted in George Novack, Pragmatism verses Marxism, p.29.

2.The literature of both the 'traditional Whig' view of penal history and the developing 'revisionist' approach is now large and references are contained in this text at relevant points - much of the literature is addressed in the recent collection Social Control and the State, Stanley Cohen and Andrew Scull (eds.), Martin Robertson, Oxford, 1983.

3.Cf. David J.Rothman, "Sentencing Reform in Historical Perspective", Crime & Delinquency, Oct., 1983, pp. 631-647.

4.Sheldon Glueck gave the historical evaluation of the positivist as "the Lombrosian School will always be credited with one very important contribution: instead of speculation about human freedom verses determinism and spinning out theories of crime causation and criminal responsibility in the abstract, the Lombrosians went to the prisoner for the evidence". The Problem of Delinquency, p.35. Lombroso himself states "when.. I realised how inadequate were the methods hitherto held in esteem, and how necessary it was, in studying the insane to make the patient, not the disease, the object of attention. In homage to these ideas, I applied to the clinical examination of case of mental alienation the study of the skull, with measurements and weights,

by means of the esthesiometer and craniometer. Reassured by the result of these first steps, I sought to apply this method to the study of criminals... the a priori studies of crime in the abstract, hitherto pursued by jurists, especially in Italy ... should be superseded by the direct analytical study of the criminal.. I, therefore, began to study criminals in the Italian prisons.. [and whilst conducting one postmortem I made a discovery which impressed upon me] not merely an idea but a revelation. At the sight of that skull, I seemed to see all of a sudden, lighted up as a vast plain under a flaming sky, the problem of the nature of the criminal..." From Introduction to Criminal Man, quoted in Glueck, The Problem of Delinquency.

5. Discipline and Punish, pp.220-21.

6. Discipline and Punish, pp.195 ff. Bentham stated: "Morals reformed, health preserved, industry invigorated, instruction diffused, public burdens lightened, economy seated as it were upon a rock, the guardian knot of the poor-laws not cut but untied - all by a simple idea in architecture." Bentham, Panopticon, or the Inspection House, p.39 (in Bentham's Collected Works, Bowring edition, Edinburgh, 1838-43, vol. IV.) Foucault, however, discerns a commonality: these were "different projects...but not incompatible... coming slowly together [in the productive use that the power to punish] applied to the space of exclusion..." (p.199)

7. Ibid., p.204.

8. Ibid., p.205. The very singularity of the visible Panopticon ensures its grasp. For the actual fact that it is only the model of Bentham, the fact that the concrete buildings of actual individual Panopticons were only constructed in isolated examples (for example in America at Statesville from 1926-35 in particular, in France Petite-Roquette in 1836 and Rennes in 1877; see also discussion by Gilbert Geis in Pioneers in Criminology, Hermann Mannheim (ed.), Stevens & Sons, 1960, pp. 63-67.) betrays the reality that the Panopticon is reason's Freudian penal slip. The archaeological 'trace' which reveals the 'truth' of the insidious web of reason. Its reality lies in its grasp on the family, the school, factory, communications and transport regularities of modernity.

9. The reality of modern social welfare and its knowledge demand is thus Bentham's "cells, communications, outlets, approaches, there ought not anywhere to be a single foot square, on which man or boy shall be able to plant himself - no not for a moment - under any assurance of not being observed. Leave but a single spot unguarded, that spot will be sure to be a lurking-place for the most reprobate of the prisoners, and the scene of all sorts of forbidden practices." "Panopticon, Postscript", p. 86, in Bentham's Collected Works.

10. Bacon writes in a small piece called The Sphinx: "Now of the Sphinx's riddles there are in all two kinds: one concerning the nature of things, another concerning the nature of man; and in like manner there are two kinds of kingdom offered as the reward for solving them; one over nature, and the other over man". In Gateway to the Great Books, R.M. Hutchins and M.J. Alder (eds.), Encyclopedia Britannica, Chicago, 1962, Vol 8, p.3.

11. Quoted in Fay, Social Theory and Political Practice, p.37

12. Foucault, Discipline and Punish, p.201.

13. The very structure of the Panopticon flows from a similar structure as post-Kantian science demonstrates the theme of centre and outer, of the imposition of the correct syntax from the centre.

14. "The scarcely sustainable visibility of the monarch is turned into the unavoidable visibility of the subjects... We are entering the age of the infinite examination and of compulsory objectification." Discipline and Punish, p.189.

15. Stanley Cohen and Laurie Taylor, Psychological Survival, Harmondsworth, Middlesex, Penguin, 1981, p.99.

16. Cf David Garland, Punishment and Welfare, for a thesis of the development of the 'welfare sanction', and Jacques Donzelot, The Policing of Families, Pantheon Books, New York, 1979, for a model whereby the modern family is enclosed in varying layers of discipline centered on the social-work body of knowledges. Panopticism of moral consensus is also becoming used in critical narratives focusing upon the growth of the modern Police as an institution. The rise of the modern police is linked to "surveillance". The new Police forces are not at all as their early forms but began to be organised in bureaucratic modalities and to be controlled by strict rules of procedure. Earlier 'police' [nightwatchmen, parish constables] were ad hoc and irregular, but the modern police took as their task the rational surveillance of the whole population. To achieve this acceptance by the populace was required as to the need for such surveillance. Further, the need to combat crime allowed as a function of that purpose, the development of centralised criminal archives specified in the name of rationalising and categorising the flow of information.

17. No set of individuals, no specific social class of rulers, control the process of panopticism; the panopticon itself, as Bentham declared was to be "open to the democratic tribunal of the world". It is the episteme of modernity itself which dominates.

18. Foucault, The Order of Things, p.310

19. Ibid., p.311.

20. Extreme nominalism throws into question the Kantian syntax, holding that items are chairs, criminals, lunatics, only because they are called 'chairs, criminals, lunatics', and no answer at all can be given to the question as to why certain objects are (or are about to be) called 'chairs, criminals, lunatics' while others are not (as so to do would be to introduce some form of realism: possibly a reduction to a relation of some form of common identities as in the classical Aristotelian strain where these recurring identities give rise to the name). Foucault never declared a realism behind the linkages modern societies have constructed, or announced their ideological demystification - to do so would destroy the ambiguous 'rational irrationality' of the nominalism his texts portray modernity as preforming, and indeed, his own as continuing. The centrality of the issue of nominalism is becoming increasingly recognised among Foucault's commentators, see for example John Rajchman's Michel Foucault, The Freedom of Philosophy, Columbia University Press, New York, 1985, footnote 6, pp 73-4.

21. The gaze is necessary to cope with the earlier discovery of Locke, that objects, and their features, were not divided by nature or God into real and objectively delimited classes. [John Locke, Essay on Human Understanding, especially Book II Section XI, and Book III Section III.]

22. Discipline and Punish, p. 102.

23. We should note that this occurs at the same time as the multitude of 'philosophies of punishment' prevent the total capitulation of the political-judicial strands of episteme to a regime of disciplinary logos. Thus the criminal and the delinquent can, ambiguously, co-exist. Foucault does not simply ignore the 'juridico' in the name of the totality of the 'delinquent' as Bob Fine states he does in Democracy and the Rule of Law: Liberal Ideals and Marxist Critiques, Pluto Press, London, 1984, see pp. 189-203. Fine shares there a particularly popular interpretation of Foucault's notion of the delinquent in the idea that the prison produced "in the form of 'delinquency' a politically safe form of resistance that is easy to accommodate, supervise and control". Ibid., p. 196. The idea that 'delinquency' was productive in the marginalisation of a section of the working class appears an important strand in Garland's "social functions of Victorian penality", see chapter two "Punishment and Social Regulation in Victorian Britain", in Punishment and Welfare. For Garland the notion of delinquency changes somewhat and expands in new forms as the institution of

the prison comes into crisis in the 1890's. Garland takes this crisis of imprisonment in the 1890's and, as a response, the development of novel penal discourses in the twentieth century, as a crucial site for a developing modern punitive reason to create a Welfare-punishment complex. One is, however, free to ask whether there was anything novel about the so-called crisis of imprisonment in the 1890's, has not prison always been in crisis?

Interestingly, it is Hume in the Treatise who appears to set out the conditions for the Foucaultian thesis. Foucault argues that the institutional site of the reformatory, or penitentiary, was specifically implicated in the creation of the 'delinquent'. The delinquent was a new form of discourse - the 'criminal' had been created by the abstract discourse of the criminal law and was thus an analytical creature; he was the obverse of the 'false' divine right of the sovereign. However, the destruction of that legitimative methodology of reason ensures that the new creation of scientific reason, the delinquent, must be a synthetic, actual empirical, creature; but how was the nominalist dance of words and universals to be controlled? How was "the delinquent" to be fixed into a systematic play of words ensuring its domination over people? Here Panopticism produces a normalization of the social body by means of surveillance. The creation of the normal follows from the creation of the institutional public type of deviant, the delinquent - he is first constituted inside the institution which abstracts from the array of individuals "selected identities" (Locke), these are then disseminated throughout daily life and secured through surveillance monitoring for "resemblances" (Hume). Any possibility of the prisoner being seen as an agent of political struggle, and thus the necessity for political discourse was quashed. [The new episteme substitutes "for a power that is manifested through the brilliance of those who exercise it, a power that insidiously objectifies those on whom it is applied, to form a body of knowledge about those individuals, rather than to deploy the ostentatious signs of sovereignty". Discipline and Punish, p. 220.] The science of criminology, deriving from penology, produces over time 'knowledge(s)' about the criminal 'predisposition, characteristics, milieu' etc., which are in turn reinforced by recidivism. The fact of recidivism being explained by insufficiency of information, and further surveillance therefore demanded in the name of the emerging biologies and psychologies. The power of the functionary to dominate comes not from his superiors but from below - the brilliance of this ploy of power is that it is achieved by the banishing of politics and metaphysics from the building of knowledges. This, however, creates a political power in that it classifies and typologies people in the service of governmentability; thus power is enhanced by the spectacle of removing politics.

As if to explain the mechanisms of panopticism Hume had earlier stated: "The application of ideas beyond their nature proceeds from our collection, all their possible degrees of quantity and quality in such an imperfect manner as may serve the purposes of life... When we have found a resemblance among several objects, that often occur to us, we may apply the same name to all of

them, whatever the differences we may observe in the degrees of the quantity and quality, and whatever other differences may appear among them. After we have acquired a custom of this kind, the hearing of that name revives the idea of one of these objects, and makes the imagination conceive of it with all its particular circumstances and proportions. But as the same word is supposed to have been frequently applied to other individuals, that are different in many respects from that idea, which is immediately present to the mind; the word not being able to revive the idea of these individuals, only touches the soul, if I may be allowed so to speak, and revives that custom, which we have acquired by surveying them. They are not really and in fact present to the mind, but only in power". Treatise on Human Nature, (see Ch. Five for references, p.20. Power here, for Hume, is that "power of producing such an idea" (Treatise, p. 23), which is also central to Foucault. Hume continues: "nor do we draw them out distinctly in the imagination, but keep ourselves in a readiness to survey any of them, as we may be prompted by a present design or necessity".

24. Foucault's distaste for criminological writing leads him to the tactic of 'going beyond' criminology by denying the necessity of engaging its forms on its own terms. Discipline and Punish affects mainstream criminology by its very refusal to debate 'issues' on the traditional terms of reference and relegates the status of its knowledge claims to a status similar to what MacIntyre called in After Virtue the 'fictions' of modern social science - behind Foucault's analysis there is, however, the oppression of a 'will to power' which MacIntyre does not, at least openly, imply.

25. The Order of Things, p.314.

26. Ibid., p.315.

27. Discipline and Punish, p.9.

28. Ibid., p.256.

29. Nigel Walker, Explanation and Non-explanation, p.101.

30. For much of the following analysis see Eugenio Trias, Philosophy and Its Shadow, Kenneth Krab Benhoft (trans.), Columbia University Press, New York, 1983, especially Part II, "The Structure and Function of Philosophy".

31. See MacIntyre, After Virtue, and Whose Justice? Which Rationality?.

32. Trias, Philosophy and Its Shadow, p.33.

33. See the analysis of Gillian Rose in The Dialectic of Nihilism: Post Structuralism and the Law, Basil Blackwell, 1984, for a portrayal of recent attempts to overcome metaphysics which serve to bring it back to life. The similar process where "Metaphysics is replaced by science; science returns to metaphysics" (from The Dialectic... p. 7) becomes the conclusion of Unger in Law and Modernity, pp. 266-267.

34. The positive function of the incest prohibition is the 'social law' of exogamy. This is the fundamental basis of the creation of 'exchange' and a series of social and cultural relationships. This law of exchange enables groups to work out a stable relationship based on the principle of reciprocity, and different structures of limited exchanges and general exchanges come about.

35. C. Bryant, Positivism in Social Theory and Research, MacMillan, London, 1985, p.174.

36. Logico-tractatus, 5. 143.

37. So runs the core of the Foucaultian analysis - but the notion of social epistemology as the result of epistemes produced in an essential link between discourse and power (and where the logos of social theory flowing from the productive foundationalism of power itself) encourages the reflexive question 'what is the status of Foucault's text?' Interestingly, Foucault appeared to turn at one time to the social theory of Marxism in an effort to temporally locate those who controlled the power/knowledge nexus, those who guided the panopticon, but Foucault increasingly distanced himself from it; no over-reaching social theory is proposed. But what then is the status of Foucault's claims? We are left with a confused, and confusing, array of complexity, visions of power and language, specifically, the confusion of men in history in the play of power between nominalism, essentialism, designative and expressionist conceptions - in a sense the logical positivists are right, mankind has indeed been suffering from the bewitchment of language; but it is also certainly more complex than the positivist answer (to speak clearly, with due regard to definitions) would also have us accept. [The standard way of understanding Foucault's interest in language in The Order of Things is as a Structuralist. There is, however, a metaphysical difference in the approach to language which Foucault takes, as opposed to, say, the early Levi-Strauss. Levi-Strauss approaches language as a neutral, innocent medium whose internal mechanisms are to provide a key to the scientific unpacking of the social body whereas to Foucault language is never innocent, but is always implicated in the service of a regime of power.]

As one commentator has noted Foucault's rejection of general categories and the need of an explicit total analysis ensures that his key concept(s), such as "discourse/practice is not inserted into a totalized theory but floats like a hawk over the social historical process, ready to swoop down upon any topic that seems appropriate" - such tactics that particular commentator endorsed as a viable tactic of a free floating use

of "critical theory". [Mark Poster, Foucault, Marxism & History, Polity Press, Cambridge, 1984, p.39.] But what this may lead to is the inability to distinguish between areas or projects of resistance: as Foucault has been read by another commentator to propose any and every resistance in stating that "critique... should be an instrument for those who fight, those who resist and refuse what is.. it isn't a stage in a programming." [Quoted in Jeffrey Minson, Genealogies of Morals: Nietzsche, Foucault, Donzelot and the Eccentricity of Ethics, MacMillan, London, 1985, at p.221.]

38. Ibid., pp.90-91.

39. Foucault, Power/Knowledge, Harvester Press, 1980, p.83. See I, Pierre Riviere, having slaughtered my mother, my sister and my brother, Michel Foucault (ed.), Frank Jellinek (trans.), Pantheon Books, New York, 1975, for a scene of opposing disciplines seeking to lay claim to the 'truth' of Pierre, and Pierre's own 'unheroic' text.

40. Discipline and Punish, p.180.

41. The need to formulate and lay open to administration the will of the individual and position the wills of individuals is implicit in the fear that Tonnies expresses in his Gemeinschaft/Gesellschaft distinction. This fear arises as the social world of the Gesellschaft is seen as primarily unnatural - the ties, or lack of ties, are forced and must be constructed. Gesellschaft society is an artifact but it is one that must be feared for it is an "artificial construction of an aggregate of human beings which superficially resembles the Gemeinschaft in so far as the individuals peacefully live and dwell together. However, in the Gemeinschaft they remain essentially united in spite of all separating factors, whereas in the Gesellschaft they are essentially separated in spite of all uniting factors." To such a nineteenth century writer the image of urban life implies that the visage of Hobbes is present, but now it is industrialised society that is the scene of a always possible war of all against all. The need is pressing in the Gesellschaft of modern urban life for a framework of social routine.

42. "In a world of honour the individual is the social symbols emblazoned on his escutcheon. The true self of the knight is revealed as he rides out to do battle in the full regalia of his role; by comparison, the naked man in bed with a woman represents a lesser reality of the self. In a world of dignity, in the modern sense, the social symbolism governing the interaction of men is a disguise. The escutcheons hide the true self. It is precisely the naked man, and even more specifically the naked man expressing his sexuality, who represents himself more truthfully.... In a world of honour the individual discovers his true identity in his roles, and to turn away from the roles is to turn away from himself... In a world of dignity, the

individual can only discover his true identity by emancipating himself from his socially imposed roles - the latter are only masks, entangling him in illusion, 'alienation', and 'bad faith'. Berger, Berger, and Kellner, The Homeless Mind, Vintage Books, New York, 1974, p.90 - 91. For Foucault this is part of "a process of knowledge that obliged one to look for and to tell the truth about oneself". "Le Combat de la chastite", Communications, 35, p. 17, quoted in Poster, Foucault, Marxism & History.

43. On the relationship of the self to history Berger states: "the two worlds have a different relation to history. It is through the performance of institutional roles that the individual participates in history, not only the history of the particular institution but that of his society as a whole. It is precisely for this reason that modern consciousness, in its conception of the self, tends towards a curious ahistoricism. In a world of honour, identity is firmly linked to the past through the reiterated performance of prototypical acts. In a world of dignity, history is the succession of mystification from which the individual must free himself to attain 'authenticity'." The Homeless Mind, p.91.

44. Michael Ignatieff, "State, Civil Society and Total Institutions: a Critique of Recent Social Histories of Punishment", in Social Control and the State, Stanley Cohen & Andrew Scull (eds.), Martin Robertson, Oxford, 1983, pp. 89-90.

45. See, for example, Ralf Dahrendorf, Law and Order, [The Hamlyn Lectures] Stevens & Sons, London, 1985. Also King and Radzinowicz, The Growth of Crime: the international experience, New York, Basic Books, 1977.

46. For it must not be forgotten that the prison is as a site of practice - not simply the materialization of certain beliefs about practical rationality, theoretical reason, and societal conceptions of 'justice' but also an active instigator of these.

Part Two: The Epistemological Imagination and the
Imaginative Structuring of Modernity

Chapter Four: Species of Epistemology.

I

The techniques of formal epistemology begin earlier than the Enlightenment in the context of the Sophist's general scepticism concerning certain knowledge - a scepticism premised upon the results of their travelling and the doubts they voiced upon returning. They questioned all idols, and one of these was the taken-for-granted status of ordinary common-sense knowledge. Before such doubts were raised the appearance of the world could take the form of local knowledges and, as both MacIntyre (with particular reference to the Homeric narratives) and Lyotard (for the general narrative form) express it, the narrative formation of existence. But once doubts have been raised as to the security of these, one tactic of response has been to provide answers within the provision of formal frameworks.

Post-enlightenment man faced not the Christian narrative of the world and man's purpose but a world in which secure knowledge was to be the key - he attempted to mediate existence by knowledge. Epistemology came of age as the secular response to the authority of the oracle and religious revelation - it was to provide the rationale for man to say "It is warranted for me (or X) to believe that.....". What follows the "that" was the itemization of the world - an itemization which could be ranked in significance depending on the goals which man set himself. Primarily itemization was crucial to identify problems, to sociologise, psychologise, naturalise, materialise, philosophise (in its modern sense) - departmentalise existence into actions, policies, envisaged goals, constraints, opponents, obstacles, frameworks, routines.

The drive of epistemology was, thenceforth, to provide a common framework, a generalization, a universalistic grounding upon which to appraise particular statements (knowledge-claims).

The dominant approach to modern epistemology has been individualist (i.e. to see itself as providing corrective guidance for 'subjectivism') - the individual is seen as the primary entity of concern and emphasis is placed upon identifying the psychological input into the ultimate sources of knowledge so that the psychological may be distinguished from the true fruits of man's cognition.¹ With both the stress upon perception, memory and inference of the empiricist side, and that upon the innate ideas of the rationalist the emphasis is on man's abilities, particular yet universal to him as species member, in his personal interaction with the external world.²

This is, however, to take a particular approach to the issue of epistemology and the being of man, for, as Karl Mannheim stated, there are two aspects to epistemology, of which the subject (man) is but one: "All epistemological speculation is orientated within the polarity of object and subject."³

Engels earlier claimed in the Essay on Ludwig Feuerbach: "the great basic question of all philosophy...is that concerning the relation of thinking and being."

The issue is the relationship of man to the world - which to place as the basis of concern, the external object, or man as subject. As Mannheim put it, our concern

"either starts with the world of objects and with this as a basis explains the position of the subject in this world order,...from which are derived known cognitive powers, or else it starts with the subject as the immediate and unquestioned datum and seeks to derive from him the possibility of valid knowledge".⁴

Roughly speaking the main stream of individualist epistemology is divided between the two approaches of Rationalism and Empiricism. Crudely put, under Rationalism (sometimes called logical form), a claim to knowledge is valid/legitimate only if it exemplifies a certain accepted logical form which is based upon an indubitable bedrock. The mode of testing knowledge-claims is the coherence theory of truth, and emphasis is placed

upon the overall systematic edifice of knowledge. Under Empiricism a claim to knowledge is legitimate only if it can be justified in terms of experience. The usual mode of testing is the correspondence theory of truth.

Non-individualist epistemology which claims that knowledge is formed within the machine-like interactions of objects has assumed a variety of names - materialism, mechanism, and structuralism are examples. Within these modes a claim to knowledge is legitimate only if it is a specification of a publicly reproducible structure. However, all versions of these epistemologies involve a flow through the individual (even in class position), and all see man as a crucial link, or as Ernest Gellner (following Koestler) once put it, as the ghost in the machine - the problem for them is always how to flesh out the ghost without destroying their social mechanism.⁵

Another approach, which attempts a mediating position, is Pragmatism. Pragmatism was born out of mixing apparent incompatibles: that of the Rationalist and Idealist tradition crying 'mind, mind', and the Empiricist and materialist calling 'matter, matter', with a sceptical approach which saw the claims of both as not completely borne out. The pragmatist saw epistemology as derivative of our need as creatures living in situations to find our way about the lived-in-world. The pragmatist shifts the emphasis from claims about uncovering the secrets of nature, of uncovering manifest 'truth', to claims as to how best to handle the situations in which man finds himself. The problem is, and this is shared with all the other approaches, how to identify reality, but the pragmatist holds that reality is rich, multiple, and ever-changing; this developmental approach implies that a static epistemological approach is incorrect for man. To the pragmatist, men under the epistemologies of empiricism and rationalism seize upon aspects of this diverse and developing reality frozen in their experience, claiming anything from direct intuition to a mere representation of past experience. Such men thus fix upon one or some of the innumerable qualities

or relations of existence and thence build up a system for which they claim correctness. The pragmatist questions all of these 'accepted true knowledges', redefining them as sets of contextual rationality in man's necessary strategy of existence. In this way the medieval certainty of revealed faith is reinterpreted as projected belief, fundamental bedrocks are exposed as tentative presuppositions. Moreover, for the pragmatist this does not destroy 'reason' but demonstrates the contextuality of reason; that is to say that the function of both projected belief and tentative presuppositions is to serve as positions upon which to base action whereby it may be verified in resulting practice.

II

A. The Rationalist Imagination.

Stress is placed upon the primacy of reason as opposed to the senses, and the path of intellectual insight is thought capable of grasping the overall structure of reality (which is thought to cohere in a mathematical structure). The activity of theorizing, and the creation of theories, is seen as inhabiting a level, or making a conceptual leap, above the activity of observation or generalities able to be drawn from them: because of this rationalist theories can be tested and utilized without reference to observation and sensory data. The strongest rationalist position sees the senses as totally superfluous and misleading, the weaker, that they can aid but are not sufficient of themselves to develop knowledge.

The rationalist edifice of knowledge is founded upon the actuality of 'a priori' knowledge, and rationalism marks out its most specific domain as the investigation of what is 'a priori' knowledge - this 'a priori' knowledge can be known if its truth can be established without use of sensory observation.

Strong emphasis is placed upon the possibility of innate ideas: man is seen as having the capacity for recognising truth

somewhere deep inside his very nature. Where do these ideas come from? Descartes postulated this "inner light" as coming from God, and all rationalists must have some equally good/bad answer. Plato held these as deriving from previous incarnations - from the historical implantation of the tradition of truth. It is in the nature of this ability, and the reality of these ideas that the strength or weakness of rationalism lies - as the whole system is coherently built upon the bedrock of the certainty of these. The certainty of the rationalist building is the security of its base claims.

The claims which rationalism holds as its base it perceives as substantive - their delineation a matter of crucial definition. The empiricist retorts that the only knowledge covered is mere tautologies which give no real knowledge but are only contingent; the rationalist replies in turn that such knowledge transcends the words used. It is contested that 'a priori' reasoning can provide us with not just conceptual truths which follow from given definitions and postulates, but substantive truths about reality. The organization of these into a system via the mechanism of coherence is held as giving the possibility of constructing an overall vision of the world.

Crudely, rationalism can be reduced to the following tenets:

- i) the path of reason is the true method to knowledge of reality;
- ii) knowledge is systematic, and thus knowledge claims must cohere in systematic requirements;
- iii) the building of knowledge proceeds with deductive reasoning from first principles which may be innate;
- iv) such a system can cover the whole of reality.

III

B. The Empiricist Imagination.

The battle cry of the empiricist imagination is simply "from

experience".

Empiricism holds that all knowledge which contains substantive matters of fact, as opposed to matters of definition, is based upon/comes from/derives from/has its source in experience irrespective of the application of concepts which are used in connection with this knowledge-claim. Concepts are simply labels, reference terminology, neutral and inexpressive in themselves - true knowledge of the world is tested via correspondence to sense data, and thus the world is uncaring of our concepts and tales of its existence.⁶

Following the influential terminology of Kant's "Kantian synthesis", crucial distinctions are used as classifications, thus:

i) an 'a posteriori' judgement (derived from ordinary sense observation) deals with questions and statements which can be adjudged true or false only by reference to how as a 'matter of contingent fact' something is/was/will be; e.g. "Frank is presently driving a red car."

ii) an 'a priori' judgement is based upon necessary consequences and covers something which is universal and is adjudged true or false without reference to experience; for instance it is normally thought that the axioms of mathematics are such a case.

iii) analytic judgments are statements where the predicate is contained within the subject; e.g. "all bachelors are unmarried" (being unmarried is contained within the concept of being a bachelor, as is the criminological usage such that "all criminals are law breakers").

iv) a synthetic judgement is any other judgement which takes us beyond tautologous statements to give us substantive information about the world.

Under the empiricist imagination:

- all 'a priori' truths are analytic. David Hume made a crucial distinction between "relations between ideas" - the truth

of "all breaches of the criminal law are crimes", where the statement's necessity and universality arises simply from its being a tautology, and statements describing relations between facts (which comprise synthetic judgments).

- all synthetic truths, that is, all propositions which give real information about the world, are arrived at 'a posteriori', and are thus never necessarily but always contingently true.

For the empiricist, all empirical knowledge is of the latter mode, and thus empiricism is the only methodology which gives real information about the world.

Against the sceptic both Empiricism and Rationalism propose an essentially similar path, yet from opposite ends. Empiricism attempts to construct its edifice from certain basic elements whose certainty is found in their production from the senses, and their relation to a secure external world. Rationalism specifies certain basic axioms which are indubitable and deductively builds upon these.

IV

C. The Pragmatic imagination.

Pragmatism pictures that man as knower is never the receiver of the 'truth' of reality, either through the correct interpretation of the messages of his senses, or the direct apprehension of the essential meaning of a concept. Instead man is always in a situation, and that situation is the conceptual scheme, or paradigm, which casts an interpretive context for his speech-acts (words, concepts, theoretical sets, and so forth). These conceptual schemes do not exist divorced from life (as in Popper's third world), where man can 'objectively' view them, but are always connected to the practice of life.

In summary the important claims of pragmatism are:

- i) the significance of statements and the ranking of

statements depends upon their degree of entrenchment in a conceptual scheme.

ii) Concepts do occur in experience, but the meaning of these concepts is defined not by synthetic 'a priori's', but by absolute presuppositions. For example, in discussion of causation, the statement "every event has a cause" is not a synthetic 'a priori' (as Kant thought he showed), and thus is not a necessary truth of experience, but is actually an absolute presupposition which operates to define in practice people's ways of thinking and conducting both science and predictable life. These foundational suppositions or paradigms are not held as absolutely 'true', as with rationalism, but it is acknowledged that some such suppositions are required as necessary and active positions upon which to base any scheme. No claim of absolute truth, or certainty, is made for these - but they may be arrived at by agreement, whether consciously or not, and be therefore conventions. They are always historical artifacts.

iii) the primary requirement of paradigms is internal coherence. Thus the internal 'policing' of the 'truth' of statements is the application of logic (similar to rationalism), and operates so as to provide 'immanent critiques'. That is, if the agent claims to hold certain beliefs as his foundations, and yet appears to hold to conclusions logically incompatible with these, a third party is at liberty to point out the discrepancy.

iv) truth-value is thus a property within paradigms, of logic operating upon the conventions of people. As the conventions of people are crucially related to their modes of life, differences in meaning of these conventions are expressed in practice. Thus: "...there is no distinction of meaning so fine as to consist in anything but a possible difference in practice", as Charles Peirce put it in his How to Make Our Ideas Clear (1878).

v) facts are dependent upon the conceptual scheme, and are not theory-neutral. Man as observer always has on a pair of spectacles through which he observes the world - it is impossible to observe without wearing some or other pair of spectacles.

In philosophical terminology the term pragmatism (and another related term pragmaticism) was coined by American philosophers in the late nineteenth and early twentieth centuries although similar ideas developed elsewhere. It has never become defined into a comprehensive system, and it is against its nature to be so easily defined (if it is even possible to speak in this way). Instead it has become a group of loosely associated theoretical ideas and attitudes developed over a period of time and which contain a fluidity which has both provided a refuge to some, and grounds for its dismissal to others. It is most easily confused with an avoidance of theory, and this misuse of the term is most common in British writing, which 'detheorises' even the philosophy of pragmatism. Latterly there has been a range of work which seeks to develop pragmatism into a comprehensive perspective.⁷

The pragmatic imagination is closely related to sensibilities of the unconventional, the new, the marginal and anarchic in experience, and fixes its sympathies with the adventure, the risk and the path of innovation. At the same time it can veer in its politics from demonstrating, on the one hand, a distrust with any concept of elitism and actively favouring egalitarianism (as with the American James), to a distrust of conventional norms and favouring an elite form of innovative morality (as with the German Nietzsche) - its common stress is upon picturing an individualism which sees life as a constant stream of effort, and of continual choosing between alternatives, with the everpresent 'imperative' that the good or evil (bad) of actions, and beliefs, is to be found in the consequences which these have upon the practice of life.

The American Dewey absorbed much of the drive of the rationalist imagination's emphasis (as portrayed by Kant, and then Hegel in particular) upon the universality of the foundation of reason to unite all men; but added the criticism that this unity is a unity of reason, self, and practical world. It could only be achieved by man actively combining men and events in a continuous process

"of communication and participation", in which all men were included as participating individuals. Thus ideas were not viewed as the constituent stuff of the world, nor as submissive to matter, but were active instruments and organs of integration, adaptation, continuity and survival which man relied upon as his most essential characteristic.

In all its forms pragmatism denies the existence of a final and closed system - it holds that people act in life upon their acceptance of an operative system of beliefs, but denies the 'truth' of the foundations of these, at the same time as asserting the necessity to 'believe' some set of 'opinions' - it denies that a closed system can ever be established giving the ultimate nature and destiny of man and the universe. Yet it also recognises a form of realism; for James pragmatism

"turns away from abstraction and insufficiency, from verbal solutions, from bad 'a priori' reasons, from fixed principles, closed systems, and pretended absolutes and origins.....It means the open air and possibilities of nature, as against...dogma, artificiality, and the pretence of finality in truth."⁸

The problem always for pragmatism is that given the historical dominance of the pursuit of "truth" as something absolutely guaranteed (existence in the sight of God), how can an imagination that denies this notion of truth be accepted as "true"? And, if it denies the validity of this dilemma, upon what 'grounds' does it claim its validity? Pragmatism answers that it requires a complete 'change of imagination' out of the Platonic conception of "truth" (i.e. the perfect form), to a radical vision of "truth" in a different concept of "agreement" and justification.

NOTES.

1. For a brief essay on this theme see Anthony Quinton, "Authority and Autonomy in Knowledge", in Thoughts & Thinkers, Duckworth, London, 1982, pp 65-75.

2. As Karl Popper put it: "Bacon and Descartes set up observation and reason as new authorities and then set them up within each individual man. But in doing so they split man into two parts, into a higher part which had authority with respect to truth - Bacon's observations, Descartes' intellect - and a lower part. It is this lower part which constitutes our ordinary selves, the old adam in us. For it is always 'we ourselves' who are alone responsible for error, if truth is manifest. It is we, with our prejudices, our negligence, our pigheadedness, who are to blame; it is we ourselves who are the sources of our ignorance.

Thus we are split into a human part, we ourselves, the part which is the source of our fallible opinions (doxa), of our errors, and of our ignorance; and a super-human part, such as the senses or the intellect, the sources of real knowledge (episteme), whose authority over us is almost divine." From "On The Sources of Knowledge and of Ignorance", in Conjectures and Refutations, p.17.

3. Karl Mannheim, Ideology and Utopia: An Introduction to the Sociology of Knowledge, p.12.

4. Ideology and Utopia, p.12.

5. Cf. Ernest Gellner, Legitimation of Belief, Cambridge University Press, London, 1974.

6. Newton is the grand enlightenment model for Empiricism. Between man the subject and the world as object we have the opposite to the Kantian imposition of syntax. It must be always the world which reveals itself, not man imposing a language upon it. The world comes first, thus: "the best and safest method of philosophizing seems to be, first, to inquire diligently into the properties of things and to establish those properties by experiments, and to proceed later to hypotheses for the explanation of things themselves. For hypotheses ought to be applied only in the explanation of the properties of things, and not made use of in determining them." As Anthony Arblaster summarises it the claim is simple: 'Hypotheses non fingo'. I do not construct hypotheses. The empiricist merely records the way the world is. Quotation from a letter of Newton to Oldenbury, quoted by Arblaster in The Rise and Decline of Western Liberalism, Basil Blackwell, Oxford, 1984. p.180.

7. Richard Rorty and Jean Francois Lyotard are notable examples we have already mentioned. The work of Joseph Margolis provides a grand tracing of what he terms "pragmatic" themes in a large body of contemporary thought, see Pragmatism without Foundations: Reconciling Realism and Relativism, Basil Blackwell, Oxford, 1986. His version of pragmatism is on his own terms "a colonial abuse of labels" and is used to cover currents of thought which have praxis and historicity as their guiding centers. He sees the central point of pragmatism as the rejection of foundationalism and forms of "cognitive transparency", or in other words the thesis that "there is a determinate match or adequation between

the cognisable properties of the real world, and the cognizing properties of the human mind such that the distributed truths of science or of other disciplined inquires may be assured that the inquiring mind does not, by its very effort, distort, or alter or fail to grasp the world's independent (cognizable) structure".(p.xvi) His own approach can be seen as a form of Neo-Kantianism in style.

8.Quoted in "Pragmatism", Encyclopedia of Philosophy, Vol 6, MacMillan, New York, 1967.

Chapter Five: The Epistemological Imagination of David Hume and the Empiricist influence on Modernity.¹

Section A

I

Was Hume a Modern?: David Hume and the narrative content of the Treatise.

In his most recent work, The Philosophical Discourse of Modernity, Jurgen Habermas feels no qualms in beginning the philosophical discourse of modernity with the work of Immanuel Kant. In a wide sweeping work Habermas implicitly relegates David Hume to the status of the pre-modern; at best a preparatory, preliminary yet peripheral, episode in the transformations around the enlightenment but not partaking in the progressive problematics of modernism.

In this work Habermas analyses the problematic of modernism in terms of an opposition between what he calls "the paradigm of consciousness" with its associated "philosophy of the subject", contrasted to a thoroughgoing intersubjective paradigm of "communicative action". For Habermas the development of philosophical understanding since the enlightenment contains certain crucial junctures where a choice became vaguely apparent; chances which were, however, misconstrued and a potential path not taken. The central juncture is claimed to be where Hegel trumped the subjectivism of the Cartesian-Kantian legacy with the notion of Absolute Knowledge capable of reconciling all dispute and sublimating all difference. At this point the strength of reason became dressed in the clothes of absolute security fashioned on the model of a pure self-consciousness (of oneself, and ultimately of social history to social history) as opposed to any lesser task for reason linked to discursive understanding.

Hume's absence is understandable, after all in historical terms the dominant image of Hume is that of the destructive sceptic - the analyzer of the failure of claims to knowledge - a position in which he takes on the appearance of a counter personage to the

gigantic optimism that the enlightenment placed in the power of truth and of the advancement of knowledge. As David Faith Norton points out:

"David Hume's philosophy has been exciting responses for nearly 250 years. The overwhelming majority of these responses have been negative, based on the understanding that Hume's philosophy is itself negative, a dogmatically sceptical denial of man's knowledge of truth and value."²

Such a reading would not be conducive to Habermas's sympathy, nor however, would the counter reading bequeathed by Kemp Smith.³ This line of interpretation sees Hume as offering a positive doctrine; but it is a doctrine which so "empiricizes" man as to make the path of knowledge (and thus of action) one which resides only in the passions of man and not in his powers of reason. Key statements such as "Reason is and ought to be the slave of the passions", are summarised by Kemp Smith to show Hume's thesis as contending that we are truly only within "Nature's guidance, operating ... not through reason but by way of feeling..." Hume is seen to present a thoroughgoing naturalism as both the reality and the proper aim of man's relationship with the world. In this context Barry Stroud summarizes Hume as claiming that "reason, as traditionally understood, has no role in human life";⁴ instead Hume begins to look as belonging to the conservative strain of the common sense philosophers. Again such a view would be deeply repugnant to the rationalism of Habermas whose own lineage would hold such positions disposed of by the Hegelian critique whereby:

"since the man of common sense makes his appeal to feeling, to the oracle within his breast, he is finished and done with anyone who does not agree; he only has to explain that he has nothing more to say to anyone who does not find and feel the same in himself. In other words, he tramples underfoot the roots of humanity. For it is the nature of humanity to press onward to agreement with others; human nature only really exists in an achieved community of minds. The anti-human, the merely animal, consists in staying within the sphere of feeling, and being able to communicate only at that level."⁵

Habermas accepts that the Hegelian legacy has turned to ruin. We are thus to be seen as contemporaries of the young Hegelians, some of us attempt

"to compensate, by way of temporalized originary powers, for

the lost order of things that the metaphysically isolated and structurally overburdened subject tries in vain to renew from its own forces."⁶

Others indulge in nihilist fanaticism, a frantic toing and froing between empirical and transcendental modes of dealing with issues, between radical self-reflection and an incomprehensible element that cannot be reflectively retrieved. Against which

"we should drop the sentimental metaphysics of homelessness and .. understand the puzzle of all these doublings for what it is: a symptom of exhaustion. The paradigm of the philosophy of consciousness is exhausted. If this is so, the symptoms of exhaustion should dissolve with the transition to the paradigm of mutual understanding."⁷

Habermas claims that "in the philosophical discourse we are still the contemporaries of the young Hegelians", and for Habermas to turn to the ideas of Hume would be to return of a pre-modern conception. Such a view, however, neglects to counter the extent to which we are the inheritors of the Humean legacy and the possibilities that we may still be in certain effects the contemporaries of Hume. A Hume, however, broader than the Hume of traditional interpretation.

The two traditional views have become the victim of the mushrooming of Humean scholarship and the widening of the modes of interpreting Hume. To the names of Kemp Smith, or alternatively those who saw only the classic sceptic, recent names have been added such as Duncan Forbes,⁸ Donald Livingston, David Faith Norton,⁹ and Frederick Whelan,¹⁰ not to forget the chapters by Alisdair MacIntyre in Whose Justice? Which Rationality?. The result is an increase in perspectives and modalities of understanding, the effect of which is to enrichen, as well as make more difficult, the task of coming to grips with Hume.

In Humean scholarship much of the recent works are openly concerned, not with breaking down the texts of Hume as the analytical tradition has historically done, but with contextualising - of repositioning the living acts of synthesis

which Hume himself undertook in the compilation of each and every one of his texts, whether they be properly philosophic, for example the Treatise¹¹, or the Enquiries,¹² or essayist, for example The Histories, the Dialogues, and the Essays.

We shall concentrate upon a small passage of the Treatise; namely Section VII of Book I; the Conclusion to that Book entitled Of the Understanding. These thirteen pages contain some of the most quoted phrases of the Treatise and are usually noted for being the place where Hume collapses any possibility of using reason as a guide in life and retreats instead to his philosophical naturalism and to his daily pursuits of backgammon and playing cards.

These pages relate how Hume pursued the Enlightenment commitment to demanding rationality in place of arbitrary authority and superstition, but was in the end forced to the security of the embrace of a beneficent nature and her backing to habit and custom. Hume betrays some disappointment with his ascription of "our taste and sentiment" as the ultimate basis of rational justification, as this placed all talk of rational foundations of knowledge "without a meaning", (T.p.267) and when finding the basis of causal inference as "nothing but", or "merely", a psychological basis. However, when he had faced the choice between "a false reason and none at all" it was only "the current of nature" which saved him and it is our metaphysical faith in this current that ultimately makes our every day life possible. (T.p.268)

Hume begins these pages as if pausing for a momentary breath in the midst of a grand enterprise. He claims to have finished his "examination of the several systems of philosophy, both of the intellectual and natural world" and that it is "now time to return to a more close examination of our subject, and to proceed in the accurate anatomy of human nature, having fully explain'd that nature of our judgement and understanding". The basis for the pause Hume presents as "inclination" - the natural flow of

the writing of the text leads, so Hume would have us accept, to a moment of reflexivity.

"But before I launch out into those immense depths of philosophy, which lie before me, I find myself inclin'd to stop a moment in my present station, and to ponder that voyage which I have undertaken, and which undoubtedly requires the utmost art and industry to be brought to a happy conclusion." (T. p.263)

This 'pondering' turns, at least for the section to come, the action of the text and of the resultant synthesis of knowledge, the outcome of the Treatise, into a juncture consisting of the personal subject of Hume and the production of the text. Moreover, we are told by Hume himself that this juncture comes after the presentation or rendition of the systems of philosophy themselves. We move therefore, from the task of the expose of 'system' to the presentation of the 'experience' of the writer of the text, Hume himself. What then is Hume up to by this movement?

II

A template of Hume's technique is presented in his own introduction to "The sceptical and other systems of philosophy" in his description of the tactics required for scepticism to take on "Reason". Hume states:

"Reason first appears in possession of the throne, prescribing laws, and imposing maxims, with an absolute sway and authority. Her enemy, therefore, is oblig'd to take shelter under her protection, and by making use of rational arguments to prove the fallaciousness and imbecility of reason, produces, in a manner, a patent under her hand and seal. This patent has at first an authority, proportion'd to the present and immediate authority of reason, from which it is deriv'd. But as it is suppos'd to be contradictory to reason, it gradually diminishes the force of that governing power, and its own at the same time; till at last they both vanish away into nothing, by a regular and just diminution." Hume can only sum up in the face of this that "'Tis happy, therefore, that nature breaks the force of all sceptical arguments in time, and keeps them from having any considerable influence upon the understanding." (T. pp. 186-7)

This is both a pattern and a plan - both a description and a

template for action. It is essentially reproduced throughout the Treatise. Hume's tactic is continually the rhetorical portrayal of the strength of rationalism in terminology which he then borrows to infiltrate and internally dismember the very structure which grants it strength. From the very first the Treatise is built upon rhetoric - Habermas points out in The Philosophical Discourse of Modernity that the aim of rhetoric is to open a space for argumentation to proceed. To reveal, that is, a terrain upon which the activities of synthesis and analysis can proceed. The Introduction begins:

"Nothing is more usual and more natural for those, who pretend to discover anything new to the world in philosophy and the sciences, than to insinuate the praises of their own systems, by decrying all those, which have been advanced before them." [If we, 18th century men, were] "content with lamenting that ignorance, which we still lie under in the most important questions, that can come before the tribunal of human reason, there are few, who have an acquaintance with the sciences, that would not readily agree with them." [But] "'Tis easy for one of judgement and learning, to perceive the weak foundation even of those systems, which have obtained the greatest credit, and have carried their pretensions highest to accurate and profound reasoning. Principles taken on trust, consequences lamely deduced from them, want of coherence in the parts, and of evidence in the whole, these are everywhere to be met with in the systems of the most eminent philosophers, and seem to have drawn disgrace upon philosophy itself."

In this process

"disputes are multiplied, as if everything was uncertain; and these disputes are managed with the greatest warmth, as if everything was certain."

Rhetoric is actually the sole victor:

"Amidst all this bustle 'tis not reason that carries the prize, but eloquence; and no man needs ever despair of gaining proselytes to the most extravagant hypothesis, who has art enough to represent it in any favorable colours. The victory is not gained by the men at arms who manage the pike and the sword; but by the trumpeters, drummers, and musicians of the army." (T.pp. xi - xiv)

By contrast we are asked to

"leave the lingering method...and.. to march up directly to the capital or centre of these sciences, to human nature itself; which being once masters of, we may every where else hope for an easy victory.. [Through the exposition] of the

principles of human nature, we in effect propose a complete system of the sciences, built on a foundation almost entirely new, and the only one upon which they can stand with any security."

Hume here appears to obey all the dictates of enlightenment subjectivism, moving the very basis of epistemology itself onto the shoulders of the subject, man. Moreover, the claim is conducted in the name of system building - this however, will be a system alternative to either "the ancient" or the "modern systems" as proposed by the propositions of external reason. Henceforth, the bottom line of the 'systems' of knowledge, the grounding, must be the principles and structure of the operation of the subject - human beingness. Moreover,

"as the science of man is the only solid foundation for the other sciences, so the only foundation we can give to this science itself must be laid on experience and observation."(T.p.xvi)

Furthermore, there are certain preconditions, or structural frameworks for the freedom to engage in such 'experience and observation', namely as Hume witnesses from the predominance of Scottish and English writers in the recent rise of scientific studies of human nature, "a land of tolerance and of liberty". What this implies is that not only is there the probability of a direct link between metaphysical systems of absolute certainty and intolerant politics, but that the socio-political world may strongly constrain the activities of thought and discussion within it.

One must ask, however, how it is at all possible for Hume to present this section, this turning of the subject back upon itself, in the language of the first person directly after his attack upon the very concept of personal identity in the pages which immediately proceed this section? For has not Hume succeeded in denying any rational validity to the use of the word "self" and its various manifestations? How can he then go on the employ this phrase in presenting the material of the next section? Ls

It is as well to note that this criticism is at times advanced in connection with the supposed inconsistency of Book I with the other books of the Treatise; namely, the use which Hume makes of the concept of the self in dealing with his theory of the passions and of morals. It is central, for instance, to Hume's concepts of virtue, of the use of sympathy (see pages 318 and 320), and of the attributes of pride (see page 287), and protection of property. It is not coincidental that much of Hume's use of the self in Books II and III is linked to the explanation of the concept of sympathy, the concept which is perhaps the basis of the entire social fabric as Hume presents it. But Hume cannot be drawn into any charge of inconsistency as Between Book I and the others, for the inconsistency, if there is to be any, resides within twenty pages of Book I itself. What then did Hume do in the immediately proceeding section to the concept of the self?

Hume began, as usual, with a rationalist conception of the self, but this time presented in such a way that we are fully conscious that Hume is not one of those

"certain, beyond the evidence of a demonstration, both of its perfect identity and simplicity".(T.251)

Hume subjects the concept of the self to the test of experience so that we can uncover its true composition. A quest which, undertaken in search for the impression of the self, finds that no distinct impression corresponding to the notion of the "mind" or the "self" is encountered. Hume is also certain of the stakes of this quest - for it is not only those who easily fit into the rationalist framework who have used the notion of the self or mind as a foundational entity. Indeed, we must bear in mind that the very distinction "empiricist - rationalist" is a problematical distinction to use in any other way than as an intellectual series of "ideal types". For if Liberalism, for example, is to be seen as beginning with the work of Locke and Hobbes, both roughly labelled as empiricist, its beginning placed great reliance upon a notion of the individual's private consciousness (a conception of the self) as the foundational

basis upon which the political entity of the autonomous individual could be fashioned.¹³ Thus the intellectual soul which Descartes discovers, through the introspective voyage of sceptical doubting, as a self-contained ego of reason, is matched by the Hobbesian conception of the seat of desires and volition. But as is well known, Hume demonstrated in his analysis that the self is not to be found in experience. Instead, Hume tells us "when I enter most intimately into what I call myselfI can never catch myself" other than the series of perceptions which are present at that time (T.252). Thus:

"the mind is a kind of theatre, where several perceptions successively make their appearance; pass, re-pass, glide away, and mingle in an infinite variety of postures and situations..... there is properly no simplicity in it at one time, nor identity in different." (T.253)

It is this impasse, and the reflexive paradox involved in the statement that "I can never catch myself", which Kant is said to have resolved for Liberalism by taking Hume as succeeding in the task of demonstrating that the self is not derivable from experience, but must be recognised as a condition of the possibility of experience. Thus the unity of consciousness is a postulate of both theoretical and practical reason, not something to present us with a cause of anxiety.

However, this movement to Kant as the 'positive' overcoming of Hume's 'negativity' on this subject is to overlook Hume's actual solution, cast in terms of the active role of the memory. Hume's doubts as to the composition of the self threaten the very composition of Liberalism and the readings of his saving turn to memory have been interpreted as a key example of his naturalist turn. Hume, read in this way, moves to the conservative side of Liberalism, relying upon a psychologism sitting atop a beneficent flow of nature. The turn to psychology is seen to demonstrate via the propensities of the imagination the activity of a belief, which although it is not justified by any analysis of reason still carries out an essential function. But what is it that Hume tells us the memory does? Hume explains it allows the imagination to shape a series of somewhat related perceptions into a unity

and creates a fiction of the self, through the use of which order can be made of otherwise chaotic presentations. The fiction of the self is a product of the memory, via the faculty of recall and reflection on our past perceptions, which represents them as linked together in a network of relations. The memory, via this act of recall and fictional creation, transforms a "bundle or collection of different perceptions" into the fiction which provides us with a notion, an idea, representing diverse perceptions into a patterned entity which is the only possibility of continuous identity that there is. What sort of presence does the self then have? Here we must be at pains to remove the interpretation which holds that Hume treats the memory as giving us the weakened presence of the object, for Hume demonstrates in the case of the self at least that there is no single perception, no object, which corresponds to the self, and as the demand of weakened presence demands a presence at some time in the past, this interpretation is simply not valid in the case of the self. Instead Hume is at pains to stress that although the belief in the self is a "natural belief" and thus demanded by the functioning of nature, the claim that it amounts to a real personal identity is a "confusion and mistake" (T.254). Moreover, Hume states that the fiction of the self has another function. For when we do not utilise this fiction "we are apt to imagine something unknown and mysterious". In other words the use of the fiction of the self, and the reflexive acknowledgement that it is a fiction, saves us from the trap of metaphysics, that is from the enthusiasm of metaphysics.

To summarise this point: what is at issue is whether Hume goes any further in this area than a simple failure in the project of a subject trying to catch 'himself' via the objectifying attitude that an observer assumes towards entities in the external world. Or, is there any possibility that Hume can be seen in a similar context, which Habermas takes as our present: namely that the objectifying attitude by which the knowing subject regards itself as it would entities in the external world is no longer privileged? Hume himself was only partially aware of the

potentiality of his own distinctions. Hume remained extremely perplexed by his own writings on the self - as his reflections in the later appendix to the Treatise show, while he was convinced that his analysis was not incorrect, he was not totally sure in what way it was actually correct. (T. 633-36) In fact his purported summary in the appendix actually runs counter to what may well be the crux of the use of this fiction - the centrality of the act of narration to making sense of life.

This consideration, however, appears contrary to much of the traditional interpretation of Hume's depiction of the cognitive process. Hume, is normally associated with attributing a large degree of passivity to the operation of the understanding - cognitive processes are embedded in "relations of resemblance, contiguity and causation" and "the essence of these relations consists in their producing an easy transition of ideas". Thus:

"it follows that our notions of personal identity, proceed entirely from the smooth and uninterrupted progress of the thought along a train of connected ideas".

Hume turns the activities of the memory into a passive process. Since the

"memory alone acquaints us with the continuance and extent of this succession of perceptions [it is] the source of personal identity..... memory does not so much produce as discover personal identity, by shewing us the relation of cause and effect among our different perceptions". (T.262)

But the act of narration, the making sense of entities in life via the positioning of meaning as in the presentation of a story, containing, perhaps, an imposition on the events of the past of a form which they otherwise do not have, is essentially an active process. In what way then can Hume be said to implicitly rely upon the structural formation of narrative?

Hume uses narrative in two ways.

First, as an essential element of small scale social interaction which gives meaning to impressions which would otherwise just be relations of quantity, indeed, as the precondition for much of the causation of those quantitative

ascriptions. Thus the receptivity of the individual to his social environment is centrally bound up with his concept of himself and of his others which is a product of his social and other memories and of the sets of meaningful behavioral patterns that he has absorbed from communication with other people. These include the ideas that a person receives regarding other people's opinions of him and of his action - a feature Hume places central under the notion of reputation. Reputation is for Hume a cause of the passions of pride and humility, he calls it a secondary one but in practical terms it is the most important. (T. p.316-7) The notion of reputation is placed alongside the notions of character and name, all of which as Hume uses them in the context of his moral psychology, imply a strong concept of self-identity. But the context of these considerations, as opposed to the context of the destructive analysis in the early parts of Book I, is social life. Outside of society, and in the context of isolated metaphysical speculation, the scientific methodology of subject-objectification makes the self something of no meaning. Being inside society means, however, being susceptible to other causalities (influences) not capturable in the terms of an isolated object-subject relationship. Moreover, these reinforce, rather than go against, the skeletal findings of human nature. For since there is no distinct human self there can be no pre-social humanity - since there is no distinct individual mind, but only perceptions associated in various patterns, individual identity is something which is strongly determinate upon social experience, including socially installed habits of thought and of interpretation of action, i.e. forms of narrative understanding of relationships in the social world.

III

This interpretation is only implicit in Hume (it is the potentiality which is taken up in strains of symbolic interactionism) but it may account for what most interpreters have seen of a mysterious inconsistency. Historically analysis

appears to have fallen into a dualist trap. Either we keep to a subject-object relationship whereupon understanding depends upon the perspective of observation, or we proceed into a modality of entering into the interiority of the phenomena. Henry Home, or Lord Kames as he is otherwise known, a kinsman of Hume, for example, attempts to demonstrate what he takes to be Hume's sceptical position on identity as a result of applying only the first method. Kames states that if we only have the perceptions of the external sense to rely upon then we "never could have any consciousness of self", but would be lost in a range of ideas which cannot give a notion of personal identity. However, he claims, individuals have the capabilities of 'internal senses', one of which can give "an original perception or consciousness of himself, and of his existence". Kames holds that this is of the liveliest kind of perception and dissolves any puzzle over personal identity as it is this immediate, intuitive, and unanalyzable

"consciousness of self, carried through all the different stages of life, and all the variety of action, which is the foundation of personal identity. It is by means of this perception, that I consider myself to be the same person, in all the varieties of fortune, and in every change of life."¹⁴

Hume, however, given the totality of the Treatise has denied the dominance of either of these two modalities. The social reality of identity, contained in the social existence of character and name, of virtue, of pride and humility, is something whose present existence depends upon the understanding derived from the interpersonal associations and interactions of the relationships of life. The individual keeps his character, his name, by behaving in his habitual manner. Through his customary activity, through his conditioned sentiment, his reactions to stimuli, his ongoing social reputation is continued as ascribed identity. The "heaps and bundles" of the impressions of his activity, are constituted into the character of an honest man, a man of integrity, or alternatively, by the acts of social memory received and constituted by testimony, precept, habitual understanding, and other modes of social communication. The testimony and opinions of others, are part of the general "bundle

of perceptions" but they also help structure this bundle into coherence. Via sympathy, understood communicatively, the individual stands always within interpersonal relationships which allow him to relate to himself as a participant in that relationship, the essential meanings of which cannot be fixed either from the perspective of some exteriority or from some absolute intuition, but depend themselves upon the performability of their interaction. And this activity is dependent upon an ongoing, mostly recapitulating, reconstruction of knowledge already employed (to use a phrase of Habermas). For Hume it is absurd to think of absolutely new conceptions making sense in social relationships. The mind simply rejects them. So it is that the ascriptions of character draw upon and are dependent upon the elements of already existing social understanding. This we can call the narratives of social life - those conjunctions of words and expressions that tell us that such and such an activity is fit for such and such an occasion, that present us with images and expectations of behaviour for character and situations, and which mean that the mind has only comfortable impressions when the narratives are followed, and upsetting ones when the narratives break down or when the behaviour we encounter is at odds with the narrative expectation.

Hume's second use of narrative builds on the first being the structure of his message of Book I, a message he presents via what is expressly the narrative which forms this section.

As we have seen Hume phrases the conclusion in terms of an event - a moment of pause and reflective pondering on the "voyage" that he has taken in his writing. The rest of the conclusion is taken up with Hume relating the course of this "event". The central theme is that of a voyage - and Hume, epistemologically consistent with his portrayal of psychological naturalism, is read as presenting merely a passive chronicling. A simple rendition of what happened, of what ideas and impressions imposed themselves upon the imagination of David Hume himself. Again it has been seen as central that reality take on the form of a mere

sequence without meaningful beginnings and ends for the 'scientific' rather than the metaphysical/theological analysis to investigate them. Hume has, however, even when he is denying a structure to the world available to the analysis of pure reason, been engaging in something more than mere chronicling. Take his treatment of reason as the servant of feeling. For Hume:

"Reason can never shew us the connection of one object with another, tho' aided by experience, and the observation of their constant conjunction in all past instances. When the mind, therefore, passes from the idea or impression of one object to the idea or belief of another, it is not determined by reason.(T. p.92)

....Reasoning is nothing but a species of sensation. 'Tis not solely in poetry and music, we must follow our taste and sentiment, but likewise in philosophy. When I am convinced of any principle, 'tis only an idea, which strikes more strongly upon me. When I give preference to one set of arguments above another, I do nothing but decide from my feeling concerning the superiority of their influence. Objects have no discoverable connection together; nor is it any other principle but custom operating upon the imagination, that we can draw any inference from the appearance of one to the existence of another."(T. p.103)

However, when Hume seeks to illustrate this he transforms the situation into a narrative example. Hume asks us to consider

"a person, who stops short in his journey upon meeting a river in his way, foresees the consequences of his proceeding forward; and his knowledge of these consequences is convey'd to him by past experience, which informs him of certain conjunctions of causes and effects."

Hume determines that the individual does not, as an act of reflective reason, call to mind all the previous instances of the interaction of water and animal bodies. Instead, Hume tells us,

"the idea of sinking is so closely associated with that of water, and the idea of suffocating with that of sinking, that the mind makes the transition without the assistance of the memory. The custom operates before we have time for reflexion. The objects seem so inseparable, that we interpose not a moment's delay in passing from the one to the other".

This discussion Hume tells us destroys the notion that the mind

"is convinced by reasoning of that principle that instances of which we have no experience, must necessarily resemble those, of which we have. For here we find that the understanding or imagination can draw inferences from past

experience, without reflecting on it; much more without forming any principle concerning it, or reasoning upon that principle." (T.p.103-4)

Hume goes on to argue for the subversive role for reason - but this is a reason which has a certain characteristic. The reason which Hume takes aim at here has a form of autonomy purified of the unreflective customs of ordinary life. It is a reason for which much is expected, it is to be a form of authority logically independent of the unreflective maxims and standards which constitute the normal modes of acting. Hume's attack upon the pretensions of this reason demonstrates that life does not allow reason to be independent of, and superior to life, but instead requires a mode of understanding which seeks to operate from within the activities of life. He implicitly demonstrates that everyday life proceeds not via independent reflection on abstract principle but more via the internalisation into unreflective acceptance of narrative structures in the framework of common existence. For in his example, the traveller will make the connection between the categories of river, human bodies, sinking and death, and may or may not desist from his aim of continuing his journey. He will not lose his conception of action to a passivity awaiting further external pressure, for his everyday experience will follow certain possibilities of narrative structure and coherence. Given the weights of various elements in the stories in which he is participating - how urgent is the journey? What is the purpose of his journey? - various scenarios, which to the external observer may be chronicled as "mere sequence", take on the role of fitting "consequences" into an already presented story which is at our disposal. Hence our traveller may turn south, for instance, on the expectation that there is a bridge that way with some customary reliance upon what a bridge entails to a project of crossing a river.

This example actually is more than an act of chronicling taking on the characteristics of narrative in the fact that all "events", even when they are considered to be real occurrences of the past, disclose their lack of self interpretation. We

cannot refer to events as such but only to events under a description and the description is a function of the narrative the events make up. Hume, after all, had to begin with a meaningful description which sets a coherence to everyday reality by permeating it with narrative - it was "a person who stops short in his journey upon meeting a river in his way" who was at question.

Similarly with the conclusion. What is at issue here is a reflective stock-taking temporal grasp of what Hume will present us with as a narrative whole. A whole which serves to give a larger story providing the context for particular acts and decisions, actions and events. Hume is clear, in his various letters concerning his philosophy for example, that one of the tasks of his writing is to instruct others as to the correct way to do philosophy and to engage in the reasoning of the world. The voyage of the section is thus no unadventurous enterprise. The whole is the journey of the inquirer armed with the weapon of philosophy but for Hume this takes on the form of

"a man, who having struck on many shoals, and having narrowly escap'd ship-wreck in passing a small firth, has yet the temerity to put out to sea in the same leaky weather-beaten vessel, and even carries his ambition so far as to think of compassing the globe under these disadvantageous circumstances." (T.p.263)

In After Virtue Alasdair MacIntyre having introduced the perspective of the human agent as both actor in and author of his own story immediately states the essential sociality of this phenomena: "We are never more (and sometimes less) than the co-authors of our own narratives".¹⁵ The authenticity of Hume in developing his statement lies not in a creativity from an absolute self-consciousness or self-centeredness but in the developing and refining of social roles and ongoing stories which represent the process of doing philosophy and of analyzing the role of understanding in human affairs. Hume's target here is the series of narratives which have combined the notions of travelling with those of autonomy and of gaining the authority of an absolute guarantee. Hume grasps the nettle of autonomy

stating:

"I am first affrightened and confounded with that forlorn solitude, in which I am placed in my philosophy, and fancy myself some strange and uncouth monster, who not being able to mingle and unite in society, has been expelled all human commerce and left utterly abandoned and disconsolate.... When I look abroad, I foresee on every side, dispute, contradiction, anger, calumny and detraction. When I turn my eye inward, I find nothing but doubt and ignorance...such is my weakness, that I feel all my opinions loosen and fall of themselves, when unsupported by the approbation of others. Every step I take is with hesitation, and every new reflection makes me dread an error and absurdity in my reasoning." (T.p.264)

This is a different journey than the grand narratives of the pre-enlightenment. As opposed to the narrative of Parmenides and the Platonic allegory of the cave for example, the spacial connotations are radically different. Hume asks:

"can I be sure, that in leaving all established opinions I am following truth; and by what criterion shall I distinguish her, even if fortune shou'd at last guide me on her foot-steps?" (T.p.265)

HYowever, the narrative does not represent the Being of truth by the presence of the other, the sun goddess or the emancipator from the chains of the cave, but as facilities internal to the being of the subject himself. Thus:

"after the most accurate and exact of my reasonings, I can give no reason why I shou'd assent to it; and feel nothing but a strong propensity to consider objects strongly in that view under which they appear to me".(T. 266)

The guide can only be experience and habit, and this is an upsetting guide for it leads us to ridicule that desire to encounter "the original and ultimate principle", which is "our aim in all our studies and reflections".

"How must we be disappointed, when we learn that this connection, tie, or energy lies merely in ourselves, and is nothing but the determination of the mind, which is acquired by custom..."(T. 266)

When we desire to know the ultimate principle as something which resides in an element external to ourselves "we either contradict ourselves or talk without meaning". This is a deficiency of ideas which Hume says is not perceived in the common life but is a

result of "understanding when it acts alone and according to its most general principles", understanding which However, "entirely subverts itself, and leaves not the lowest degree of evidence in any proposition, either in philosophy or in common life".
Ultimately:

"we have, therefore, no choice left but betwixt a false reason and none at all...

I know not what ought to be done... I can only observe what is commonly done; which is that this difficulty is seldom or never thought of.."(T.268)

Hume, however, tells us that he has entered into the search for ultimate foundations with an intensity of subjectivism that has now wrought its revenge. The result is the chaos of a multiplicity without any semblance of sense.

"I am ready to reject all belief and reasoning, and can look upon no opinion even as more probable or likely than another. Where am I, or what? From what causes do I derive my existence, and to what condition shall I return? Whose favour shall I court, and whose anger must I dread? What beings surround me? and on whom have I an influence, or who have any influence upon me? I am confounded with all these questions and begin to fancy myself in the most deplorable condition imaginable, environ'd with the deepest darkness, and utterly deprived of the use of every member and faculty." (T.p.269)

"Nature" intervenes at this moment of metaphysical absurdity dispelling the tension by either weakening the intensity of the dilemma or transferring the attention to more practical concerns. Hume returns to dining, back-gammon, and conversing with friends. He finds himself "absolutely and necessarily determined to live, and talk, and act like other people in the common affairs of life".

This return to the common life, and the psychologism which appears to underpin it, provides the point of departure at which Hume has been taken by many to despair finally of reason and reduce progressive effort to a hope in the current of nature, that is, to met/a functionalism wherein the metaphysical faith in God is replaced by faith in function and progressive interaction.

IV

For Kant Hume had failed, not suspecting the existence of a pure science of reason he

"ran his ship ashore, for safety's sake, landing on scepticism, there to let it lie and rot; whereas my object is rather to give it a pilot, who by means of safe astronomical principles drawn from a knowledge of the globe, and provided with a complete chart and compass, may steer the ship safely, whither he listeth."¹⁶

Kant's narrative follows the terminology of Hume transforming, however, the barren rock of skepticism into

"an island, enclosed by nature itself within unalterable limits. It is the land of truth - enchanting name - surrounded by a wide and stormy ocean, the native home of illusion, where many a fog bank and many a swiftly melting iceberg give the deceptive appearance of farther shores, deluding the adventurous seafarer ever anew with empty hopes, and engaging him in enterprises which he can never abandon and yet is unable to carry to completion."¹⁷

His own system must also encounter the crises, the occasion which

"we cannot put aside and yet cannot endure. All support here fails us and the greatest perfection, no less than the least perfection, is unsubstantial and baseless for the purely speculative reason, which makes not the least effort to retain either the one or the other and feels indeed no loss in allowing them to vanish entirely."¹⁸

Ultimately:

"the thing itself is indeed given, but we can have no insight into its nature."¹⁹

Hegel describes the crisis of grounding:

"in fact one finds oneself in a kind of witches circle in which determinations of reflection, ground and grounded, phenomena and phantoms, run riot in indiscriminate company and enjoy equal rank with one another."

For Hegel the crisis is but the final evidence of the superiority of the logic, for it is the logic which will guide the journey.

"The end itself, this falling to the ground of the mediation, is at the same time the ground from which the immediate proceeds. ...the abyss for finite reason is [found] insofar as finite reason surrenders its finitude and sinks its mediating movement therein; but this abyss, the negative ground, is also the positive ground of the emergence of simply affirmative being, of essence which is in its own self immediate; mediation is an essential movement."²⁰

One only takes this solution with the logic!

Nietzsche's implicit retort to Hume was that the desire to return to the Common Life from the crisis was no more than one of the many symptoms of human weakness; a symptom of our inability to rely upon ourselves, a denial that we are alone as individuals and thus must carry the burden of our solitude; a failure to assert our individual will as the ultimate ground for everything and to realise that we self grounded and not constrained by any external order of things.

The Nietzschean solution transforms Hume's current of nature into "an inner will" which he "designate(s) as 'will to power'". Basing himself upon a critique of Kant, Nietzsche tells us:

"The sore point of Kant's critical philosophy has gradually become visible even to dull eyes: Kant no longer has a right to his distinction 'appearance' and 'thing-in-itself'".²¹

Pragmatically Nietzsche holds:

"the categories are 'truths' only in the sense that they are conditions of life for us: as Euclidean space is a conditional 'truth'".²²

The image of the abyss is every present with Nietzsche - it is the remembrance which stimulates Zarathustra in his message that the play of life must continue over this suspension. A message which continually brakes the impasse of the lack of grounding in the 'fact' that "the criterion of truth resides in the enhancement of the feeling of power."²³

The alternative pragmatic solution is that of the later Wittgenstein, who in a "therapeutic" overturning of subjectivism denies the need to attempt either of the twin paths of autonomy and the ultimate principle. Thus in On Certainty Wittgenstein holds:

"All testing, all confirmation and disconfirmation of a hypothesis takes place already within a system. And this system is not a more or less arbitrary and doubtful point of departure for all our arguments: no, it belongs to the essence of what we call an argument. The system is not so much the point of departure, as the element in which

arguments have their life."²⁴

Such a dicta appears very close to Hume's return to the common life. Hume's dicta that philosophy must have stock with the "gross earthy mixture" of the common life, does not mean, however, that all we can do is analyze the rules and live by them as Wittgenstein appears to some to offer (and, as it must be admitted, the conservative politics of Hume claimed 'Justice' consisted of). For although thought, philosophy, must begin within the common life and thus the problem of grounding becomes pragmatic in a sense: As Hume put it in the introduction after the return to the common life we freely recognise:

"we can give no reason for our most general and most refined principles, besides our experience of their reality; which is the reason of the mere vulgar, and which required no study at first to have discovered."(xviii)

Our acceptance of the natural ways of the world is, however, mitigated. David Faith Norton calls this a mitigated naturalism to accompany Hume's mitigated scepticism. For not only does Hume, as soon as he claims nature returns him to the life of indolent belief, claim nature also fits him to stir again, but his very narrative portrayal of the overcoming of the sceptical crises is a moral decision. As Hume states in the introduction, this decision is not made by those who hold to the "modern systems of philosophy" - for they instead impose "their conjectures and hypotheses on the world for the most certain principles".(T. xviii) The proper attitude to such claims is the sceptical one - but the sceptical attitude must itself be guided by an understanding of its social role. That is to say, epistemological scepticism must be socially responsible. It must co-exist with social belonging and here Hume is rather conservative seeing the ongoing journey of the intelligent individual as one who defends the ongoing traditions of the time, his non-sceptical moralist positions likewise participate in what Hume presents as the proper narrative of intellectual progress.

In summary this is a narrative which Hume pitches against the currents of his time. Currents which as Popper summarises taught,

via the epistemological optimism after Bacon and Descartes,

"that there was no need for any man to appeal to authority in matters of truth because each man carried two sources of knowledge in himself; either in his power of sense perception... or in his power of intellectual intuition..."²⁵

It is a narrative in which Hume, however, tells us that the faculties of man are incapable of themselves, as isolated subjectivity, of providing the ultimate foundation.

The return of Hume to the common life still has strong elements of subjectivity, but now it is a subjectivity acutely conscious of its reality as limited. Limitations, however, which cannot be fixed or positioned in some absolute boundary as Kant envisages, but whose limits are expressed and constituted in their temporal positioning in social progress.

Thus the epistemological scepticism of Hume returns to the framework of the common life - this movement is natural - indeed it is proper - but this return is not irrational. It is not irrational, but rational, to base one's life and intellectual arguments within the narratives of the social world. Exemplified, for Hume, by moral belonging. But the claims of the participants of the common life can themselves be subjected to the mitigated scepticism proper to such life.

Thus we must enjoin the narratives of the social world, for we must use them both as the framework, and as the dialogical opponents of our activities. My social existence not only puts me into social interaction with a coexisting range of contemporaries in a geo-economic position, it also connects me with a peculiar form of temporal continuity, an existence in time/space coordinates mediated by recall of the past, strongly felt for Hume in custom, which runs from predecessors to successors. It is a sequence which extends beyond the boundaries of my life, both into the past before my birth and into the future beyond my death.

This is a sequence which finds itself expressed in a form of

communicative interaction of the social world. To the extent to which Hegel took this up he was right - to the extent to which he absolutivised it into the philosophy of absolute self-consciousness encompassing the motif of a complete consciousness, and thus to the teleology of consensus, he was anti-Humean and wrong.

However, the Humean form of communicative narrative activity rhetorically puts forward certain 'metaphysical assumptions' which underpin the Humean legacy and determine that this need not be reflexive pragmatic 'communicative reason' but may pass over the question of its underpinnings in an acceptance of its functionality. Therefore, we may suggest, if Habermas really wants to find the juncture at which the Enlightenment ignored the potentiality of reflexivity and forms of communicative reason in favour of establishing a trust in the paradigm of consciousness, then he should return before Kant to the narrative of David Hume and to the weakness of the empiricist metaphysics which gives rise to the coarseness of the traditional interpretation of Hume. One that has, perhaps, crippled Hume's prior overcoming of "the sentimental metaphysics of homelessness".

Section B

I

The metaphysical assumptions of Humean Empiricism.

Modernity begins at the rupture of the metaphysical guarantee that religious authority holds over the identification process between language and the world. At this stage the subject, man, requires a new legitimation for his apparent ability to speak accurately and to capture the process of the world. Hume's introspection, whilst in part an obedience to the Socratic demand to know thyself and upon that 'certainty' to base your relationship to the world - a demand which transcends epochs or systems of thought - is specifically modernist in its primary use

for epistemological clarification. The subject doing the representing, including the presentation of theory as in the micro politics of the Treatise, seeks to hold himself out as an observable object so that he may make clear the very process of representation. Thus for both Rationalism, as with Descartes, and empiricism, here with Hume, self-reflection as the primary move replaces the look to an absolute external authority. The fruit of such self-reflection, the identified relationship of the subject doing the representing to the self, becomes the archemendian point through the use of which epistemological certainty is granted. All knowledge of things beyond the self depends on two key assumptions: the notion that we apprehend real objects that can exist independently of ourselves requires that our sense impressions can accurately represent such objects; and all knowledge of things beyond what is immediately present to us, i.e. knowledge of the past and future, and of relations that are held to be generally true, assume the validity of inductive inference which in turn presupposes the uniformity of nature. Hume appears to hold that these assumptions, generally referred to as the assumptions of objectivity and uniformity, pertain to matters of fact. If their truth be assumed then it is possible to engage in reasoning concerning matters of fact combining the evidence of experience with adherence to strict rules of inference - such knowledge must, however, be methodologically probabilistic in nature and thus subject to future modification as evidence is adduced.²⁶ Modesty as to knowledge claims, thus, cannot be overcome, even though some degree of security can, and must, be practically relied upon.

We have moved, therefore, from the pre-Enlightenment position of Christendom where knowledge claims ultimately relied a faith in the language of God to a position of belief in objectivity and uniformity. But, further reflection reveals that these two basic assumptions cannot themselves be validated by experience, for their reliability must be held constant to substantiate experience itself. They are, therefore, necessary matters of belief, and it appears to Hume that the strength to which they

are ordinarily held (the strength to which they 'naturally impress themselves upon the mind') suggests that there is some form of natural psychological explanation for this. Without some form of naturalist explanation the lack of logical justification for these two central beliefs occasions the sceptical crisis. Under the concept of "mitigated scepticism" (sic) our theorizing must return to the naturalness of the common life, wherein:

"Nature, by an absolute and uncontrollable necessity has determined us to judge as well as to breathe and feel." In returning to the common life: "I may, nay I must, yield to the current of nature".

It is not in pursuit of a program of reason which drives questioning but a form of passion; the love of truth being one particular passion. What gives rise to this passion or changes in passion? Changes and disruptions in the common life, the pains and pleasures of common existence; indeed,

"whatever supports and fills the passions is agreeable... whatever weakens and enfeebles them is uneasy. As opposition has the first effect, and facility [Hume's concept covering the source of pleasure] the second, no wonder the mind, in certain dispositions, desires the former and is adverse to the latter." Custom usually produces "facility", hence "'tis a quality of human nature... common both to the body and mind, that too sudden and violent a change is unpleasant to us, and that however any objects may in themselves be indifferent, yet their alteration gives uneasiness." (T.p.270)

How can we be sure we can judge the correctness of our feelings about change and stability and our reaction to social happenings? In the Enquiries, Hume expands upon the idea of Nature quoted earlier:

"as nature has taught us the use of our limbs, without giving us the knowledge of the muscles and nerves, by which they are actuated; so has she implanted in us an instinct, which carries forward the thought in a correspondent course to that which she has established among external objects; though we are ignorant of those powers and forces, on which this regular course and succession of objects totally depends." (E.p.55)

Moreover, it is nature herself that enables us to distinguish between "just philosophy" (i.e. the path of proper discourse) and "false philosophy". Since:

"philosophy, if just, can present us only with mild and moderate sentiments; and if false... its opinions are merely the objects of a cold and general speculation, and seldom go so far as to interrupt to course of our natural propensities". (T.p.272)

Nature, it appears has made ample provision for us.²⁷

Hume thus gives a grounding for the very feasibility of (empirical) science which Whitehead was later to recognise as the impossibility of science without the supposition of a "beneficent nature". But for Hume man does not correctly understand this talk of 'nature' and in the Natural History of Religion Hume demonstrated that the traditional relation between 'God' and transcendental relations at the heart of postulations of "eternal justice" and transcendental categories of good and evil were the products of man's psychological fears and, implicitly, the institutionalization of these fears by the Church. This fear, and the legacy of the appropriation of it by the institutions of Church and State, obstructs the development of 'true' reactions of man to moral situations. Any penology is constrained since men

"must be careful not to form expressly any natural sentiment of blame and approbation [but instead are guided by rationalist abstractions]. Popular monotheism...[is] a species of demonism".

In the penal realm the result is the subjection of man to semi-religious discourse which legitimates modes of official vengeance by the authorities under the name of the state. The people are constrained from developing a natural penology:

"The heart secretly detests such measures of cruel and implacable vengeance; but the judgement dares not but pronounce them perfect and adorable. The additional misery of this inward struggle aggravates all the other terrors, by which these unhappy victims to superstition are for ever haunted."(Natural History, p.67)

The power of the pre-Enlightenment, the power which focused upon fear and ignorance to sustain authority, should be transformed into a power of knowledge; a knowledge-sentience complex which would guide progress. But how was that knowledge, and that power actually possible when the sceptical critique could bite so well?

Only by an implicit natural rationality in the developing course of that common life - yet in the common life the prejudices of the populace are divided: Hume's knowledge of "Natural History" demonstrates to him an operative distinction between a political/religious, and a legal/moral obligation. Hume held that it was possible to construct a 'naturally recognizable' system for the operation of law, and in turn morality, in the natural operation of the sentiments, and in time to replace the existing transcendental and religious basis of obligation with this 'natural basis'. Hume is clear that this enterprise implicitly goes against certain forms of power, specifically the religious. In the Dialogues he holds that the true use of religion was to take advantage of the psychological situation where "motives of morality and justice [need reasoned support] but nature compels man to set religion up as a 'separate principle'", which inevitably becomes "only a cover to faction and ambition" (D.p.114-5). This abduction of reason cannot be held in check by the false recourse to rationalist techniques, nor countered by the falsehoods of revelation, but only by the knowledge of natural history. Through the growth of knowledge, the passions in men can be identified and manipulated by "artifice", so that unreasonable motivation might yield reasonable result. In time the scientific knowledge of moral sentiments, i.e. a knowledge of psychology and the natural composition of man and his environment, will develop and be effectual because of the weakening power of religion over public opinion. This victory will not be achieved by man's power of abstract reason, but by his recognition of his actual guidance by his passions and natural desire. It is as a consequence of these that civil society has come about, and it is through their operation that the institutions of civil and political society should be guided.

In the terms of Hume's friend, Adam Smith, our survival and developing happiness has not been

"entrusted to the slow and uncertain determinations of our reason...[but to]..original and immediate instincts".

The knowledge of the larger scheme is within this process (Natural History) and of the science of moral sentiments can put

the question of obligation on a grounding which is strictly 'empirical'. As Adam Smith specifies it, the question now "is not concerning a matter of right, if I may say so, but concerning a matter of fact."²⁸

This empirical emphasis is linked to another key prescriptive rule of the imaginative domain: for both Smith and Hume the inquiries of man should not be directed to obtaining conceptions of the 'whole', but focus instead upon the situations of the common life and the knowledges empirically obtainable which can guide this. 'True' philosophy is not concerned to give totally encompassing theories, indeed it can only focus upon the empirical appearance and does not plan to tell the whole story; it claims to leave the world ultimately a mystery.

"The whole is a riddle, an enigma, an inexplicable mystery. Doubt, uncertainty, suspense of judgement, appear the only result of our most accurate scrutiny concerning this subject." (Conclusion to Natural History of Religion)

Yet this is in a sense a false "mystery" - for Hume provides a notion to fill this absence: it was "nature" herself that broke out of the trap of reflexivity in approaching the abyss of reason - what then is this "nature" and how is it that it is so powerful?

The confrontation with nihilism, with the radical undecidability and uncertainty in which the reflexive questioning of the subjectivist self-inquiry of the empiricist 'self' ends is outflanked by creating the image of a naturally evolving world-society complex whose own internal mechanisms suffice to correct its own, natural, self-determination. Inside this new view of the world, this new paradigm, lies an overturning of the strength of rationalism to express the coherence of the world's structure. This image specifically overturns the

"established scheme of human knowledge in the Scottish seventeenth and eighteenth centuries.... a unitary and more or less integrated scheme the articulated disciplinary parts of which involved continuous reference to each other."²⁹

It was a scheme whose unity and coherence was then mirrored in the curriculum of proper education. The "understanding" which

Hume offers, and to a limited extent Smith and Ferguson, turns away from this scheme in response to the demands of a surfacing modernity with its inescapable question of how to grapple with the effects and needs of an expanding economy impacting upon the moral and intellectual life of citizens - a question of pressing immediacy for the Scottish context Hume faced and whose response was formulated in specific modernist terms. Namely the universality of 'natural' human nature, a concept which presented a universalistic context of the human subject in an (abstract) world, and which further led to a new form of political legitimation. A formation, which divorced from the narrow confines of a particular time, place, and tradition bound "cultural debates in which the philosophical presuppositions of [its specific] institutions were at stake"³⁰ could 'de-pragmatise' conceptions into a more abstract legitimation. Consequently, the 'traditional' values of kinship and of local community could be eroded as the need for values comparable with the market, growing wealth and commercial utility asserted itself. A need answered in the Humean model of a complex functioning mechanism as the socio-historical body of "natural society"; and a technique of change offered in the practical politics of philosophical moderation.

Moreover, the "secret springs and mechanisms" of social life necessarily link to the potential uncovering of the operative forms of a determinism³¹ and this conception evokes a change in our attitude towards the world - our previous superstitious 'admiration' for the natural order of things is replaced by a more mundane relationship, which sees all objects merely as items governed by the laws of nature. Respect, or religious fear, in the face of mystery is overturned; it is only the weakness of our conceptual and investigative tools which prevents us from uncovering the operative mechanisms of nature.

In applying this to the human personality, Hume appears confident "of an entire victory... having proved, that all actions of the will have particular causes" (T.p.412). An understanding of human

nature seen as applying the lessons of the physical sciences which Bacon had provided. The causal principle is thus central and if there is a mistake in the causal principle then we have no certainty of knowledge, but if the causal principle is independent of subjective desire we can look forward to an expansion of knowledge and sound improvement in the ordering of human affairs. Hume first subjects the causal principle to sceptical attack but ultimately holds that the causal principle is secure from scepticism because it is not founded in reason but in 'nature'; the structure of the world is not built upon truths of reason but is a variable mass of entities in interaction obeying ultimately only the flow of causality. Such appears as the confidence of the empiricist imagination.

From the centrality of causality the crucial focus of "moral science" concerns the doctrine of "necessity". This is what makes possible a science of history and of politics.³² Hume provides a vision whereby entities have, under similar conditions, set ways of action, ways which give rise to predictability and characterization of effect. Moral condemnation does not rely upon a notion of what we call "free will" but the reality of determinism.

In obedience to our will we do not exist outside the pattern of causality, but inside. The logic of determinism is applicable to the operation of the will as in time, under the empiricist imagination, is the notion of reducibility. Hume had previously, in the Treatise, appeared to reduce the mistakes man made in the association of ideas to a question of physiology (cf. T. especially pp. 10-13). Thus the Humean comment that "the same motives always produce the same actions" begins the slide of modernity into behavioral psychology.

Thus liberty and necessity are reconciled as being different sides of the same coin: that coin being the determination of the will by motives. Motives for their part are presented as causal entities operative in the reality of events. Hence these motives

themselves are inside the pattern of causality, and thus the action, caused by the will, subject to motives, which are in their turn caused by previous events and occurrences, starts a chain of determinism for the theorist to uncover.

II

What of the relationship which knowledge takes to the world? Man is part of the flows of that world and the world is to be conceived of naturalistically. There simply is nothing outside the world which influences, which can be kept steady as the ultimate frame of reference to understand and rank particulars. Instead the principles of science, i.e. the causal principle, perform this function and sense is made of the world through the observation of the phenomena of the world with this principle kept constant. This conclusion to modernities problem of grounding - scientific naturalism - impacts on the role of intellectual endeavour directly and of the fruits of that endeavour. Specifically individual man can not have possession of 'truth' in such a way that he may 'lead others to the truth', and similarly participation in social life must be based on that understanding. This will lead men to value intellectual modesty and encourages men to moderate their enthusiasms and temper their expectations; expectations otherwise unduly aroused by fictions.

As Livingstone summarises, Hume presents a picture wherein authority, and in turn social order, holds together by the many and various manifestations of the social consciousness of individuals and the narrative structure of the social whole. Thus social and political standards exist as a temporal conflux between future and past experiences and hopes. Ideas and motifs are positioned by the narrative recall of the past. As opposed to arguments for the timeless essences of the natural law and social contract positions then current, Hume sees that the narrative standards that constitute the present political and social order are a mixture of the traditional and the contingent;

they are not the objects of "autonomous" reason.

This reliance upon the narrative technique means that Hume is often mixing the descriptive with a confidential prescription.³³ The political imagination of Hume draws us in to concur that individual man has only a limited sphere of political interest; the model of the ancient polis is not one to be aspired to. Hume's critique of the arguments for a reconstituted polis are presented as fundamentally epistemological: those who recommend it produce ideal visions, produced out of the abstract flight of reason where

"every man framed the model of a republic; and, however new it was, or fantastical, he was eager in recommending it to his fellow citizens, or even imposing it by force upon them".³⁴

Hume is clear as to what is responsible for this conceptual confusion, referring to the Levellers in the Enquiry as "a kind of political fanatics, which arose from the religious species". A political awareness based upon a proper study of natural history will provide an alternative path. For Hume participation cannot be personally experienced by all, constitutional representation will be the successful method of political process, and, instead of notions of the polis, recourse to the encompassing rules of justice (law) will best ensure the establishment and continuance of good authority. The passions of man are capable of moving man with many conflicting feelings requiring subjection to ordered repetition (the control of law). Law, in its turn, is most just in reflecting its growth from the structures of habit and custom - its primary role in normal life is the protection of the rules of property and reinforcement of mutual respect and reciprocity. As man moves away from the restraint of custom and tradition the restraint of law is vital:

"good laws may beget order and moderation in government where the manners and customs have installed little humanity or justice in the tempers of men."

Only in the orderly State, made possible by the laws of justice, supporting the authority of government with the natural loyalties of the people, could liberty, commerce, and progress in the

social 'ease' of arts and science be possible. Moreover, private happiness, secured through the cultivation of the private virtues, could only be enabled via such civic foundations. However, modern politics were for Hume, being exposed to metaphysical social currents at odds with the task of maintaining political stability and the rules of justice.³⁵

Movement and gradual reform was possible, perfection through revolution or other events not; thus "men must, therefore, endeavour to palliate what they cannot cure". The framework of contemporary social order, i.e. the rather rigid rules of justice, is necessary because of certain empirical features of the human condition. Notably the scarcity that nature has made for man's provisions, limited generosity in the spirit of man tempered by the reality of sympathy.

"If every man had a tender regard for another, or if nature supplied abundantly all our wants and desires [then] the jealousy of interest, which justice supposes, could no longer take place"; [nor says Hume would there be need for the rules of property per se... (T.p.494).

"increase to a sufficient degree the benevolence of men, or the bounty of nature, and you render justice useless, by supplying its place with much nobler virtues, and more valuable blessings".

If we could replace material scarcity with plenty:

"or if everyone had the same affection and tender regard for everyone as for himself, justice and injustice would be equally unknown among mankind" (T. P.485).

The rationalist may, however, simply produce these solutions out of the "fancies of the imagination" and man will have neither security nor reality. We should turn away from the constructs of the rationalist and instead "look abroad into the world" basing our political and social aspirations upon the real, empirically operative foundations of authority instead of living with the desires and fruits of the old religious or semi-religious traditionalist doctrines and fictions. Authority cannot claim justification by any reference to a rationalistically defined essence, but by its observable actions in the natural movement of society. The authority of politics is the authority of functional integration, wherein

"the happiness and prosperity of mankind [is as] a wall built by many hands, which still raises by each stone which is heaped upon it... [Society is to be an edifice of happiness] raised by the social virtue of justice; ... the building of a vault where every individual stone would fall to the ground [without] the mutual assistance and combination of its corresponding parts".(E.304-5)

The slowly constructed building which is the proper societal existence for man is fragile and constructed over time. Life in it, the progressive social life of modernity, is to be not so much a question of 'ethical' participation in a common, over reaching framework of social identity, but rather a process of studied indifference by individuals which avoids grand universal claims and related styles of politics. Movements such as the Levellers, which proposed state intervention over the question of the allocation of property and a politics modelled on participation in a reconstituted polis type republic, offered utopian visions of radical democracy deeply repugnant to Hume. First, their epistemology was wrong; it was not only wrong it was unnecessary. In the project of overcoming the forms of legitimation which previous rationalist systems joined to the power of sovereign and church the motif of rationalism should be discontinued. Moreover, even if some of their 'progressive' faith in man could be shared in moments of optimism, this did not deny that there was great danger in change, thus the second feature was the need for some form of tradition and authority. Rather than optimistic and heady calls for participation and freedom Hume's response can, retrospectively, be summed up in one phrase: Institutionalism. Institutionalism was the slow victory of political moderation; a denial of party political fanaticism and a process which retained certain of the mechanisms of past legitimative strategies for authority in that it placed the citizen's primary duty solely in terms of maintaining the rules of justice: in particular the rules of property and the established rights of citizens.

The rationale for institutionalism is both historical and epistemological. The empiricist imagination for human action is one of constant conjunctions and determinism - the implication

is that human behaviour is contextualised. Thus human action, beliefs, political power need to be regulated, positioned, engaged in frameworks and located amidst rules and patterned expectations. In a broad sense acceptable ('moral') behaviour is only possible in a structured society, and, combined with the principle of parsimony (which here means that we have a natural disposition to respect established authority) providing systematic frameworks for social life will enable social stability to prevail.

Historical knowledge, as Book III of the Treatise outlines, demonstrates that liberty, commerce, refinement and progress in the arts and sciences only arose in countries with good laws and constitutions, thus there was an historically demonstrable relationship between these two variables.³⁶

One current of the Eighteenth Century was to use history to bring about societal changes, to help generate those sorts of upheavals of which the French revolution stands as the supreme example. Here history is as a branch of polemics and serves to give sanction to political contest. For Hume that was fictitious history - a weaving of webs of dreams and of new utopias. Instead history must be approached as something 'scientific'. This history, however, conceived of a study of growth and development, could in turn become a counter revolutionary force; a "philosophic history" in the service of a politics of moderation. Here Hume, as Duncan Forbes brings out, differed from the other key writers of the Scottish Enlightenment in appearing to lack a degree of "sociological sophistication". Hume allowed a greater role for chance, accident, and the intentions of key actors in politics than a structuralist sociology, i.e. a through-going depth deterministic approach, would allow. But this difference is ambiguous, for on the one hand Hume appears to have had some aversion to the very idea that sufficient knowledge of the 'reality' of determinism could ever be arrived at that would enable such a structural analysis of history as Marx was later to provide, and yet on the other he feels the need to state that

there must be some scheme of natural flow, even if we are never to be a party to it. The first can give us a notion of history as resulting from decisions that men as individuals and temporary groupings have carried out, rather than presenting these men as giving decisions which however, result from intentional states implicit and understandable in their nature as objects and where these intentions result from causal conditions which must be carried out and are inexorably fulfilled by man. Man thus becoming the tools of other forces. Hume cannot, however, be seen as a champion of radical openness in human affairs, as an early proponent of the 'pragmatic' contingency of human affairs - the demand to give a proper foundation inherent in empiricism becomes too strong.

Man's choices are empirically explainable within the "natural" product that is society. Moreover, although the rules of justice are "artificial", this is an artificiality that has "naturally" come about and owes its necessity to natural process. The necessity of the rules of justice is not a utilitarian argument whereby man chooses as in a contract, as a mass act of will, but as participant in the machinery of social change. However, this understanding of participation in natural depth can itself be conservative, for if the constitution of the rules of justice was a process of utility then man could freely change the rules of justice as his abstract arguments from utility led him, but Hume's concept had an almost unchangeable notion of the rules of justice. The prospect of nihilism is denied but the price is a recourse to assumed function. As society has come about as a natural product, its structure is essentially superior to those ideas of social organization which any rationalist approach could give us.³⁷

What then are we to be guided by? The natural bonding of society flows out of the interaction of everyday life, and operates best when the naturalness of sympathy is undistorted by rationalist speculation. There is thus little cause for man needing to use reason to address 'the question of government', indeed "vulgar

sense and slight experience are sufficient". (E. p.195) "Justice" is not something which has its foundation in a body of first principles, but is basically the empirical interaction of single pieces of social behaviour, namely the "abstaining from the possessions of others". (T. p.489)

We can be secure in this, however, for although the "remedy" to the problem of "justice.. is not deriv'd [directly] from nature, but from artifice", the reality is that

"nature provides a remedy in the judgement and understanding for what is irregular and incommodious in her affections. (T. p.489)

As opposed to social contract theorists, the "convention [of justice] is not of the nature of a promise" but comes out of "a general sense of common interest": the actual mutual expression of which may produce resolutions in the nature of a promise, but any conception of a "state of nature" out of which man contracted "is to be regarded as a mere fiction" similar to the notion of "the golden age" which Hume refers to as an invented poetical notion. Reliance upon the notion of an original state, or state of nature is, for Hume, an alternative usage of the golden age motif.³⁸

To those "liberal" writers of the seventeenth century who are often thought of as Hume's predecessors, "civil society" - modernity's early presentation of a concept for its self-understanding - came about as a sudden act of individuals in pursuit of individual ends. For Hobbes

"the final Cause, End, or Design of men.. in the introduction of that restraint upon themselves (in which we see them live in Commonwealths), is the foresight of their own preservation..."³⁹

For Locke

"the great and chief end.. of Men's uniting into Commonwealths and putting themselves under government is the preservation of their Property".⁴⁰

For Hume there is no sudden decision - no break with the slow and gradual processes of nature. Instead the performance of the

virtue of justice, i.e. obedience to the rules of justice, is best conceived of as lying inside the gradual flow of nature which has operated through a vast amount of individual human actions. Nature has performed the task with great subtlety since these "rules by which property, right and obligation are determined, have in them, no marks of a natural origin, but many of artifice and contrivance". They appear "too numerous to have proceeded from nature" and "are changeable by human laws", yet "all of them have a direct and evident tendency to public good, and the support of society". Hume states that "this last circumstance is remarkable upon two accounts" and it is illuminating to follow his statement through. We read:

"first, because, though the cause of the establishment of these laws had been a regard for the public good, as much as the public good is their natural tendency, they wou'd still have been artificial, as being purposely contriv'd and directed to a certain end. Secondly, because, if men had been endow'd with a strong regard for the public good, they wou'd never have restrained themselves by those rules: so that the laws of justice arise from natural principles in a manner still more oblique and artificial. 'Tis self-love which is their real origin; and as the self-love of one person is naturally contrary to that of another, these several interested passions are oblig'd to adjust themselves after such a manner as to concur in some system of conduct and behaviour. This system, therefore, comprehending the interest of each individual, is of course advantageous to the public; tho' it be not intended for that purpose by the inventors." (T. p.528-9)

Thus the intentions of the "inventors" - judges, legislators, 'class-interests' and so forth - are not sufficient as causal entities to truly explain the evolution and operation of the system of justice. Even when we may observe evidence that law-makers create law for their own interest, for their own "interested passions" they are within the flow of nature with the result that they "adjust themselves" to "a system of conduct and behaviour": the whole of which gives a social benefit "not intended... by the inventors".

This idea that the actions of personally interested, selfish individual actors create in the totality of their actions a system of unintended consequences of natural beneficence is Hume's

presentation via natural jurisprudence of what Smith gives us in commercial economics. By this move the understanding, i.e. the use of reason, that man may apply in the 'public sphere' is deemed the same as that applied in the understanding of economics.⁴¹ The other function of the Aristotelian style system - the concern with moral well being and development of the citizens as oppose to their physical protection or economic welfare is also shown redundant. For Hume's "natural history of morality" sets out an alternative edifice to that where morality is taught through the abstractions of rationalism, i.e. what he identifies as the medium of religion. Through this we have avoided the fear of the mob, for it is now shown as not 'empirically' true that 'Si dieu n'existe pas, tout est permis' - the rules of justice still bind and the foundation of their hold can be demonstrated by the proper investigation of "natural history".⁴²

The knowledge of natural history and of the operation of the passions means that Hume can present against radical revolutionary change and the arbitrariness of the simple 'command version' of legal positivism the grand notion of an empirical, evolutionary "natural law" which preserves the strength of the law from easy change and charges of arbitrariness or partiality. In this there is no need for some fundamental set of innate ideas or external reference point, such as the existence of God, to give a basis to the moral sense of man. The growth and operation of natural justice can be accounted for by the facilities of human nature (self-love and some benevolence), the capabilities of human action (communication via sympathy and the restraint from seizing the possessions of others) and the entirety of social interaction (mutual recognition). In sum, as Duncan Forbes has commented, we have the first exclusively sociological conception of society and social change.

Hume does not expressly address the penal realm but an approach is implicit in his discussions of the progress from the 'unnaturalness' of the religious notions of equivalence to a

growing system of natural responses made possible by sentience - the response to offenders is becoming 'more natural' as the hold of religion decreases. The position of Law is an essential feature enabling the proper operation of the social body, and the modern creation of 'civil law' is an advancing product of the stream of nature placing together "industry, knowledge and humanity... by an indissoluble chain."⁴³ Social control is linked to social relationships and the interaction of the individual with his fellows, the tremors of social change can and will be contained through the expansion of the middle class, that "middling rank... who are the best and firmest basis of public liberty".⁴⁴ Through their participation in industry, and the indulgence in the "luxury" which follows men are socialised for peaceful cohabitation even with the greater social power and opportunities which the division of labour allows. Hume is somewhat dubious about the extent to which the crude power of government can be the instrument of social control. Naked government force, the visible coercive instruments at its disposal, are limited in their scope, instead custom and habit are the true restraining forces on man's rather asocial tendencies. Furthermore, it is the always present micro-situations in which man is interacting with his fellows that provide the actual restraint on his conduct, with individual man feeling the need to preserve his reputation, while being responsive to his internal sentience concerning the action of others. It must, then, be in the area of influencing "opinion" that true control lies. Adam Smith was even more specific in his argument that knowledge of the "natural sentiment of justice" (i.e. psychological impulse), could allow the substitution of either clear coercion, or the hold of religious belief and the transcendental idealism thereby associated - the influencing of the "collective judgments" of society was the key. Indeed, both Hume and Smith are united in seeing that the decline in the power of religion was giving a more 'natural' bent to social 'opinion', or in Smith's phrase the "moral sentiments" of society.⁴⁵ Hume holds that moral sentiments are common to all humanity and are empirical instincts "absolutely universal in all ages and

nations". The limited reflexivity of the common subjects is a problem as their superficial reflection results in religious feelings; moral sentiments are truer since they are a consequence of our active engagement with the reality of our social and material world.⁴⁶ An engagement which allows us "little leisure or inclination to think of unknown invisible regions".⁴⁷

III

As the true province of law, morality, and even the production of Hume's thesis lies for him 'within the current of nature', such a foundation throws into question the whole enterprise of doing 'moral theory' at all. What then is the role of philosophical discussion concerning moral distinctions under Humean empiricism?⁴⁸

Again Hume's target in describing morality is a pure model of rationalism: a model which gives man a morality which is the product of reason alone - a table of "abstract rational difference[s] betwixt moral good and evil" (T.p.466). Hume's first argument is that as morals have to do with practical life then 'moral philosophy' must be something which will

"influence our passions and actions, and go beyond the calm and indolent judgments of the understanding,[and]... since morals have an influence on the actions and affections, it follows, that they cannot be deriv'd from reason; and that because reason alone, as we have already prov'd, can never have any such influence. Morals excite passions, and produce or prevent actions. Reason of itself is utterly impotent in this particular. The rules of morality, therefore, are not conclusions of our reason". (T.p.457.)

The role of reason is secondary to the empirically operating mechanism of the world - Reason must serve only to bring to light what nature has decreed.⁴⁹

Hume now makes a further move, for not only is the distinction between good and evil not something that exists in the categories of reason but it is not even something that depends upon "any

matter of fact" discoverable by a simple positivistic investigation:

"Take any action allow'd to be vicious: wilful murder, for instance. Examine it in all lights, and see if you can find that matter of fact, or real existence, which you call vice. In which-ever way you take it, you find only certain passions, motives, volitions and thoughts. There is no other matter of fact in the case. The vice entirely escapes you, as long as you consider the object. You never can find it, till you turn your reflexion into your own breast, and find a sentiment of disapprobation, which arises in you toward this action. Here is a matter of fact: but 'tis the object of feeling, not of reason. It lies in yourself, not in the object. So that when you pronounce any action or character to be vicious, you mean nothing, but that from the constitution of your nature you have a feeling or sentiment of blame from the contemplation of it" (T. p.468-9).

Moral theory is only talk, its elements of 'reason' a superstructure which fits over the true, subjectivist economy of "certain passions, motives, volitions and thoughts" which run throughout and structure the reactions of the self. The naturalist 'truth' of the discourse of virtue or vice

"defines virtue to be whatever mental action or quality gives to a spectator the pleasing sentiment of approbation; and vice the contrary".

Punishment or reward, "the good or ill desert of virtue or vice" is a direct consequence of the moral sentiments - the sentiments produce a passionate reaction "attended benevolence or anger" and we desire to make happy the person we love and miserable the person we hate. The strength of these reactions will, Hume believes, be attenuated by the structure of the common life where continuing interaction with our fellow men is best suited to mild reactions

We thus return to where this chapter began; into the consideration of the Humean self and the interaction of social theory, conceptions of the self, and the interdependent structuring of the 'sense' of social relations. As in the chaos which the search for the self experiences in moving beyond the rules of everyday life so the justice of the social depends upon adherence to the settled rules of the social to prevent chaos.

The rules of the self and the rules of the social reflect the precepts of that epistemology.

IV

Postscript: Aspects of the modern legacy of Hume.

It is unnecessary to go at any length into the vast influence which the Humean imagination has had upon the subsequent development of modern ethics, moral and social theory. The is/ought division is but the most obvious reminder that above all Anglo-American society has been dominated in its moral thought by a Humean era. In that emotivism and many aspects of 'conventionalist' accounts of justice, however, depend upon the notion of men interacting together and simply pooling their statements of the "I feel..." or the "I think..." being the foundationalism they are somewhat of a development and departure from Hume.⁵⁰

Hume demanded rational (in the empiricist sense) justification for all layers of epistemological warrant. The epistemological tradition he has been seen as bequeathing has increasingly been unhappy with fictitious foundations for conventionalist accounts of justice. Subsequently fully explanatory accounts of empirical conditions need to be produced for the institution of justice, as for example, in the minimum content of H.L.A.Hart's empiricised Natural Law, which draws upon the Humean demand for justice as rules to depict the scientific constitution of a 'legal system' as the "union of primary and secondary rules". Hart's "minimum content of natural law", draws upon Hobbes and Hume to "see in the modest aim of survival the central indisputable element which gives empirical good sense to the terminology of Natural Law".⁵¹ Thus, assuming that

"our concern is with social arrangements for continued existence, not with those of a suicide club..... Reflecting on some very obvious generalizations - indeed truisms - concerning human nature and the world in which we live, show that as long as these hold good, there are certain rules of

conduct which any social organization must contain if it is to be viable. Such rules do in fact constitute a common element in the law and conventional morality of all societies which have progressed to the point where these are distinguished as different forms of social control."

Hart specifies "the salient characteristics of human nature" as a "content" which gives men the "reason for obeying voluntary" social rules. Society requires a "minimum of co-operation given voluntary by those who find it is their interest to submit to and maintain the rules" for without this "coercion of others who would not voluntarily conform would be impossible."

Moreover, Hart now proposes a division of labour. The philosopher, of the empiricist type, operates "to stress the distinctively rational connection between natural facts and the content of legal and moral rules" for which the minimum content suffices. Separately, the sociologist or psychologist has the task of investigating the empirical conditions of how a population develops or maintains such a moral code. They are not interested in the rationality (the debatable 'reason for') of their doing so as this has already been ascertained (at least in outline). Thus the positivist criminologist may search the schools, the sports clubs, the family rearing practices of the society with the aim of finding observable correlations as to the differentiations concerning behavioral outcomes (compliance regularities). This investigation and uncovering of the "causal connections" as to the maintenance of the social code must, implicitly, offer power to be placed in the service of the appropriate rationality of that code. The rationality of the code is a process which relates the content of legal and moral rules to the set of minimal truisms.⁵²

These are:

(i) Human vulnerability (i.e. the requirement of forbearance from violent activity, especially those concerning bodily harm);

(ii) approximate equality as a species characteristic (of personal bodily strength, in the face of death) (thus the requirement of mutual forbearance and compromise);

(iii) limited altruism (which makes the rules of forbearance necessary);

(iv) limited resources which produce the "static rules" which protect property and allow the production of food and goods without fear of disturbance. Dynamic rules flow from the division of labour required for the creation of adequate supplies and make possible the exchange of goods, the creation of obligations and promise keeping (contract). These obligations are not limited to private concerns but the system of social law itself wherein "individuals are enabled by words, spoken or written, to make themselves liable to blame or punishment for failure to act in certain stipulated ways." Thus "a standing procedure providing for such self-binding operations is required in order to create a minimum form of confidence in the future behaviour of others, and to ensure the predictability necessary for co-operation.

(v) Limited understanding and strength of will, for while "the facts that make rules respecting persons, property and promises necessary in social life are simple and their mutual benefits are obvious [and] most men are capable of seeing them and sacrificing the immediate short-term interests which conformity to such rules demands.... neither understanding of long-term interest, nor the strength or goodness of will... are shared by all men alike.... All are tempted at times to prefer their own immediate interests, and, in the absence of a special organization for their detection and punishment, many would succumb to the temptation."

This acknowledgment of what is known in criminology as "control theory", i.e. that crime is caused by the absence of restraints, is linked by Hart to a theory of punishment which accepts another rationale for the act of punishment, namely, "as a guarantee that those who would voluntarily obey shall not be sacrificed to those who would not". Punishment ensures on behalf of those who do obey that no advantage shall be gained by not obeying. "The core of good sense in the doctrine of Natural Law" determines that

"given the setting of natural facts and aims which makes sanctions both possible and necessary in a municipal system, that [punishment] is a natural necessity".⁵³

Two points: first the image of doing social theory, in this case the jurisprudence of 'descriptive sociology' (as Hart terms his

project), that is presented is one of 'reading the facts of the world' in the light of our overriding interest (in this case survival) and then using the human facility of reason marking proper content from the irrelevant. In the construction of theory the 'aim of survival' is held as the referential point and the facts of the world studied, interpreted by our reasoning facilities and specific projects of action result. Moreover,

"it is important to observe that in each case the facts mentioned afford a reason why.. law and morals should include a specific content. The general form of the argument is simply that without such a content laws and morals could not forward the minimum purpose of survival which men have in associating with each other."

It is the content of these facts that provide the reason for observation of the law - this is a reason which Hart tells us is to be viewed differently to flows of determinism for it is the making apparent the link between the facts, survival, and the content of law and morals which serves to mediate between the facts of the natural predicament of man and the products of his activity, i.e. law. But what are we going to be instructed? The second point is how are these facts known to man, what is the construction of the methodology whereby they reveal themselves and what is the warrant for accepting them? (i.e. the epistemological question). Hart does not turn to any 'sociology', this is no confrontation of disciplines, there is no exercise in translatability, no demonstration of the foundations by which commensurability is accomplished. Instead this is an exercise of the mind, essentially the facts of the world do not need to be positioned in some explicit methodology of revelation since they are (assumed to be) self apparent to reasonable reflection. Moreover, it is apparent that

"contrary to Hart's claim that he is providing us with an empirical version of natural law, the relationship which he asserts to exist between a society and the existence of mutual forbearances is true analytically, and we do not have to go beyond his specification of 'society' in order to find the idea of 'mutual forbearance' as inextricably bound up with it, and this would be true independently of any observations we might make."⁵⁴

The movement of the intellect is thus a movement in the present,

for the present, i.e. it serves to make the operation of the present 'rational', and, in the tradition of empiricist metaphysics, 'natural'. This is, in the end, the internal manoeuvrings of a world view, i.e. the organization of the conceptual framework of the inquirer, which, because it is denied as such, closes itself off to pragmatic conversation.

John Rawls, in his influential Theory of Justice, links directly with the Humean contention of the primacy of moderate scarcity and limited generosity. Although drawing important distinctions, for example on the role of the self, for Rawls "given the limited role of reflection, the virtues of benevolence and love, as features of the good, are forms of sentiment rather than insight, ways of feeling rather than knowing".⁵⁵ Michael Sandel concludes that for Rawls it is essentially an "epistemological deficit" which makes necessary the rules of justice rather than any shortage of benevolence. It is thus this epistemological deficit, which is in the nature of the subject (i.e. the relationship between man and inquirer) and insurmountable, rather than the question of benevolence which is something "variable and contingent", that requires justice for its remedy and so accounts for its pre-eminence.

"Where for Hume, we require justice we do not love each other well enough, for Rawls we need justice because we cannot know each other well enough for even love to serve alone".⁵⁶

This, however, is to overlook the fact that it is an epistemological deficiency that drove Hume back into a privileging of the common life. A very denial of pure knowledge and truth other than as inherent in the apprehensions of the common life - justice must come out of and reflect the moral presuppositions of that common life; and although we do not have the kind of knowledge capable of creating an absolute justice, indeed the very notion is absurd, we do have the forms of knowledge of the common life. What creates the sense of justice, in a truly Humean sense rather than a Rawlsean, is that background set of popular conceptions and ideas which the Humean history was itself to contribute to. For Hume it is essentially

local knowledges embedded in the historical order which provide the substance for the rules of the present and wherein the framework of the present is justified by a narrative relation with the events of the past - the dilemma is that for Hume the justification, as opposed to the sense of the rules, must transcend the shallow foundations which localism appear to condemn us to, a justification he can never demonstrate. (Although pragmatism is latent in Rawls Theory of Justice⁵⁷ we saw see in our discussion of pragmatism in Chapter Seven Rawls' latter articulation of his theory of justice is expressly pragmatic.)

This legitimative strategy is most dramatically demonstrated in the work of Karl Popper. In The History of Our Time: An Optimist's View⁵⁸ Popper uses historical narrative to achieve the granting of pride to the present, and thus distinguish the 'providentialist Historicism' he elsewhere criticises,⁵⁹ and which serves up an array of narrative relations between present and future existences.⁶⁰

The question of Participation.

The line which Hume's contemporary, Rousseau, took on political participation was in many ways the opposite to Hume and has become enshrined in much of the political rhetoric of modern democracy. For Rousseau a full moral life for individuals in society is inconceivable without active participation in political society, the general will, participation in "the common unity". The spread of the right to vote now encompasses all - and participation appears as a strong candidate for the primary political ideal of modern "democratic" society, indeed Daniel Bell has called it the motif of the post-industrial order.⁶¹ Participation has been identified with voting in elections, and further with party affiliation. The state of voting at elections and the membership of political parties can thus be used as a mirror reflecting the general social health of various societies, and, crucially as a measure of 'alienation'. Thus the reported decline in percentages of people voting, and membership of

political parties, correlated with the increase in the crime rate, can be used as an index of growing social alienation (including a lessening identification with dominant social institutions, which then becomes a plausible criminogenic variable).

The Humean perspective is radically different. The main political stage is but one arena and the individuals who dominate there are seen as extreme in their interest - political activity and involvement is not the route to social progress, indeed Hume's neostoicism portrays central government more as a vice to be endured rather than an opportunity for progressive participation.⁶² The alternative route for social progress is increasing the level of education in society and membership of associations and clubs and developing one's self. Modern society is an organizational society and the Humean thesis holds that sensible participation is more likely to be achieved through a range of memberships of these organizations. Thus voting figures may not be an adequate guide to participation. Further, the Humean attitude to the institutional mode of modernity is instrumental - a certain distance is to be kept from the official ethos of the very organizations that one inhabits. 'Society' is in reality a term used to cover the terrain of these various manifestations, it is, therefore, impossible to talk of the 'social good', or of the ranking of public goods to achieve the 'just state' - that rather is the outcome of interaction and compromise. Not only is this picture of the composition of society radically at odds with notions which stress a complete identification with the ranking of goals but also in the conception of law which is engendered. It is much more conducive to a notion of law as resulting from bargaining and compromise among various organizations and individuals than any notion of the glorious rationality of law, a notion which appears, for example, to be present in some descriptions of the codification process of Continental Europe. Reaction to breaches of such laws in the Humean legacy can then be much more instrumental and 'sensible' than the 'morality bound', primarily retributive,

sstrategies of figures in the legacy of Kant and Hegel, for instance. However, to deny the emotional and common sense responsive elements to punishment is to ignore Hume's 'natural legitimation' for punishment.

Liberal tolerance is a sentience which Hume's neostoicism can be seen to help put into place. For to Hume the spheres of one's interests extend outwards in circles from one's self, the control of one's destiny and thus the achievement of happiness is best assured by the control of one's self, by the proper mastering of one's emotions, and by the running of one's family, friendships, associations, and only latterly by affairs of government. The conduct of government should, therefore, not be seen to interfere with the operation of the common life without good reason. The mastering of one's emotions allows an increase in the range of activities which the individual can observe in society without feeling outrage and moral turpitude.

Furthermore, the concentration away from the notion of a truly public participatory realm of the 'political' means that there need be no truly comprehensive "public philosophy", or substantive political philosophy. There can instead be as many varying conceptions as there are organizations, clubs, or other kinds of 'interest groups' to voice them. But in acknowledging this the stability of the static justice of Hume is given up for a non-reflexive development of Humean institutionalization. A resultant social order in which justice becomes equivalent to the 'Criminal Justice System', or 'The Institution of Justice',⁶³ with a stress upon Hartean style rules of recognition, change and adjudication and in which an appeal 'to doing justice' is an appeal to observing the correct procedure, the correct observation of rules. MacIntyre complains that

"the function of that system is to enforce an order in which conflict resolution takes place without invoking any overall theory of human good."⁶⁴

Of course a great deal of the criticism of what has been elsewhere called the 'consensus' school of criminal law, and what

has often focused around a simplistic reading of Durkheim (who can be seen as combining many features of both Hume and Kant), is that the rules of criminal law do reflect the moral principles and feelings of the society. To the reflexive pragmatist the problem is not the denial of some monolithic conception of social existence but that this operation of 'justice' refuses to acknowledge that its rules are methodological guides of social existence whose existence points us always to the questions of how life is to be lived, rather than to the sanctity of rules.

We may amplify this by saying that the rules of justice should be seen as 'expressive' and are not themselves the reality. Durkheim touches on this when he talks of the rules in terms of mediation. For Durkheim, following Hume, human passion and social sentiment are the core of punishment. Punishment is the effect of the arousal of reactive instincts, the emotional response to the occasion of deviance, to the observation of wrongdoing by individuals. It comes about because the sight of crime, the impact of deviance, offends against the sensibilities of the individuals apprehending; collectively it offends against the 'conscience collective' which, and here is the grand assumption, all individuals of the society have apprehended, intuited and partaken of. The punitive reaction comes about as a sense of disequilibrium experienced in the individual psychic, in the upsetting of that sense of settled expectations concerning behaviour which the individuals of a society share. The nature of penal organisations and the severity of punishment is a reflection of the forms of social organisation within a society. As a society moves from a simple undifferentiated form to one characterised by complexity, functional specialization and increasing interdependency of societal tasks, a movement from "mechanical solidarity" to "organic", the forms and intensity of punishments change. Durkheim's early writings clearly display a realist epistemology behind his positivism; his work has spawned an ideology of viewing punishment wherein punishment is a necessary function of the social body to regulate itself and to protect itself from disintegration. The varieties of punishment,

or penalty in Garland's terminology, are seen to be naturalistically reduced to a unitary phenomena which protects a coherent society from the harm of the every present crime. This early writing clearly demonstrates the weaknessness of an empiricist metaphysic and has been justly criticised.⁶⁵ An even more rewarding task, however, would be to trace the self-deconstruction of Durkheim's realist and naturalist conception of society into the complex contingency of his proto-pragmatic later writings where society becomes the creator of individuality, but the society which individuals are subordinated to is not a naturalistic reality with set functions, not an organ devised to satisfy material needs in some version of Hart's natural law, but a system of ideas evolving into complexes of greater complexity, differentiation and contingency.⁶⁶ That analysis would have the task of showing that in the hands of its greatest exponent empiricist methodology can but offer descriptions of human phenomena, its ambition to offer us the truth of the human condition, becomes, under the impact of reflexivity, the ambition to offer greater and greater ranges of questions, data, and imponderables.

NOTES.

1. We historically recognise Hume as the greatest empiricist builder of modernity [A representative work is Farhang Zabeeh, Hume: Precursor of Modern Empiricism, Martinus Nijhoff, The Hague, 1973.]; the father figure of anglo-saxon positivism, and in turn, of behavioral reductionism. Hume the social/moral philosopher of the common life of the anglo-saxon world; Hume and Smith together the philosophers of commercial modernity. In this chapter the first half shall attempt a reading of Hume that is actually more pragmatic than his usual interpretation, the second part moves to the more traditional empiricist.

2. David Faith Norton, David Hume: a common-sense moralist, sceptical metaphysician, Princeton University Press, Princeton, 1982, p.3.

3. Smith, Norman Kemp, The Philosophy of David Hume: a critical study of its origins and central doctrines, Macmillan, London/New York, 1941.

4. Stroud, Barry. Hume, Routledge & Kegan Paul, London, 1978, p. 14.

5. Phenomenology of Spirit, para 69, quoted in W.T. Murphy, "The Habermas Effect: critical theory and academic law." Modern Law Review, Forthcoming.

6. The Philosophical Discourse of Modernity, p.296.

7. Ibid., p.296.

8. Duncan Forbes, Hume's Philosophical Politics, Cambridge University Press, Cambridge/London/New York, 1975.

9. David Faith Norton, David Hume: Common-Sense Moralist, Sceptical Metaphysician, Princeton University Press, Princeton, 1982.

10. Frederick G. Whelan, Order and Artifice in Hume's Political Philosophy, Princeton University Press, Princeton, 1985.

11. David Hume, A Treatise of Human Nature [1739-40] L.A. Selby Bigge (ed.), 2nd Edition, text revised by P.H. Nidditch, The Clarendon Press, Oxford, 1978. All further references to this text are contained in the main body annotated as (T.p.)

12. David Hume, Enquiries concerning Human Understanding and concerning the Principles of Morals, [1777] Introduction and Index by L.A. Selby-Bigge, 3rd ed., text revised and notes by P.H. Nidditch, The Clarendon Press, Oxford, 1975. All further references to this work are contained in the text and annotated as (E.p.).

13. The extent to which this interpretation of Hume's deliberations upon the self undercuts the Liberalism of the Lockean legacy can be seen by contrasting its effects with MacPherson's summary: "the possessive character of individualism in the 17th Century was found in its conception of the individual as essentially the proprietor of his own person or capacities, owing nothing to society for them. The individual was seen neither as a moral whole, nor as a part of a larger social whole, but as an owner of himself. The relation of ownership, having become for more and more men the critically important relation determining their actual freedom... was read back into the nature of the individual. The individual, it was thought, is free inasmuch as he is proprietor of his person and capacities. The human essence is freedom from dependence on the wills of others, and freedom is a function of possession." C.B. MacPherson, The Political Theory of Possessive Individualism: From Hobbes to Locke, Oxford University Press, London, 1962, p.3.

Let us remember that Locke places the reason for men forming society as the protection of their property and yet the basis of private property was the interaction of a self enclosed 'self' and the objects of the world:

"though the Earth, and all inferior Creatures be common to all Men, yet every Man has a Property in his own Person. This no Body has a right to But himself. The Labour of his Body, and the Work of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left in, he hath mixed his Labour with, and joined to it something that is his own, and thereby makes it his Property." [Locke, Second Treatise, sec. 27.]

14. Lord Kames, Essays on the Principles and Natural Religion, pp.190-191. See discussion in David Faith Norton, pp.186-7.

15. Alasdair MacIntyre, After Virtue, p.199.

16. Immanuel Kant, Prolegomena: to any metaphysics that can qualify as a science, Paul Carus, trans., Open Court, Illinois, 1902. p.9.

17. Kant, Critique of Pure Reason, Norman Kemp-Smith Translator, New York, 1965, p.257.

18. Ibid, p.513.

19. Ibid, p. 514.

20. G.W.F. Hegel, Science of Logic, A.V. Miller (trans.), George Allen & Unwin, London, 1969, p.483.

21. F. Nietzsche, The Will to Power, Walter Kaufmann translator, New York, Random House, 1967, p.300.

22. Ibid., p.278.

23. Ibid., p.290.

24. On Certainty, p.16

25. Popper, Conjectures and Refutations, pp. 4-5.

26. As we saw in the first section confidence in the self as the ultimate site for secure knowledge is difficult since although Hume's concern is to identify the grounds of our knowledge of "matters of fact and existence", and in this he doubts any ground of certainty or logical validity for possible knowledge beyond the immediately private, and transient existence of our perceptions themselves the 'self' is but a "theatre" where perceptions continually appear, depart and reappear. It cannot be the site since we then need a mechanism to discipline these happenings.

27. Donald Livingstone observes that "the ultimate system which Hume officially adopts is pure theism". As Livingstone points out, however, this is no traditional religious theism. [The Natural History of Religion, H.E. Root (ed.), Adam and Charles Black, London, 1956, referred to in the text as (Natural History. p.), had given a naturalist explanation for man's religious

belief in the demands of psychological need.] From the observation of the complexity of the world we are led to suppose some purpose or design and from this we are led to the maxim of an intelligence which is "single and undivided". Thus: "even the contrarieties of nature, by discovering themselves everywhere, become proofs of some consistent plan, and establish one single purpose or intention, however inexplicable and incomprehensible". (Natural History of Religion p. 74, quoted in Livingstone, prev cit., p.178.) Livingstone contends that "advanced scientific knowledge might well collapse without this belief" seeing this as "a new and specifically Humean insight". Whereas "Newton, Boyle and others had argued that scientific reasoning can provide independent grounds for the belief in a supreme intelligent author, Hume is arguing the other way, that belief in a supreme intelligent author is a ground for scientific thinking". Ibid., p. 179.

28. Adam Smith, The Theory of Moral Sentiments, [1759] D. Raphael and A. Macfie (eds.), The Clarendon Press, Oxford, 1976, both this and the earlier quote are from p.114-5.

29. Whose Justice? Which Rationality?, p. 250.

30. Whose Justice? Which Rationality?, p.258.

31. "The actions of matter, are to be regarded as instances of necessary actions: and whatever is in this respect on the same footing with matter, must be acknowledged to be necessary." (T.p.410). Moreover, "in the communication of their motion, in their attraction and mutual cohesion, there are not the least traces of indifference or liberty. Every object is determined by an absolute fate to a certain degree and direction of its motion, and can no more depart from that precise line, in which it moves, than it can convert itself into an angel, or spirit, or any superior substance". (T.p.400)

32. In the Enquiries Hume states: "What would become of history.... How could politics be a science, if laws and forms of government had not a uniform influence upon society? Where would be the function of morals, if particular characters had no certain or determinate powers to produce particular sentiments, and if these sentiments had no constant operation on actions? And with what pretence could we employ our criticism upon some poet or polite author, if we could not pronounce the conduct and sentiments of his actors either natural or unnatural to such characters, and in such circumstances? it seems almost impossible to engage either in science or action of any kind without acknowledging the doctrine of necessity, and this inference from motives to voluntary actions, from characters to conduct". (E.p.90)

33. The conclusion to modernity's problem of grounding - scientific naturalism, which Hume portrays as the resolution to his sceptical crisis, involves in the terms of Hume's narrative the operation of nature behind this choice [i.e. of the return to the common life], but the signification of Hume's act of narration - the required effect upon the audience - is one of normative acceptance and acquiescence as to the naturalness of the audiences likewise behaviour.

The program for political moderation, a program for some reliance upon habit, custom, caution and diffidence in reasoning and a critical stance toward all non evident contentions amount to a program derived from Hume's analysis of the way the world is. Either that is the case or Hume's normative stance is but the beginnings of a tradition for modernity the ultimate foundation of which is a considered act of philosophical choice. Note that Hume does not fall into the logical premisses of his 'is' 'ought' trap. He does not base his normative stance upon his possession of a certain number of absolute truths in a positive sense. Indeed his position derives from the skeptical crisis entailing the absence of such truths, but out of this he provides a solution which in itself must amount to some form of claim to a "truth of Hume's empiricist meta narrative".

34. The History of England, Oxford, 1826, vol vii, p.136. The substance of this argument is reproduced by Popper in his The Open Society and its Enemies.

35. Individual freedom can be best ensured by making clear the relationship between the public and the private worlds in which individuals found themselves. We must not expect too much from the promises of the public, for if we were to commit the fallacy of pinning our hopes and fears upon the external public realm of the politics of the state we risk losing the moral control we have over our own lives and happiness. It was not the role of government to instruct as to the proper ethical formulation of the social order, instead the proper role of the state should be to react to and help further the functional needs of the natural social body - to obey the imperatives of empirical operation and naturalist desire.

36. Duncan Forbes reads Hume as offering the contrast between "modern regular government and medieval irregular government, where the personality of the king was all-important and respect for the rule of law, as such, weak or non-existent. In such circumstances men who would have made excellent kings in a modern monarchy were bad kings". Forbes suggests Hume as "a remote ancestor, in a general sort of way, of Max Weber's essentially bureaucratic modern state". See "Hume and the Scottish Enlightenment", in Philosophers of the Enlightenment, pp 94-109. This attribution, however, can only be right in the sense that Hume links regularity and constancy of expectation within boundaries to a constancy of behaviour.

37. A key example is the idea of distributing property according to the principle of desert, as opposed to the Humean defence of present possession (lawful possession that is). In the Treatise Hume had suggested that the sentiment of sympathy would lead men to consider equality type considerations (his own version was that a deserving man would be given goods over an undeserving man), however, this appears as an anomaly to the rigidity of the rules. In the Enquiries Hume considered the rationalist imagination as giving rise to social change by inducing men to pursue an abstract ideal - again that of distribution by desert. "A creature, possessed of reason, but unacquainted with human nature, deliberates with himself what rules of justice or property would best promote public interest, and establish peace and security among mankind: His most obvious thought would be, to assign the largest possessions to the most extensive virtue, and give everyone the power the power of doing good, proportioned to his inclination. In a perfect theocracy, where a being, infinitely intelligent, governs by particular volitions, this rule would certainly have place, and might serve to the wisest purposes: but were mankind to execute such a law: so great is the uncertainty of merit, both from its natural obscurity, and from the self-conceit of each individual, that no determinate rule of conduct would ever result from it: and the total dissolution of society must be the immediate consequence". (E.p.192-3) Hume thus gives some recognition to the argument from desert but counterposes arguments based upon his 'empirical' knowledge of human nature and the conduct of history - its overturning of the Treatise position where in the conflict between sympathy and justice, justice wins, may reflect his growing concern with historical analysis. It also can be seen as an argument that the use of reason must necessarily take place in an imperfect world and be combined with the evidence of the empirical investigations and information thus created as to the operation of the world. The correction of reason by experience.

38. Hume draws us into a distrust for rationalist approaches to the notion of justice by the rhetorical use of a social principle of parsimony - he states that if the "rule" of justice "be very abstruse, and of difficult invention" then society must "be esteem'd in a manner accidental, and the effect of many ages". Hume's position is that a low degree of rational speculation is required to grasp the concept of justice for the rule of justice is nothing other than "the rule for the stability of possession"; a "simple and obvious" position such "that every parent, in order to preserve peace among his children, must establish it; and that these first rudiments of justice must every day be improved, as the society enlarges". (T.p.489) Man's natural condition require such rules of justice since what is "to be regarded as certain, is that it is only from the selfishness and confin'd generosity of men, along with the scanty provision nature has made for his wants, that justice derives its origin". (T.p.495) Although the operation of justice may involve the articulation of principles which assume the character of universality and generality these, important as they may become for the continual operation of the system of justice, cannot be considered essential to its origins or its actual binding force: since "'tis certain that the

imagination is more affected by what is particular than by what is general: and that the sentiments are moved with difficulty, when their objects are, in any degree, loose and undetermined".(T.p.580) The defence of the institution of justice is essential and this is superior to the possible wrongness of the particular: "Whereas a single act of justice, considered in itself, may often be contrary to the public good... 'tis the concurrence of mankind, in a general scheme or system of action, which is advantageous". Thus "before any tribunal of justice" it may be "an instance of humanity to decide contrary to the laws of justice... the whole scheme, however, of law and justice is advantageous to the society".(T.p.589) Further, once the rules of justice have been established they are "naturally attended with a strong sentiment of morals; which can proceed from nothing but our sympathy with the interests of society".(T.p.579-80, emphasis in the original)

39.Thomas Hobbes, Leviathan, Oxford University Press, Oxford, 1909, Part III, ch.17, p. 128.

40.John Locke, Second Treatise on Government, Peter Laslett (ed.), Cambridge University Press, Cambridge, 1960, para 124.

41.The effect of this is to transform the importance of the knowledge which, for example, a 'jurisprudent' can lay claim to. Jurisprudence, began in the position of 'the Queen of the social sciences, it will end the period of the dominance of Hume as "descriptive sociology". (H.L.A.Hart, The Concept of Law.)

42.Smith is often more cutting: his own foundationalism includes at times the hint of religion. In the Wealth of Nations Smith presents arguments for increasing the general level of prosperity of all citizens - but he is also minimising the role of politics. As if to go beyond Hume and expose the underbelly of modern society Smith states "civil society so far as it is constituted for the security of property, is in reality instituted for the defence of the rich against the poor, or of those who have some property against those who have none at all".(Quoted in Gey, The Enlightenment: an interpretation, p.366-7) The growth and extension of the middle classes is crucial for social order since "no society can surely be flourishing and happy, of which the far greater part of the members are poor and miserable". Grey also brings out the extent to which Smith related the condition of individual men to their experience of the division of labour and the environment they experienced.

43."On Refinement in The Arts", in Essays, Moral, Political, and Literary, Clarendon Press, Oxford, 1966, p.278.

44.Ibid., p.284.

45.Smith's jurisprudential project was to create a "Theory of Moral Sentiments" without reference to the grid templates of theology - thus the task was to throw open the terrain of civil

society to investigation and plotting in such a way as the resulting information occupied the same plane of commensurability as information of human nature - thence could be produced psychic maps of men's sentiments and a scheme for the mapping (and by extension, prediction and control) of their opinions and conduct. Moral sentiments differ from religious because they are direct passions while religious conceptions are secondary effects of such passions.

46. For "industry" we may read early capitalism, and the link between humanity and knowledge appears as the empirical version of man's assent via guidance by knowledge. To a certain extent Hume is concerned to make sense of what appeared to many as the softer sentiments of the times. It was only seven years after the death of Hume that Samuel Johnson was bemoaning the loss of the convincing effect of public hangings (1783; 1746 being the last that the heads of traitors were struck at the Temple Bar) and one can see Hume as reflecting that movement whereby "humanity was acquiring the status of a practical virtue". (Grey, The Enlightenment, p.36.) It must be an ongoing subject for analysis to ascertain the extent, and under what conditions, did the fashionable participation in the spectacle of the hangings or a good torture and the cheering of the punishment of religious dissenters - those feelings which the civilized characters of Moliere's plays experienced - become reduced in the imagination of the theorists to a phenomena which was addressed to the mob alone. Both Hume and Smith demonstrate how the concept of "compassion" or "sympathy" was developing and becoming fashionable as part of the conservative imagination - even in the individualist texts of Defoe, for example, as his description of the young thief in Colonel Jack (1722) as the product of his environment shows - at the same time as it was being theoretically reduced to "natural sentiment".

47. Natural History, p. 21 and 31.

48. In the Enquiries the problem is set thus: are morals "derived from Reason, or from Sentiment; whether we obtain the knowledge of them by a chain of argument and induction, or by an immediate feeling and finer internal sense; whether, like all sound judgments of truth and falsehood, they should be the same to every rational intelligent being; or whether, like the perception of beauty and deformity, they be founded entirely on the particular fabric and constitution of the human species". (E.p.170) Hume's aim is to achieve a "reformation in all moral disquisitions and reject every system of ethics, however, subtle or ingenious, which is not founded on fact and observation". (E.p.175)

49. Thus Hume declares that the process whereby incest is allowed in the animal kingdom and not in the human is not because man has through his reason declared its "turpitude" stating he ought to be bound by a mode of action, as this is to argue in a circle "for before reason can perceive this turpitude, the turpitude

must exist; and consequently is independent of the decisions of our reason, and is their object more properly than their effect". (T.p.467)

50. See A. MacIntyre in Whose Justice? Which Rationality?, p.339.

51. The Concept of Law, pp.189-95. Following quote is from pp.188-9.

52. Note that under this division of labour the role of the criminologist is extremely narrow. He cannot be involved in the debate over the content of legal and moral rules - which we may on other occasions call the question of setting out the socially acceptable conceptions of the social, human good - that instead is, somehow, to rest upon a set of rather barren "very obvious generalizations". What is a task readily available is the whole task of collecting, measuring and correlating the various preferences and behavioral regularities, the sense of which requires the assumption that the first process has previously been successfully accomplished.

53. Ibid., p. 195. Emphasis in the original.

54. Robert N. Moles, Definition & Rule in Legal Theory: A reassessment of H.L.A.Hart and the Positivist Tradition, Basil Blackwell, Oxford, 1987, p.217.

55. Michael Sandel in Liberalism and the Limits of Justice, p.170.

56. Ibid., p. 172.

57. Rawls' 'reflective equilibrium' is a notion in line with the pragmatic reading of Hume, his 'original position' is, however, an attempt to escape the pragmatic imagination by construing a set of points outside of what we later call living language games. These serve to preserve a notion of 'consensus' and enable the games to be judged and a foundation to be conclusively established. But these points cannot but be postulations, suppositions required for the logic of the project to bite, their strength therefore is determined, in pragmatic terms, by their persuasive force.

58. In Conjectures and Refutations, pp.364-376.

59. Cf. The Poverty of Historicism, London, 1957.

60. See the discussion in Livingstone, prev. cit., Chapter 11, "Politics and providential History", pp.285 ff.

61. Bell, The Coming of Post-Industrial Society, p.12.

62. See on neostoicism generally, Gerhard Oestreich, Neostoicism and the Modern State, Cambridge University Press, Cambridge, 1982. Oestreich specifically ties neostoicism into the development of a social individual whose inner psychic makes possible an easy subordination to the external authorities of politics.

63. See works such as H. Gross, A Theory of Criminal Justice, Oxford University Press, Oxford, 1979.

64. Whose Justice? Which Rationality?, p.344.

65. See, for example, David Garland, "Durhkeim's Theory of Punishment: a Critique", in The Power to Punish. In many texts of 'traditional criminology' Durhkeim is the standard 'straw man' wheeled out to present 'consensus theories of law and punishment'.

66. The later writings referred to are The Elementary Forms of Religious Life, Allen and Unwin, London, 1976; and the essays in Sociology and Philosophy, D. Pocock (trans.), Cohen & West, London, 1965, particularly "Value Judgments and Judgments of Reality".

Chapter Six: The Kantian project and its relation to the "edifice" of knowledge.

I

For Kant it was central to the post-Enlightenment construction project to distinguish the 'social' from the 'natural'. The development of man's 'humanity' lay in terms of self-imposed rather than naturally conditioned ends and activities. The Kantian man

"was not guided by instinct, not nurtured and instructed by ready-made knowledge; rather he should bring forth everything out of his own resources. Securing his own shelter, food and defence....all amusement which can make life pleasant, insight and intelligence, finally even goodness at heart - all this should be wholly his own work."¹

Man stands alone - his special dignity is something he creates, social interaction is 'human' and not under the tutelage of 'natural flow'. Whence then did man stand? Man the reasoning being stood within the space between progress and knowledge - movement was based upon knowledge and this required a self-conscious awareness as

"reason does not work instinctively but requires trial and instruction in order to gradually progress from one kind of insight to another."²

Hume's project is exposed as being of limited ambition, his dilemmas overcome if we choose the rationalist path where our guide is the light of "pure reason...a sphere so separate and self-contained"; one not liable to subjective contamination or arbitrary desire, and is also one complete where

"we cannot touch a part without affecting all the rest. We can therefore do nothing without first determining the position of each part, and its relation to the rest; for as our judgement cannot be corrected by anything without, the validity and use of every part depends upon the relation in which it stands to all the rest within the domain of reason.... In the sphere of this faculty you can determine either everything or nothing".³

For his part Hume

"did not suspect [the existence] of such a formal science, but ran his ship ashore, for safety's sake, landing on scepticism, there to let it lie and rot: whereas my object

is rather to give it a pilot, who, by means of safe astronomical principles drawn from a knowledge of the globe, and provided with a complete chart and compass, may steer the ship safely, whither he listeth."⁴

Kant's reaction to the developing edifice of knowledges was ambivalent. The image of power was unmistakable, but Kant understood the aim of this advancing edifice as being to embrace all of reality, all events and activities, both of physical substance and man's actions, into a unified system, explainable in terms of the universality of cause and effect. Furthermore, the dominant model, which took Newtonian physics as its guide, meant that the style of the structure that was gaining ascendancy was undoubtedly the inclusion of knowledge related to actual sense experience and primarily generalizations which could be derived by induction from such experience. This threw into question the role of those concepts formally identified as metaphysical. Notions such as "God" and "freedom" - Hume had said of books containing metaphysics to consign them to the flames, as they contained "nothing but sophistry and illusion" - was "God" and "freedom" then to be renounced? What then would be universal and absolute about the 'human'?

Response was doubly problematic, as this new edifice was superseding other, extremely rigid structures: namely those models loosely based upon the scala perfectionism, either of Christianity, or continental rationalism as exemplified by Spinoza or Leibniz. The new empiricist approach was occasioning discoveries and methodologies at odds with the primarily mathematical model of those rationalistic structures and their strong emphasis on the relation of ideas to each other, especially as many of these ideas were increasingly shown to bear little resemblance to things as they were coming to be 'objectively demonstrated' by the empiricists.

There could, however, be doubts. Firstly Kant could not metaphysical concepts could actually increase our knowledge in the way empirical science was showing itself able to. Secondly Hume's anti-inductionist argument appeared to render scientific

knowledge actually a form of non-knowledge. The certainty of empiricism relied upon the principle of causality and the success of inductive inference; but the criticism of inductive inference appeared to lead inextricably to scepticism. There appeared need, therefore, of a structure which would overcome both the dogmatism of current rationalism and the implicit scepticism of Humean style empiricism. Furthermore, this structure would have to face the problem of what to do about that area of "reality" the character of which was distinctly "human". Notably, the experiencing of choice, the self-consciousness of the 'self', self-reflection on human behaviour and the 'meaning' of that behaviour as well as the concepts of freedom, God, duty and normative law. Were these to be absorbed into a mechanical world? Kant also thought any successful structure should be self-referring; in other words, it should contain an explanation of the relation of human understanding in the construction of such a structure. Both this understanding, the materials of the structure, and by extension the character and style of the enterprise, were to be supplied by the path of critical philosophy.

The preface to the first edition of the Critique of Pure Reason had set this out clearly:

"Our age is essentially an age of criticism, to which everything has to submit. Religion, on account of its sanctity, and legislation on account of its majesty, both try to withdraw themselves from it. But they then straightaway arouse just suspicion against themselves and cannot claim that sincere respect which reason grants to whoever has been able to withstand its free and open examination."

Critical understanding also addressed the question of what, and how, can understanding and reason know, apart from experiences. In this way critical understanding did not destroy metaphysics, but provided a "single and sudden revolution" which cleared the way for true metaphysical understanding.⁵ Philosophy was asked to turn its critical attention to the constitution, power and structure of human reason itself - to perform a "Copernican" reversal of perspective.⁶ The primary examination of science was the scope of the Critique of Pure Reason, and the handling of

this knowledge of the nature of the world, and man's moral responsibilities and social obligations which constituted his special 'humanity', that of the Critique of Practical Reason.⁷

II

Predecessors to the Kantian System.

The Cartesian definition of philosophy found in the Principia was "the study of wisdom", which he equated to "the perfect knowledge of all one can know", in effect a constriction to a philosophy of knowledge which demanded a secure reference point (and thus not wisdom). This knowledge, in a form of self revelation, was utilizable "for the conduct of life"(morals), "the conservation of health"(medicine), and "the invention of all the arts"(mechanics).

Descartes drew a metaphorical picture of the edifice of knowledges with his "tree picture", the roots of which were metaphysics, the trunk was physics, and whose branches were composed of morals, medicine and mechanics. In his explanation of this edifice stress is placed upon the trunk (physics: as it was for Bacon and Galileo), with the "roots" being only investigated in so far as they provide a firm foundation for the trunk. Thus the substance of the Discours de la methode, which provides the conducted tour of this structure, is revealed to be a physics based upon a presentation of the grounding of metaphysics. Physical/natural science was grounded not upon sensation and probability, as with Bacon, but in the logical position of a principle of absolute certainty.

His construction method was the dovetailing of a threefold specification.

(a) To apply the quality control testing of the subjection of each and every candidate to the complete and systematic procedure of doubt, and to eliminate every belief that does not pass this test of indubitability (scepticism);

(b) To accept as material only those ideas which are clear, distinct, and free of contradiction (mathematicism);

(c) To transform any doubts on metaphysical grounding into the bedrock certainty of self-consciousness, so that the statement "I think, therefore I am", is the articulation of the only innate idea unshakable by doubt (subjectivism).

From the indubitability of the self, Descartes was able to deduce the existence of a perfect God, whose very perfection prevented any path of regression, resolved the questions of falsification or deception, and guaranteed the validity of the ideas flowing from the frame of reference he allowed man. It is a building process that is distinctly anti-empirical and the empirically minded Bacon rather deprecatingly described rationalist builders as "reasoners [who] resemble spiders who make cobwebs out of their own substance".

The substance need not be simple, however, the common characteristic was the similarity of building style which rationalism engaged in and the absolute certainty claimed for the foundations. The Spinoza statement made in 1714 in the Principes de la nature et de la grace fondees en raison highlights this. True reasoning depends upon necessary or eternal truths, such as those of logic, numbers or geometry, which establish an indubitable connection of ideas and unfailing consequences. To the rationalist this appeared both myth destroying and carefully destructive: "to expose the illusions of a reason that forgets its limits". Yet empirical "facts" had little place.

III

The Kantian Reconciliation.

Kant constructs a distinguishing between the 'a priori' forms of the understanding and the 'a posteriori' sensuous content of experience - certainty of knowledge is founded upon the very capabilities of the understanding.

The investigation proceeds opposite to Hume. We accept that we cannot help but make use of certain bottom level features in the epistemological process. The trick is to understand how exactly we do use them and how they serve to structure human knowledge. It is only after this knowledge is obtained that we may properly apply our critical orientation. Our questioning is firstly - how is pure mathematics possible? How is the pure science of nature possible?⁸ We then apply this understanding to analyze candidates for inclusion in a "pure" system of reasoning. The process is repeated in the Critique of Practical Reason. We start from the fact of our actual use of morality; we do not wish to come out with the concept of 'morality' as our final product but its reality is accepted or "presupposed" - from our recognition of moral demands and duties we then move, via the assumption that we must be free to fulfil them, to the conditions of their operation.⁹

The entire scope of mental operations divide into induction (roughly that aspect which grasps things entire as with the truth of first principles and accompanies them on their process of demonstration), understanding (that aspect which enables the reworking of what is or can be given in perception and which perceives likeness and unlikeness), and reason (the primary faculty: which goes beyond the order of things given to provide an ideal order of systematic connection of experience. This does not passively occur but is as a result of the active participation of the mind acting according to regulative ideas. Examples of regulative ideas are "freedom" in Practical Reason and "casual inference" in Pure Reason. With Practical Reason a connection is forged between "will" and "reason", whereby will is the faculty of acting according to a regulative ideal called "law". This regulates and distinguishes will from the capacity of acting to rational desire [seen as the clear presentation of the object of desire] which itself is passive and reactive. The operation of the will vis a vis "law" is the active engagement of the realm of practical action with regulative idea.).

The justification for those ideas which we rely upon as providing the foundations of scientific knowledge (the 'a priori' concepts) is achieved in our recognition of them as the bottom level conditions of thought - they are the "categories" of thought.

"Now I maintain that the categories...are nothing but the conditions of thought in a possible experience, just as space and time are the conditions of intuition for that same experience. They are fundamental concepts by which we think objects in general for appearances, and have therefore a priori objective validity."¹⁰

Their function is dual: both bedrock and limit. Efforts to obtain knowledge unconditioned by the categories of the understanding - as with traditional metaphysics - are to be rejected as dogmatic and self-contradictory. We cannot get at the "pure" world and grasp things as they are in themselves apart from the categories of the mind, however, we are aware of the limiting character of these categories and so we can meaningfully conceive of concepts of reality and knowledge beyond human understanding. What is on the side made understandable through the categories Kant calls the "phenomenal" world, and what is on the other he calls the "noumenal". In this way Hume's empiricist outcome, whereby the concepts which provide epistemological bedrock ultimately derive from the custom of repeated association in experience, is transformed into a solid objectivity providing legitimate foundation. But in so doing the world divides up into that about which we can have knowledge and that about which we can never have knowledge.

Furthermore, beyond the limits of science, there can be another use of reason. As Kant puts it: "I have therefore found it necessary, to deny knowledge in order to make room for faith". A "faith" which serves to preserve morality in the face of science and one which demands the pursuit and application of wisdom.

The Question of Kantian "faith".

What is the realm of this faith? And how can we use it, or, to ask the question in another fashion, in what way are we led to it in the study of man?

Kant asks us to use the language of our experience as a guide and to attempt to comprehend those aspects of our understanding that are fundamentally involved and demonstrated in our language use. Thus we pursue the reflexive turning and seek to understand the actual process of understanding which is involved when we ask: What is an individual human being? A section of reality; but by which perspective and what are the limits to the identification of reality that any concept used about him attains? Do certain starting points, such as the supposition of an absolute individuality, demand infinitude, freedom, and a self-contained nature? We are forced to recognise that there are many concepts which we appear to use in practical life that seem to carry that implication. Is to call a human being an individual to speak metaphysics, and in so doing to deny his links to physical reality, and thus to already assert an 'a priori' to which we have no right? Or, is there a necessity in such treatment, for if we abandon this 'a priori' and see the 'human-being-(non)individual' in the "reality" of an integration of system and impersonal causality, then what possibility is there of a speech-act that refers to, or is conforming to, or allows a demand for, treating human beings as "individuals"?

Kant regarded Humean style empiricism as being correct in many aspects, and thus it was correct and proper to think of a human being as a finite, contingent, complex mind-body actually of physical substance, hemmed in on all sides, and interacting with other objective particulars of reality which were observable and acted in obedience of the principle of causality and thus necessity. Nevertheless, for Kant this was in a sense an abstract view of the individual. A view of him particular and singular, only correct to its perspective and one which also, paradoxically, denied the universality necessarily existent as the ob-

verse of the notion (used in practical speech) of man as an individual.

On the question of human action, and the types of causality that we could use to explain this, Kant's answer was similar to Hume's in one respect. When the actions and choices of men are regarded as events in the spacial-temporal world then they must be subject to the laws of empirical necessity. When we begin as independent observers to explain men's actions, we may trace the commission of crime to factors such as heredity, education and environment. These are, however, so effective in our explanatory scheme as to have made it impossible for him not to have acted in this way, for we realise that the flip side of a law of nature is the obverse of physical necessity, which is the physical impossibility to do other - an inevitability of action. This realization demonstrates that our ascription of a range of freedom to his actions is only the result of a lack of information as to all the conditions, circumstances, factors and degrees of influence that prevent us from a total knowledge of his action - and hence from predicting exactly what he would do in the circumstances.

However, Kant notes that even in the light of this potentiality we persist in holding man responsible for his actions and we join in the general social practice of attaching an appropriate blame or reward. In our usage of theoretical reason we adopt a stance which has developed into the various roles of criminologist, sociologist, psychologist and so forth, whilst in our role in civil society where we attribute praise and blame, we consider the situation in the light of "practical reason". It is in the light of practical reason that we hold moral feelings and legislate laws which have as their presupposition that people need not breach them. In fact, we are saying that a person should not do certain things, and if he should not have done an action but actually did, then we are saying that it must have been possible for him not to have done it. But we as psychologists etc., have the potentiality to offer a complete explanation in such a

way for there to be simply nothing visible to us that could have enabled the person to have refrained from the action. It is in this quandary that Kant introduces a strange concept peculiar to human action. He calls this "another causality", that of "freedom".

This is one example of what Kant termed "transcendental objects". These are objects that transcend experience and sensation based systems of description. The criminologist who bases his approach upon the foundations of empiricism will never be able to consider the operation of this "causality". However, by the use of transcendental objects we may regard the offence in question (he uses an example of lying) as completely undermined in relation to the man's previous condition. It is "as if the offender started off a series of effects completely by himself". Kant goes on to say that when we are faced with a situation where our theoretical reason tells us empirical conditions have determined a persons actions we may still legitimately hold that person responsible and blame him. Thus we are justified in holding a man responsible for his actions, even as we as (future) criminologists can also say that "before ever they have happened, they are one and all predetermined in the empirical character". But how are we justified in this? Kant states:

"this blame is founded on a law of reason by which we regard the reason as the cause which, independently of all the above mentioned empirical conditions, could and should have determined the man's actions in another way. We do not indeed regard the causality of reason as something that merely accompanies the action, but as something complete in itself, even if the sensible motives do not favour but even oppose the action; the action is imputed to the man's intelligible character and he is wholly guilty now, in the very moment when he lies; therefore the reason was wholly free, notwithstanding all the empirical conditions of the act, and the deed has to be wholly imputed to this failure of reason."¹¹

As well as the closed and determined grip that the empirical observer can hope to identify there is always "another causality" operative which can ensure a different action, and this "another" is of its nature not able to be located in any spacial-temporal causal series. The ability to partake of this other realm of

causalities is, moreover, that aspect of man which makes him the fit subject for moral praise and condemnation which accompany participation in the linguistic and practical arrangements of our world. Furthermore, it is upon the supposition of the operation of man's "will", and the concepts associated with it, that practical, free and rational life is possible. This rational, free life comes from the interaction of the will with an 'a priori' law essential to the operation of morality. Kant held:

"These categories of freedom - for we wish to call them this in contrast to the theoretical concepts which are categories of nature - have a manifest advantage over the latter. The latter categories are only forms of thought, which through universal concepts designate, in an indefinite manner, objects in general for every intuition possible to us. The categories of freedom, on the other hand, are elementary practical concepts which determine the free faculty of choice. Though no intuition exactly corresponding to this determination can be given to us, the free faculty of choice has as its foundation a pure practical law a priori, and this cannot be said for any of the concepts of the theoretical use of our cognitive faculty."¹²

These concepts, which Kant holds as the foundation of practical life, however, present a terrible morass, for they are "beyond the limits" of scientific reason.

In the structure of the Kantian project they constitute Kant's "third antinomy". An antinomy is a pair of contradictory statements both of which may be validly proved, and both of which represent a crucial and essential interest of reason. They are enabled by the possibility of making "synthetic a priori" judgments (statements in which the predicate is not logically included in the concept of the subject, i.e. this man is a thief - an assertion the truth of which is only establishable in experience is an example of a synthetic judgement. Kant holds that there are some synthetic judgements that are logically true, a crucial one is "every event has a cause".). In the third antinomy conflict arises out of the concept of causality. The statement that everything has a cause serves to bring the elements of causality within time and under the laws of nature: but if everything must have a cause then there must be a cause that is not an event in time under the law of nature. Further, both of these

considerations are necessary to give absolute validity to the principle of causality; but both cannot, it appears, be true. The resolution of this antinomy relies, to use the title of Strawson's book on Kant, on a division of the bounds of sense.¹³ The thesis, which asserts the reality of cause not contained within the limits of the laws of nature, and the antithesis, which asserts that all causation lies within the limits of the laws of nature either now known or potentially to be uncovered, may both be true if their respective areas are distinguished. The areas of each are confined to their specific realms and cannot validly cross the limits or boundaries of their domain. Thus the thesis is applied to the relationship between noumena (being "things-in-themselves", and here containing the idea of a sufficient cause) and phenomena, whilst the antithesis is restricted to relations among phenomena. Thus separate and distinct applications of human understanding which are compatible in existence are legitimated; the legitimation of this state of affairs is occasioned by the distinction between the world of appearance and the noumenal world. This dualism limits science and re-establishes mystery, but this is not a superstitious or dogmatic mystery but a mystery based on rationally argued grounds.

A boundary is drawn beyond which scientific knowledge cannot aspire, and we are free to argue that laws of nature are not the only formula of causality and that there is another approach to understanding what it means to be human that is based on this 'rational faith'; a 'faith' which preserves morals against the dictates of scientific knowledge claims. There can be no knowledge of this other causality, although, we are told, the general concepts relating to these aspects beyond the bounds of knowledge are meaningful. Indeed theoretical reason needs the existence of this other realm for its own completion but can never establish the nature of it. However, without it the very being of theoretical reason is endangered and if we attempt to do without the realm of the 'other', we "plunge it [theoretical reason] into an abyss of scepticism".

For its part, the operation of freedom is subject to the rules

of the intelligibles. Remembering that Kant held that "the true method of metaphysics is fundamentally the same as that which Newton has introduced into natural sciences and which has there yielded such fruitful results", a statement such as "psychological causality subjects man to natural necessity as much as 'mechanical causality' does" reflects Kant's desire to assert the law abiding operation of the realm of the intelligibles. Interestingly, in the chronology of Kant's output the earlier Critique of Theoretical Reason is often read as leaving an unrestricted freedom to this other realm, whereas in the Critique of Practical Reason this other realm is held subject to its own species of causality. The operation of this realm is devoid of spacial-temporal matrices, and thus is outside of time, which means that in a crucial sense morality is also timeless. We see, therefore, that, in the totality of Kant's reconciliation, contingency and eternity co-exist.

When an offence is committed in this Kantian-reconciled world, what is actually having the linguistic utterance of condemnation attached to it is not the immanent phenomenal bound character of the activity, but the intelligible. Here guilt is complete when the person commits the crime, and nothing that went before can alter his guilt. Whatever the life-form patterns of the phenomenal world, which constitute a person's sociological or psychological (in the behaviourist as opposed to the looser Kantian sense) position, these do not affect the evil of his deed, an evil which is his evil, introduced into the world by him in his exercise of freedom. A wrong is not converted into a non-wrong on account of the activities which preceded it, nor can it be dissolved by what comes afterwards.

Kant holds that we demonstrate our recognition of this in our experiencing of remorse. Remorse, he declares, even when it takes the form of labelling an event an accident or mistake, by its nature can only have one true cause. Remorse, as opposed to regret (which is the simple reflection on outcome), is reflection on the evil brought into the world. Remorse is not atonement, it

cannot achieve the undoing of what has been done, but is simply the painful recognition that we, in our freedom, did wrong.¹⁴

But, it can be argued that this act of self-reflection need not always have Kant's result, i.e. the recognition of the pure 'a priori' "moral law". For if this causality is indeed outside the boundaries of science how exactly is it known to the "I". Kant's answer is that in the categories of practical reason, and in the operation of the moral law there exists a mechanism which stabilises the operation of this "I" that is truly "my-self". This is, however, a difficult task and Kant places the nature of the "Will" as central to its resolution. Here he distinguishes between desire in the animal, Humean form which subjects reason to the passions, and the higher form of desire that not only subjects the passions to reason but is itself subjected to the power of reason. Here Kant asserts the necessary belonging of the individual to a universality; a universality which we realise in reflection upon the notions of practical reason, and the speech-acts of that practical reason. Individual man is necessarily a particular, but the recognition of his particularity necessitates its existence as a perspective of something, and hence it is also partaking of a universality. Whereas integration of the unity of the physical for Kant meant subjection to Newtonian physics, integration on the noumenal led to the metaphysics of the 'will'. The integration of the individual will came out of reason itself. But here we have a fundamental problem - that of the relation of the will to the world of appearances. How does the moral decision, the activity of the will, moral thought, interact with the phenomenal world? How in effect is it to control, or even to be relevant?

The moral law results from a crucial distinction which Kant is making, for the existence of the moral law asserts that we can rank our capacity of reflective evaluation of possible actions. Kant's two fold categorising of 'desire', so different from the empiricist reading of Hume, entails our ability to evaluate our desires, to regard some as qualitatively "desirable" and others

as qualitatively "undesirable": action upon some "acceptable", others not, and this is to acknowledge that the crucial difference between man and sentient animal is the moral law within.

Action under the moral law is linked to our capacity for self-evaluation and the distinguishing feature between the Kantian agency and Humean lies not in that we are conscious of our capacity for making decisions about desired actions but on two differing kinds of evaluations of this consciousness. The Humean is subject to a realm where evaluation is, and cannot fail to be, a mode of quantitative analysis. The individual is linked to feelings as to the most desirable upon a plane of sentience and eventual satisfaction. In the act of deciding between two possible courses of action the Humean is attempting to make different desires commensurable under instrumentality, under the functionality of systematisation. By contrast the Kantian holds to the transcendence of quantitative weighing by the imposition of qualitative evaluation. Action under the moral law is action under the categorization of a style and quality of motivation in freedom from the phenomenal. The moral law is contingent upon the ability to rank, classify and categorise which noumenal man can engage in. The Kantian evaluation is concerned with the qualitative worth of different desires as they are judged by moral principle and it is noumenal man who judges.

The ambition of the empiricist construction of knowledges was to turn practical reason as much as possible into calculation, an ambition whose major expression has been in the doctrine of utilitarianism. But in this position the rightness or wrongness of an action becomes 'emotive', assessed according to the actor's eagerness to perform it, and in light of the reaction of the members of the populace which favour it - who approve of it, who take pleasure at the sight of its action. Kant moves against this and declares that to engage in qualitative evaluation of our desires is to engage in a qualitatively different mode of life - one he calls truly free - expressive of the distinctive quality

of being human. The domain of this judgement, the domain of the ought, cannot exist in purely material nature, it is dependant upon beings who are apart from material nature.¹⁵

The Kantian transcendence of the cave, and the visualising of the true nexus of humanity, comes from facilities inherent in man himself - in his reason which gives the ideal of humanity. The moral law, which corresponds not to any particular regime of morality (which although customary may be regarded as unjust or tyrannical) but the constraint of morality itself, is ingrained in the person because of his humanity; it is not a mere calculus of self interest, but lies in the obedience to that which is a part of oneself - not to an external force.¹⁶ Man as subject draws the precepts of action out of his own will and not from any external empirical source: man in empirical circumstances may feel passions and desires inclining him to act in a certain way - but he has the capacity of will to substitute these desires for will to do other than the desired activity. On reflection

"he must unhesitatingly admit that it is possible for him. He judges, therefore, that he can do a thing because he is conscious that he ought to do it, and he recognises in himself the freedom which, but for the moral law, would have remained unknown to him."¹⁷

However, on a related theme St. Paul in his seventh letter to the Romans expressed his self reflection thus:

"My own behaviour baffles me. For I find myself not doing what I want to do but doing what I really loathe. Yet surely if I do things that I really don't want to do, it cannot be said that 'I' am doing them at all - it must be sin that has made its home in my nature."

R. Holland, explaining his vision of the growth in violence, vandalism and mugging in Western Societies as an increasing resort to "violence "as "a means of relief" held that it is a

"fact of nature that those who are tormented lash out and if they cannot hurt the source of torment in return, either because it is too strong or they cannot identify it, they hurt someone else instead..spirits are being wounded today in a way that does not put them in a state of conscious torment - so that they do not know what is happening to them

- but which greatly worsens them and stimulates the reaction just mentioned. Being unable to pass the evil back they pass it on, only in a different form. The non-physical violence done to them is converted into the physical violence they do."

It is a similar argument to that of St. Paul, but in the intervening period sin has become a social-psychological entity. The Kantian point remains visible as Holland holds, "the perpetrators are not exculpated by the [above] general explanation" as the individual "became an evil person and bore the responsibility for it because as he knew in his heart, he could have forgone the relief." And thus he is responsible for this act of "relief".¹⁸

Acton reads Kant thus:

"a man who tries to excuse a wrong act by reference to his heredity and circumstances is, so to say, rationally abandoning his rationality....[and in this] to argue that one could not help it is to say that one is a passive subject of external stimuli in the very breath in which one shows that one is not...If we recognise the obligations that morality places upon us we ipso facto regard ourselves as free, for we accept the moral law as consonant with our practical reason, and we presuppose our ability to conform to it."¹⁹

V

What to Kant is the ontology of the rational agent?

The answer is provided by the interface of pure epistemological structure - the categories - and the synthetic knowledge generated. Man is constituted both in the phenomenonological realm and in the transcendence of this, the noumenal; thus the absolute truth of man - man's 'essence' is beyond the trap of empirical contingency, beyond time, beyond temporal expression. Man straddles and is truthfully apart from the natural empirical world of appearances or the political world dealing with the material desires of humankind. He is of two domains - the empirical and the moral/ethical.

Man's reflection upon the forces he mediates takes him both to "the starry heavens above...[and] to the moral law within." Man, in practical action, continually synthesises the 'a priori' and universalistic concepts of the moral law with his active interpretation of social existence. The application of the transcendental principles is the active task of the moral life.

But what is success? What outcome legitimates the correct from the incorrect judgement? If we adopt a secular reading of Kant then the Kantian actor is one freed from a cosmos of set meaning, confronting the world instead on his or her own terms - a moral freedom to act which is governed transcendently.²⁰ The actor having confronted the dehumanised natural world, operates in a denaturalized social-moral world governed through the principles of the transcendental 'other'. The operations of man in society are dictated by the primacy of practical reason over the theoretical - practical reason exists two fold: both in the publicly created and open political-social situation and in a private yet universal grounding.

Yet how is Kant so certain that man can actually do this? To the pragmatist the confidence which Kant holds is historical; in particular it takes confidence from a strong acceptance as to what man's actual duties are. A confidence found in a rationalised 'common sense'. This is neither the empiricist reading of the passions, nor the modern resources of "common sense", since the meaning we give common sense at present is very much that of a form of 'unsophisticated' practical reasoning centred on the 'opinion' of a 'universal' populace mediated and guided by utilitarianism. Kant's confidence is looked back upon by Hans-Georg Gadamer throughout his Truth and Method; namely, the revitalization of the Viconian meaning given to "sensus communis", the degradation of which he sees as one of the forces contributing to the modernist loss of social cohesion and continuous tradition. For Gadamer, the modern variant, "common sense", is a poor substitute for an earlier and stronger meaning

of a sense, or meaning, commonly held or determined. Fro Gadamer:

"sensus communis here [in Vico] obviously does not mean only that general faculty in all men, but the sense that founds community... the sensus communis is the sense of the right and the general good that is to be found in all men, moreover, a sense that is acquired through living in the community and is determined by its structures and aims."²¹

We have implied that the Humean confidence in the operation of sympathy, the common feelings that found the natural reactions of empirical man, is only fully understood within a life that assumes sets of understandable and predictable social reactions, similarly Kant's confidence can be seen as seeking the 'rational' internal structure of such social phenomena. The central doctrines of Kant's later work on Law and Punishment: The Metaphysics of Morals (which contains The Metaphysical Elements of Justice.²²) appears to seek the security of a strict notion of a sensus communis at the same time as it gives a universalization which draws the sensus communis away from its location in any particular community but presents itself as universal to all men (rational beings). The Metaphysics is preceded by a work entitled Foundations of the Metaphysics of Morals,²³ a work Kant directs at the general reader who possess "common rational knowledge of morality". It is to operate "within the moral knowledge of common human reason", and to unpack the essential conditions of the commonly held ideals of the time, the rational constitution of the sensus communis. The essential precondition is that there is the situation where people do know full well in practice right from wrong, good and evil, obligation and response, and our task is to discover the rational basis of this configuration.²⁴

Kant's work can be seen as concerned to destroy the limited substantive conceptions of the sensus communis for the rhetorical force of the move to the universal rationality of man, for Kant is not concerned to unpack the beliefs of any one particular area, of one community, but to formulate for all and any "man" via the supposition of a universal foundation of reason. For Kant "Metaphysics is the science which exhibits in systematic

connection the whole body (true as well as illusory) of philosophical knowledge arising out of pure reason."²⁵ This covers man, as persons, i.e. rational beings, share a rational nature: "rational nature is distinguished from others in that it proposes an end in itself."²⁶ The central feature of man, social man, is that he involves himself with a "realm of ends", in which "everything has either a price or a dignity. Whatever has a price can be replaced by something else as its equivalent; on the other hand, whatever is above all price, and therefore admits no equivalent, has a dignity.

That which is related to general human inclinations and needs has a market price. That which, without presupposing any need, accords with a certain taste, i.e. with pleasure in the mere purposeless play of our faculties, has an affective price. But that which constitutes the condition under which alone something can be an end in itself does not have mere relative worth, i.e. a price, but an intrinsic worth, i.e. dignity. To Kant

"morality is the condition under which alone a rational being can be an end in itself, because only through it is it possible to be a legislative member of the realm of ends. Thus morality and humanity, so far as it is capable of morality, alone have dignity. Skill and diligence in work have a market value...but fidelity in promises and benevolence on principle (not from instinct) have intrinsic worth."

Moral "actions need no recommendation from any subjective disposition or taste in order that they may be looked upon with immediate favour and satisfaction, nor do they have need of any immediate propensity or feeling directed to them. They exhibit the will which performs them as the object of an immediate respect, since nothing but reason is required in order to impose them on the will."²⁷

Society must never fall into "market" mentality in questions of punishment - dignity, does not allow the calculations and administrative ethos of "prices", but the absolute bindings of deontological reasoning - market mentality is anti-theoretical to the *sensus communis*.²⁸

What is ultimately at stake is overcoming the spectra of the void of nihilism. For if there was no absolute grounding then

everything was to be a matter of price and everything was permitted according to the price recognised. If mere empirical man, and empirical man in groupings, i.e. the voting public, were to determine value, it could not be freed from the subjectivity of desire. Accepting Kant's demarcation the subjectivity of desire could found politics but not morals. Desire could not determine the morally right, instead the morally right was free to judge, to label, desire. Moral subjectivity is in turn denied in the grounding which the universal categories of reason provide. The grounding of the egoistical demands of natural desire was, conversely, the limited creations of politics, e.g. the social contract.

Kant surrounds his various discussions on morality and political philosophy with a particular vision of the nature of progress and the role of man. Progress for man is movement towards the highest good. Man in society considered phenomenally is subject to the laws of nature, and in his rational existence in the social body he is subject to laws which apply both externally and internally (ourselves considered both phenomenally and noumenally). The laws of our free state

"insofar as they are only directed at external actions are called judicial, but when they also demand that they (the laws) should themselves be the determining grounds of the action then they are ethical".

The orientative capacity of reason enables man to use the structures of human cognition, the structure of humanities linkage to reason, to open up the task of social life to reason.

Mankind

"cannot do without associating peacefully and yet cannot avoid constantly offending one another. Hence they feel destined by nature to create through mutual compulsion under laws which proceed from themselves, a coalition which, though constantly threatened by dissension, makes progress on the whole."²⁹

Conflict is an instrument of development insofar as it is located and mediated in the social creation of the structure of reason, thus:

"the greatest problem of the human race, to the situation of

which Nature drives man, is the achievement of a universal civic society which administers law among men."³⁰ Kant states that if a man acts in accordance with the law out of terror or coercion it is a mere hypothetical motive, but when he is motivated by an acceptance of the law itself it is an act in line with the categorical maxim. Freedom exists only in the second case and comes from "the autonomy of the will", as opposed to the "heteronomy" of the agent who acts in obedience not to the commands of his rational reflection but out of passion, fear or hope of reward. The heteronomous agent is truly the "slave" agent and although in his lack of strength he performs the observable actions of morality, he has taken refuge in this subjection to "nature" and/or to "superior force". He may disguise his slave mentality, his amorality, in a confusion of discourse, but this needs to be subjected to critical examination and this critical orientation is necessary to achieve the autonomy which will enable him to act as rationally autonomous and in so doing command the respect of other rational beings.

In What is Orientation in Thinking³¹ Kant appears to argue that the guarantee of progress is reason's own ability to point itself in the proper direction, to determine itself the correct use of the transcendental procedure. This is the full confidence of the rationalist imagination - the true metaphysical faith. Seen in this way the progress of man is in effect part of the journey of reason: one which is also an historical journey in which are tied together the diverse strands of man's existence. The backdrop of man's phenomenal positioning is the metaphysical aspects of practical reason in the suppositions of God, immortality, freedom, and their interactions within the life of rational co-existence and co-operation with fellow rational human beings. Man considers himself first, and insofar as he belongs to the sensible world, to be under the laws of nature (heteronomy), and secondly, in so far as belongs to the intelligible world, to be under laws, which being independent of nature, are not empirical but have their ground in reason alone. Out of this interface frames of reference for social life develop, and thus the limited potentiality of the sentient life of the cave, or alter-

natively as Plato also put it, the life of the city of pigs, is enabled to be transcended and guided by the transcendental procedure. In this "man as a rational being" can never exist in a system governed by the operation of his will except under the idea of freedom, attached to which is the concept of "Autonomy", and it is from this that "the universal principle of morality" the "categorical imperative" issues.

What is this freedom to consist of? Freedom is not lack of constraint, but is a particular form of constraint. The true state of freedom for man lies in his subjection to the moral law of which man himself is the giver to man, and is at its highest when man recognises the necessity of that law and its absolute authority over the actions of the rational agent. Social progress, what appears as the teleological realization of social man, is effected through the mediation of judgement as it transforms people from pre-rational to rational beings. Man is to be the creator of the progressive social, and of his individual character "insofar as he is capable of perfecting himself according to ends he himself adopts". The construction of the social is a distinctly moral-ethical problematic and is the true activity of the "human" enterprise.³²

The progress of the social can only be structured by the declaration of regulative ethical norms - in the acceptance and communal articulation of these norms the rational guidance of man as social being is effected and the resulting expression conveys the expressive realization of the dignity of man. The laws man forms in social life are to

"proceed from themselves, a coalition which, though constantly threatened by dissension, makes progress on the whole."³³

The political-ethical life of the modern state is to be constitutional, bound by those public laws created under the guidance of

"an idea of reason, which nevertheless has undoubted practical value; for it can oblige every legislator to frame his laws in such a way that they could have been produced by

the united will of the whole nation, and to regard each subject, in so far as he can claim citizenship, as if he had been represented within the general will. This is the test of rightfulness of every public law."³⁴

VI

The international and universal totality of social progression involves a concept of the interaction of national states and the hope of an international moral world. Individual men, viewed as particulars of an international object are part of a journey to the constitution of a total ethical commonwealth.

In the movement towards the ethical commonwealth the political commonwealth is the first step. Two different conceptions of this are utilised. An external progress is visible in politics and in the external legal system; progress in the second in ethics and in the correspondence of the internal (ethical) lawmaking to the external. Two stages of association are operative.

"A iudicio-civil (political) condition is the relation of men to each other in which they are all alike stand socially under public juridical laws (which are as a whole coercive laws). An ethico-civil condition is that in which they are united under non-coercive laws, i.e. laws of virtue alone."³⁵

The iudicio-civil condition presents an external framework, creating assurances demonstrated in the formal coercive instruments of the state that individuals will act in a lawful way. Kant sees this society as, however, a rather fragile structure and one that is dependent upon this 'artificial' law to unite the various pulses, desires, and projects which otherwise threatened to tear it apart. The operation of law at this stage was to hold together a socially disunited group of people through moderating and controlling individual claims. The otherwise rampant subjectivism of man's contingent and historical attitudes needed to be brought under a system of state laws, and the operation of these coercive laws was based upon the principle of strict reciprocity in the treatment of others since no

individual is prepared to give to others any more than the freedom which he enjoys. The divisions of man so evident in this form of association will not be truly examinable until the perfect ethical community comes about. In our present political condition (judicio-civil) we are internally in a state of nature, for no one accepts the public, general authority as having the power to judge "what is each man's duty in every situation." The state cannot tell man how he ought to live, it can only tell him how he can and must live. Civil society is the product of the 'political' dimension of man, and the realm of civil society is divided into two realms, the public and the private, the demarcation of liberalism. The private domain of liberal virtue, and the public domain of political, lawful "Right". The legitimation of the inner continues directly the tradition of the religious, the outer becomes the institutionalised order legitimated through the political constitution and the formal laws of the state. The ethical community, which will in time come to replace the political, cannot be based upon coercive laws such as those of the political situation since with the ethical community "the very concept involves freedom from coercion."³⁶ Man progresses by leaving the ethical state of nature and thus frees the state from the existence of coercive laws in the adoption of virtuous motives and the performance of action under the idea of achieving the highest social good, which is the ultimate social goal.

"Here we have a duty which is sui generis, not of men towards men, but of the human race towards itself. For the species of rational beings is objectively in the idea of reason, destined for a social good, namely, the promotion of the highest good as a social goal."³⁷

This concept, although central, is ambiguous. As Beck identifies it, the concept of the highest good is also described variously as the Kingdom of God, the intelligible world, the existence of moral beings under the moral law, the moral vocation of man, the regulative "Ideal of reason" (with an Ideal being "the concept of an individual object completely determined through the mere idea"), and also as the greatest happiness combined in the most perfect proportion with the highest degree of moral perfection,

and the statement of the Groundwork that "two things constitute the summum -- the moral perfection of the person and the physical perfection of his state". It is one of the most obscure parts yet Kant appears conscious of the need of some form of grand connecting mechanism with both the power to combine, and the will necessary to achieve the state of highest good and its correspondence between virtue and individual happiness - and whatever the mechanics of that mechanism, the irreducible Kantian core is that it is to be linked to the path of reason.

It is also held up as ideal for man to achieve, it is thus an example of "the sublime, yet never wholly attainable" idea of an ethical commonwealth,³⁸ one which Kant states we must treat as attainable when ecclesiastical faith is gradually transformed into "the universal religion of reason"³⁹ and so to "a (divine) ethical state on earth". Thus finally the moral law of reason is "erecting for itself...a power and kingdom which sustains the victory over evil and under its own dominion, assures the world of an eternal peace."⁴⁰ It is pure reason's path of 'problem': the realization of this methodology will escape the dehumanising state of the political commonwealth, transform the epoch, and overcome the political for the space of the ethical. The spirit and constitution of modernity will be transformed into the 'peace' of the ethical spirit by our partaking in the universal structure of reason.

In the end politics surrenders its domain to a revamped religious orientation - rational (post)modernity.

This links to that peculiar Kantian vision of the good man - an ambiguous vision which is of great power and yet barren solitude. The good man to Kant has the power of being ruled only by the strength deriving from his inner conscience, a strength located transcendentally. The man is in solitude, because, if he exists in the present world, the world of the ethico-political realm of justice, he is, in sense, not present. The 'justice' of the good man is not located by reference to the knowledge (which as soon

as it becomes known as knowledge takes empirical shape and thus becomes policy) of the highest good, but in the reflexivity of pure human intentionality (moral reason). The morality of any action is not determined by any relation to a state of knowledge, the moral law cannot come from nature, but itself is the only grounding for the morality of nature. The solution to the need to ground morality, and yet avoid empiricist foundationalism, is to allow the reflexive movement of the moral law itself to give grounding - that we ought to act such that the maxim of our action could become the universal prescription, i.e. it must test itself. Similarly, the bearer, the subject of the imperative, posits the moral, not in his capacity as an individual personality, but as a person stripped of his individual personality (feelings, 'animal' desires, instincts) existing only as pure human personality (rational mankind).

The result, however, is to become lost in transcendence from the imperfect 'legal- civil' society of (all and any) present. The inhabitants who are the good men of Kant's 'invisible church' in the realm of freedom (i.e. the formalist judge) are the saintly images of 'perfectible' man. Being saintly images they correspond to no images our knowledges can give - they are the inconceivable personality of rational man.

VII

The outcome follows from the terms of the Kantian narrative which holds politics as a contingent to be overcome in the transformation out of the 'ethical state of nature'. The immediacy of *Gesellschaft* life, the dissatisfaction with modernity, the corruption of the impure and 'pragmatic' operation of 'moral claims', finds its solace in the new ascription of it as ante chamber to modernity's overcoming - to the kingdom of ends in the Ethical Commonwealth.

We are, however, left with an impasse. For we have a defence of

man's special dignity and freedom in the cosmos, and yet man is estranged from participation in the causal chains which constitute nature. Whenever we seek to construct comprehensive social theory, and thus to seek to understand ourselves 'theoretically' as part of the cosmos, causal chains appear deterministically to bind our interaction with nature and each other; when we declare the special freedom of our purposeful, intelligible and autonomous reason, we are divorced - alone - existing in a society which is not part of the current of nature - but yet is the 'political' which our own true nature, the ethical, disdains.

The Kantian dichotomy is taken up by a variety of positions and we do well to remember Hegel and Nietzsche as in many respects "left Kantians".⁴¹ But if the impasse Kant leaves us with has been taken to give drive to the political imagination of others, his own displays the weakness of rationalism when it returns to 'earth' from the realm of the 'other'. As Gay notes Kant is also well aware of the need for social control of 'the mob'. The optimism of reason's self-correcting and guiding properties finds its phenomenal partner in the social distrust and pessimism of the lower social orders who do not respect self tutelage to reason: the "Volk" consists of "idiots".⁴² The constitution of the political public is limited; moreover, this is a limitation exposed as truly rational by the transcendental procedure.

The "matter" of the world, the a posteriori material, is provided by the actuality of society, and the true understanding of it is supplied by the transcendental principles. Political participation and relationship to law is thus called to be understood through the regulative idea of autonomy (independence) and freedom:

"the independence of a member of a commonwealth as a citizen i.e. as a co-legislator, may be defined as follows. In the question of actual legislation, all who are free and equal under existing public laws may be considered equal, but not as regards the right to make the laws."⁴³

We know that the law pertains to all, but not all enjoin in the

creation of the law - this is rational; moreover, it is the rational justification of empirical reality. To truly understand the rationality of the world we must discern the operation of the categories in the constitution of the world - thus the principle of freedom and autonomy specifies that only he who is free and autonomous will actually be a participator in the right to vote.

'Rationally',

"he must be his own master and must have some property (which can include any skill, trade, fine art or science) to support himself. In the case where he must earn his living from others, he must earn it only by selling that which is his, and not allowing others to make use of him."⁴⁴

We thus move to understand reality and are strengthened in our rational approach to society, we realise that

"the domestic servant, the shop assistant, the labourer or even the barber, are merely labourers, not artists or members of the state, and are thus unqualified to be citizens".

The operation of the present has responded to the dictates of reason; it has recognised the distinction between the free man and those such as the artisan who

"in pursuing his trade, exchanges his property with someone else, while the labourer allows someone else to make use of him".

The purity of the rationalist imagination can here appear as an illusion actually linked to the social metaphysics of the times - a relationship to constitute the 'what is' as the rational, to defend its historicism against reflexivity,⁴⁵ and its claims against any radical pragmatism.

Take Kant's position on punishment. Kant's theory on punishment is a rationalist argument and has come to be known as a natural rights theory. In The Metaphysical Elements of Justice Kant rejects the utilitarian arguments of Beccaria while strengthening his 'rights' approach into the absolute binds of deontological reasoning. Thus we cannot look to calculations as to the effects of punishment, or non-punishment, upon the sum of goodness in the world (whether we define that goodness as pleasure, satisfaction

of desire etc.), but relate punishment to the test of whether it satisfies the persons capacity for autonomy. Thus individuals are assumed to have the capacity to determine their own ends as free and rational creatures and to live their life acknowledging this capacity in all the others of their society of mankind. Punishment is thus done to an individual for his intrusion into the autonomy of the other, and that punishment is to be related to the degree and quality of that disrespect and intrusion. Punishment is then to be strictly limited in kind and duration to the moral gravity of the actions which the offender has preformed; the purity of this linkage, however, is such that it must not only be limited in extent and duration and hence to over-punish is wrong, but that punishment must always be undertaken, for to not to punish is wrong (it does not respect the autonomy of the offender).

This is, however, abstract reasoning and when Kant brings it to earth he is dogmatic in his idea of 'practice', seeing it as fixed and absolute, rather than as a pragmatic expression. Thus Kant is open to the empiricist retort, namely that his thesis of radical freedom of the offender from the realm of empirical deterministic chains is wrong; to historicism in that he categorises various activities as absolute attacks by the offender on his own autonomy which appear to be actually defences of the Christian conceptions of sexual morality of the time (Lectures on Ethics, pp. 162-171); and to the charge of dogmatic interpretation in his proportionality requirement. On the latter Kant demands strict equivalence and absolute enforcement irrespective of questions of utilitarian deterrence. Thus the murderer must himself or herself be killed, the rapist castrated (Metaphysical Elements of Justice, pp. 100-107). One common argument against this line is that it denies any role for a lesser or greater sentence on deterrence grounds, but this argument falls short of the radical pragmatic retort of asking what sort of equivalence is this on Kant's own terms? For in what way is the taking of the life of the murder actually equivalent to the prior taking of the life of the other by the offender? On

a one-to-one basis the action looks acceptable to common sense, the *lex talionis*, an eye for an eye, a tooth for a tooth, a life for a life; but what happens in the cases when it is one life, that of the offender, for the lives of several others, as in the hanging of the commander of the death camp of Mydeck in Poland, for instance, where some 360,000 prisoners had been exterminated? In what way is the death of one man actually qualitatively exactly proportional to the deaths of 360,000? Is not it an insult to the 360,000 to say that they each are actually only worth one 360,000th of an individual, the individual who commanded their deaths?

Further, what actually is it to take the life on an individual, for is not any stage in a person's life a certain distance from birth and a certain distance from death. So instead about talking about 'life' one could talk about 'distance to death' etc. Thus in what way is the taking of the 'distance to death' of a 58 year old child murderer, who perhaps is suffering from cancer and will die within four years, equivalent to the 'distance to death' of a healthy four year old girl who has some seventy years to go before death? Or the person who is tired of life for the one who is optimistic and joyful, and so forth?

The only way out of this is to say that we are talking of 'expressions' and 'symbolisms' of equivalence, but then once that is agreed it is open to accept various other activities of practice as viable expressions or symbolisms (which is a theme of the writings of the Norwegian Nils Christie for example). Again in what way is castration equivalent to rape? Some may argue it prevents abnormal sexual impulse but that is a consequentialist argument, and what if, as it is empirically argued, most rape has to do with desires of power and domination rather than sex? Are we to say then that the act of castration must be done as an equivalent act of domination and power? Is that not to go against the autonomy thesis? Again some of Kant's examples appear to be simply making 'rational sense' of the practices of his time; when new forms of punishment enter, prison

for example, equivalence becomes even more problematic.⁴⁶

IX

Aspects of the Kantian Legacy.

The issues delineated by the terms freedom and determinism have been central to the history of speculation and do not originate with the Enlightenment, however, their modern critical use, linked to the de-marcation of reason and desire, of modes of judgement, is crucial to modernity's creation of differentiated spheres of discourse and judgement. The resulting division in the criminological arena, of law linked to justice obeying one regime of 'truth' with social science linked to justice obeying another is one result. The problems of reconciling this division, either through a battle of perspectives (relying upon a confidence that one actually highlights a superior 'truth' and thus can successfully dominate the other), the search for a meta-theory which can establish a Kantian corrective for subsidiary truths, or a commensurability methodology which guarantees acceptable levels of performance, are present problems which defy resolution. The defence of the autonomy of law is primarily Kantian. Daniel Roberts, for example, putting forward radical determinism, soft determinism, and 'chance, change, and probability in the affairs of men and atoms' as possible reconciliations which have at one time been proposed concludes,

"only one view is coherent and plausible at the level of a civilized social life: if there is to be law at all, the presumption of human autonomy is inescapable. To write a law that proscribes actions of a certain sort is, among other considerations, to acknowledge that such actions are possible. It is to acknowledge further that they are not the inevitable consequence of the sort of causal series we take to be behind events of a purely physical nature."⁴⁷

For Robinson man's occupation of dual realms means that "our 'moral science' must be incomplete and perhaps forever arguable".

The fact - value distinction is central to the motif of freedom in those combinations of positions loosely known as Liberalism.

One aspect is Hobbesian: social freedom and material freedom, i.e. the possibility of choice over material goods, the enjoyment of property and free access of goods and services, is dependent upon the resolution to subject ourselves to legal rules, to state power; the product of that freedom is the assurance of the continued enjoyment of material goods (The Hume, Smith legacy); yet that state power is to be limited in its role by that criterion; the commodity materialist image of the social contract. Another is Kantian and stresses moral autonomy, wherein the activity of free choice is the resolution to subject ourselves to moral maxims, to the power of morality. It is an image wherein universalist self-criticism replaces specific communal criticism and control; the product of that freedom is the massaging of the intellectual, the primacy of the cultural seen as an autonomous sphere answering to its own claims of rationality. The third, which runs throughout the modern, is the concept of tolerance. Because no overreaching system of commensurability is possible we compromise and allow others various choices in specie of social heteronomy on certain conditions: namely, that they do not threaten social freedom nor the operation of tolerance itself (the master prescription). Thus the characteristic of modernity can be gauged as a process of societal and cultural differentiation and pluralization, the changing and development of which is the result of the interactional dynamics concomitant from the impacting of the inner coherence of each sphere.

Morality is central - yet the empiricist asks that deontological moral concepts not stand in the way of maximising 'progressive' social power and judgement under social law (the question of separate realms), and raises the question - does not such morality come always from a simpler time when the world did not know as much; therefore, must not it always lag behind as ideology of a past? Again is it not simply mistaken and ought to be disregarded in the name of progressive consciousness? Additionally, it is not possible to line up those who make such a claim upon the 'conservative-liberal-socialist' continuum as

paradigm positions often are in criminological literature.

Harold Pepinsky, who can be placed as a socialist (and self-consciously utopian), says of the central moral claims of criminal justice: "to be convicted a person must be inferred to have chosen by exercise of free will to have committed the actus reus." But, he says, what this results in socially is an abstracted universalism that a person acted so as to earn criminal status as an individual achievement.

"Just as the class hierarchy is built on the foundation of individuals being considered to have earned their positions in it, the application of the criminal law against persons is built on the foundation of the persons' having earned offender status. Correlatively, the message communicated by the concept of criminal responsibility is that no other collectively imposed obligation stands in the way of individualism. By circumscribing the substantive requirement for the attachment of social responsibility.....formal support is lent to the popular notion that obligations to interpersonal cooperation are few and far between...Whether one goes to prison or becomes wealthy is a matter of individual responsibility; dependence on others for support is no defence to a charge of crime and no right or socially prominent guarantee. The law thus encourages the kind of injurious behaviour it is formally supposed to restrict."⁴⁸

The Kantian legacy is thus held liable for the misuse of the power to punish due to its being closed to any pragmatic critique.

Conversely, the Soviet criminologist Alexandra Yakovlev, having seen the notions of 'social responsibility' and legality outflanked by psychiatry, turns to Kant as his guide in order

"to substitute the ethically orientated interaction between the state and the responsible individual for the utilitarian action on man as an object serving various purposes. In doing justice, the punishment in this case does not interfere with his inner world, recognises the rights of the personality of the criminal as a reasonable and responsible subject and, thereby, does justice to his human dignity."

He concludes declaring:

"I don't say back to Kant! I say forward to Kant!"⁴⁹

The two legacies thus have historically lined up as rhetorical opponents, portrayed by their followers as totally

incommensurable positions, of which one only must be right. Expositions expressly take the Kantian distinction of pure and practical reason. As Jerome Hall put the differing positions of law and psychiatry:

"the most important fact in the current polemics regarding psychiatry and criminal responsibility is the clash of elementary philosophical perspectives. Every science rests upon distinctive axioms or postulates that are accepted by the scientists as 'given', while philosopher remain curious about them. Without describing the postulates of current psychiatry, we can perceive the general perspective that it draws. It purports to be rigorously scientific and therefore takes a deterministic position. Its view of human nature is expressed in terms of drives and dispositions which, like mechanical forces, operate in accordance with universal laws of causation.

On the other hand, criminal law, while it is also a science in a wide sense of the term, is not a theoretical science whose sole concern is to understand and describe what goes on. It is, instead, a practical normative science which, while it draws upon the empirical sciences, is also concerned to pass judgement on human conduct, entailing serious consequences for both individuals and the community. Its view of human nature asserts the reality of a 'significant' degree of free choice, and that it is incompatible with the thesis that the conduct of normal adults is merely the manifestation of imperious psychological necessity. Given the scientific purpose to understand conduct, determinism is a necessary, although by no means the only helpful, postulate. Given the additional purpose to evaluate conduct, some degree of autonomy is a necessary postulate."⁵⁰

In the above passage science is expressly linked to the postulate of determinism, law to autonomy, science to explanation, description and understanding, law to normative pursuit (a practical normative science). Law becomes the science of practical reason, while science proper is the result of the theoretical approach purely applied. A working reconciliation in the literature considers the respective purposes of the domains, science to understand conduct, law to evaluate conduct, and thus law can act as a secondary level which draws upon certain knowledges from sciences which it may incorporate into the evaluation procedure - so long, that is, as the fundamental postulate of autonomy remains undisturbed. Conversely, the rhetorical battle can be portrayed as 'dignity' against 'scientific progress'. The spread of the scientific ideal,

required by the narrative of modernisation, when linked to the apparent requirement of determinism for science to begin, requires the sublimation of those human forms of self-description into the universal discourse of impartial science. The deontological retort is simple: to question the supreme place of 'morality' and 'rational autonomy' is to destroy the very 'idea' of humanity. In line with the differentiation and plurality which so characterises modernity 'the moral' has become viewed as a separate sphere answering to the canons of its self-constitution. In its intrusions into the common life the dominant use of 'morality' has been narrow and confined to the 'normative' regulation of practical everyday affairs. In social control of the common life, the Kantian core of modern morality can be interpreted that morality is exactly what people can be blamed for ignoring or violating - Don't steal, don't lie, can be argued as belonging to a counter-preference and blame-generating moral code. Allied to this is the widespread view that the criminal law is based upon the standards of public morality (roughly the view of the 'consensus' school of criminal law, although shared in essence by the 'conflict' school which sees the criminal law as the reflection of the morality imposed by the 'ideological' mechanisms of the society), and that criminal sanctions operate so as to identify and stigmatise certain moral wrongs, which society as a whole condemns.⁵¹ Movements which looked to the going beyond of modernity (for example the post-modern promise of a communist society after the revolution from capitalist modernity⁵²) seek to go beyond law and require us also to 'go beyond' the moral. Morality is not of great importance (it is argued), for morality, like civil order which (it is held) it seeks to constitute, is merely a background condition for the flourishing of anything really important or intrinsically valuable. (And this can be seen as so even when it is an appeal to morality, moral normative order, which creates the social order for such internal state of satisfaction or existence. This is so because the fact that the activity may be important does not mean that the conditions which created it are also. This is demonstrated through the non-necessity of transference: if we

accept the supposition of universal causal connection, then if importance transferred along lines of conditionality, everything would be important and everything would lose its essentially discriminatory import - there would be no difference.) Another argument is that morality is no more than a set of marginal constraints on behaviour serving an agenda set by life's intrinsically attractive, effort-inspiring, eros-magnetic goals. After all will not true life for humankind be "post-moral/post-justice/post-law"?⁵³ Karol Soltan argues that the state of love is higher than the state of rational justifications:

"the morality of love [is] the highest moral aspiration of humanity...it is developed more through the appreciation of literature than through abstract moral and political theory. Where men and women have the appropriate intellectual and moral capacities, they do not need moral and political theory, and they do not need objective moral tests."⁵⁴

Can one imagine morality in Heaven? Or in Hell?⁵⁵

The anthropology behind this approach is the Kantian division, the modern resolution to the mind body distinction. As Robinson put it concerning the ontological status of the 'moral sciences', which we can put Law as the supreme example:

"What the nineteenth century happily and aptly called moral science is, as Locke recognised, an axiomatic science akin to geometry. It proceeds from first principle (major premises), which are the necessary starting point for moral discourse of any kind. The major premises of moral discourse are always subject to dispute and disagreement and, as universal propositions can never be conformed experientially... Such rights as persons have are bought into being by these premises and have no existence apart from them. Such rights are, then, the most unnatural entities in the universe, existing as they do only in the realm of moral reasoning and never in the realm of space and time." (Emphasis added)⁵⁶

These arguments, however, from a post-positivist notion of science, unduly constrict the role and identification of the normative/moral function in social change and order. For, to the post-positivist approach, science itself is heavily normative. In post-positivist approaches it becomes not an independent external reality which impartially corrects scientific diversity into a progressive development but normative interpretations of

proper scientific methodology, interpretation of results, and correlation with 'other' work. Both this appreciation of science, and aspects of the 'narrative' readings of modernity as a construction project, emphasise the inescapable normative element which provides a foundational entity being one important pole of social change.

To the pragmatist the normative results in effects which actually can become the subject matter of the sciences. The normative 'materialises'. For example a normative aspect of the Kantian scheme is that freedom is realised through history; that history is one of struggle and conflict in which man's natural instincts ensure antagonism. The compromise and progressive solution for human society is that of the law-governed social order, but this stage, the stage of the present, was imperfect because the force of that stage was not ideal, it was for the most not self determination but determination by the external threat of law. The law should, ideally, in a republican state, obey the reference idea of autonomy, the realization of that ideal will mean that law in the future will dissolve. This line of thought has been picked up by Nietzsche, Freud and Weber as referring to that process of internalisation of morality which leads to the Western phenomena of guilt. For Freud this guilt is linked to instinctual renunciation, neurosis, repression of desire, and, the mutilation of the 'self'.⁵⁷ Here a 'social scientific' account of the phenomena of guilt, this process of internalising the moral prescription, this 'progress', is seen in this reading to be the subordination of humanity to 'reason' which produces as a direct consequence unhappiness and joylessness. Thus this 'reason' of modernity is ultimately repressive, the opposite of joy, happiness and freedom; hence the instruments of this reason, the moral strictures of modernity and the subordination to law (the criminal law) must themselves be repressive. Hence the final state, the end of man, will be post-moral, post-law (justice), post-repression. This social scientific account not only incorporates the normative entities but creates itself a regulatory and normative outcome - it not only describes it

prescribes (which may be why those examples where social sciences obviously do this are regarded as 'pseudo-sciences' by analysts such as Karl Popper).⁵⁸

X

It follows from the above that the dual anthropology cannot be a dualism of two separate realms but a de-marcation of what must be one realm. It is not that the discourse of 'justice' and evaluative connotations inhabits one realm and social science and the descriptive another. After all what actually happens when citizens of a state define as just or unjust institutions of their state? Their discourse is both factual and evaluative, both placing a particular interpretation on observable practices and arguing for certain norms. Kantian notions of ideas operate as controlling mechanisms because of their openness to reflexivity and the pragmatic tactics of immanent critique, and the identification by individuals of practice as being either a correspondence to (reflective of) the normative ontology of the idea. But the movement of this recognition cannot be a movement out of the internality of one realm into the internality of another since then a total relativism of realms would follow and such an outcome does not happen because of the jointness in the meta-reality of life itself. Both anthropologies are part of nature - such is the pragmatic message. It is only under this realisation that the act of contrasting the performance of present activities and institutions to the supposed ideals which the structure of articulations and justifications hold it to be about.⁵⁹

XI

Excursus on Power.

The Kantian directive for the role of the 'moral' can be seen to constitute one 'type' in the triads of modern social order in the 'Liberal state'; one pole of the conceptional identification and positioning which mediate around the dilemma of power, order,

performance and dignity. In his application of social theory to the organizational formations of modernity Etzioni interprets the pure noumenal power of morality as normative or identitive power. The Kantian rhetoric of the 'dignity of man' becomes an allocation of symbolism, a discursive currency of human motivation and compliance stratagem which becomes implicated in the constitution and control of a social order utilizing the rhetoric of understanding love, affection, and prestige. The purity of the rational *sensus communis* is now but one pole, to be played off against the phenomenal compliance stratagems of coercive power with its constraints of the physical, and remunerative or utilitarian power, with its constraints of accepting the market for growth (successive success and growth in material desire).⁶⁰

In this analysis three types of power underlie organizational modernity which situate men in three types of involvement - alienative, calculative, and moral. Alienative involvement is the forced involvement of dissociation. Calculative involvement is changeable in its substantive identification, flexible, and instrumental in its legality. Moral involvement, conversely, is an intense positive identification with the organization (social identification). Etzioni holds that a particular kind of power and a particular kind of involvement empirically mesh together. Coercive power produces alienative involvement, remunerative power goes with calculative involvement, and normative power and moral involvement are congruent.⁶¹

The destruction of any fixed notion of the *sensus communis* develops modernity into a complex differentiation, a social market, where remunerative, rather than the coercive or the symbolism of the moral, stands as the basis of social control. Developing a system whose 'health' is a subject of a certain ease of measurement, and clearly related to performance (electionability, opinion, economic performance, etc.). Coercion resides in an hierarchal state apparatus which monopolises the use of force - at the expense of producing alienation - normative control (the appeal to the moral framework) is used in reserve. Too much normative identification reduces flexibility, and thus it is reflectively reduced to the status of an instrument to be produced when the ability of the social order to produce calculative satisfaction is failing and some fixed appeal is seen as required.

Yet what is termed morality in post-christian western societies cannot claim the overreaching bind in a coherent scheme of reflected value - apart from the over-reach of the objective rule of tolerance there is no set of 'absolute principles' that every individual holds in an obvious and 'objective' sense which Kant assumed in his *Foundations*.⁶² One cannot simply claim, however, that there is no *sensus communis* in modernity - social order does exist, social grouping is the context of individuality; what is the case is that this grouping may obey no master prescription which traditionally could have been called truly 'communal'.⁶³

If commentators like Gadamer and MacIntyre are correct, then a

coherent reverential structure of an overreaching "tradition" is not a resource for the operation of the 'common life'. Instead the subjectivity of the free will of the individual is as a cipher inside a multiplicity of narratives as to the nature of the social body and the purposes of the self; a multiplicity of positions for the self constituted at the intersections of these narratives amidst a privatized notion of the 'good life'.⁶⁴ Without some form of transcendental motif, some vision of grounded tradition, the vision of mankind, our history and prospects becomes divorced from the "in common" and suffers the lack of any unifying moral-political intentionality. The mediation of the social still occurs, however, for as Gadamer states: "the displacement of human reality never goes so far that no forms of solidarity exist any longer."⁶⁵

The cost, as MacIntyre puts it, is that when "in any society government does not express or represent the moral community of the citizens, but is instead a set of institutional arrangements for imposing a bureaucratized unity on a society which lacks genuine moral consensus, the nature of political obligation becomes systematically unclear."⁶⁶

The pluralism of modernity is not, however, confined to within the 'liberal' nation state since the nation state exists within a pluralist globe. The state is the grounding to contain the particularity of its inhabitants yet it is a grounding which cannot be universal. Ultimately, divorced from a Hegelian progressive narrative (where the rationality of states are coming together in a dialectical sublimation in the growth of reason), obedience to the law of the state implies relativism, for the state is only one of a multiple of states. The strength of the nation state as the grounding of obligation in modernity pushes obligation in modernity into an awareness of its own relativity and non-universality.

For Habermas this situation has no simple set of consequences for 'late modern' society. The area of 'practical reason' concerning social action Habermas equates to the validity claim of legitimacy and Habermas earlier in Legitimation Crises relied heavily upon the Marxist concept of ideology to group together the various manifestations of the social consciousness of modern capitalist society. Thus in Legitimation Crises a central theme was the identification of an irreversible process of disintegration of classical bourgeois ideology. Morality, political economic theory, the drive for 'democratic rights', were disintegrating and losing any ability to coherently hang together or to gloss over inherent contradictions.

Furthermore, no new comprehensive bourgeois ideology could simply be manufactured as if administratively ordered for system continuation, and this led Habermas to give the familiar Marxist narrative of the inevitable approach of capitalism to a time where the conflict between class structure, the reality of anomie and alienation, and the espousal of universalistic democratic values would be apparent to vast sections of the populace, and as an emerging critical consciousness replaces bourgeois ideology

resulting social unrest and transformation needed only to be hinted at.

However, by the time of Communication and the Evolution of Society Habermas has developed a new awareness on this question. What he now realises is that a fragmented social consciousness does not necessarily lead to a loosening of instrumental rationality or bourgeois individualism but may actually maximise systematic reliance upon it. Administrative activity appears in a time of confused moral prescriptives as a rational objectivity. Habermas understood that the reification and fragmentation process of modern society [even if analyzed in terms of ideology] decreased the need for the state to rely upon a basis of normatively secured and communicatively (i.e. two way dialogue obeying critical reason) achieved agreement. Instead "the scope for tolerance for merely instrumental attitudes, indifference and cynicism is expanded."⁶⁷ In a complex and confused set of moral perscriptives the traditional pattern of legitimation may no longer be appropriate. The traditional pattern for social theory, the Weberian typologies, required a pattern of justification for the imperatives and commands of the rulers which ties in with sets of obligations and shared expectations. In Legitimation Crises the capitalistic state appeared headed for disintegration since it had to implement class-based economic imperatives and yet secure normative acceptance in terms of universalistic criteria. This led to the generation of "contradictions" even with the state's recently created compromise, namely the 'welfare state' which now found itself analyzed as an economic cost increasingly hard to sustain⁶⁸ at the same time as it appeared unable to eradicate or even substantially reduce poverty, crime and social inequality, even being itself increasingly blamed for creating either 'dependency' or Foucaultean 'normalization'. Thus capitalism was on the path to self destruction due to its self-violation of the conditions of legitimacy which it itself posited and inculcated.

But what many of the writers who analyzed the coming 'crises of the state' mistakenly adopted was a form of neo-Hegelian conception of the reason of the state and the reason of the people being intermeshing and continuous. The disintegration of the collective identity which it thought bourgeois civil society had provided could thus cause a loss of meaning in the everyday life world, in turn reconceptualised into a critical consciousness and thence action. Habermas's later change is important not only theoretically, where it stands as Habermas's recognition that the Marxist camp had always over-stated the strength of the 'dominant ideology thesis', but also practically in the questioning it raises for the diverse related proposals for practical change in a 'post-bourgeois' era. Post-bourgeois may not mean 'post-individualist', nor lead to 'a developing social ethic' as many have confidently predicted. Much of the work done to test the 'dominant ideology thesis', for example Michael Mann's 1970 work,⁶⁹ has demonstrated the instrumental and individually possessive attitudes of the populace which, combining the phenomena of possessive individualism and a growing indifference as to whether a political order is legitimate or not

in the Weberian sense, appears to be the basis for an attitude becoming reflected in the criminological literature of the 1980's. Namely, those writers who have been concerned with the emergence of a super-class under-class divide and who have sought to demonstrate a growing authoritarian response of the state towards the bottom segment of society.

The division can in turn be seen as acceptable to the degree to which the super-class simply suspends its commitment to the basic norm that democratic values must be universalised. Moreover, people with such attitudes are unlikely to get particularly upset with the judicious use of repression against the under-class elements.⁷⁰ If this sort of analysis is correct, the state in advanced capitalism is actually gaining room to manoeuvre and assert control.

Habermas has his own project to counter this - it lies in the development of "communicative ethics and politics" and is premised upon the movement to a "post-conventional" era for political and ethical theory. It is a project which states its concern as the demonstrating and bringing to conscious existence the rationality inherent in "modernity". Thus it gives itself the status of a "scientific enterprise" divorced from rhetorical modality or moral persuasion. It is, however, on its own definition of rhetoric (the capacity for creating states of consciousness which act as world opening ideology etc), highly rhetorical and, indeed, moralistic in the sense of deeply committed to a particular interpretation of the concept of 'being human' and Kantian in its vision of progress for mankind.

NOTES.

1. "Idea for a Universal History from a Cosmopolitan Point of View", in Kant on History, Lewis White Beck (ed.), Merrill Publishing Co., Indianapolis, 1983, p.14.

2. Ibid, p.13.

3. I. Kant, Prolegomena: To Any Future Metaphysics That Can Qualify As A Science, Paul Carus (trans.), Open Court Publishing Co, La Salle, Illinois, 1902, pp 10-11.

4. Ibid., p 9.

5. Critique of Pure Reason, Norman Kemp-Smith (trans.) St. Martin's, New York, 1965, p.21-22.

6. Critique of Pure Reason, 2nd Preface.

7. I. Kant, Critique of Practical Reason, the text used here is Critique Of Practical Reason and Other Writings in Moral Philosophy, Lewis White Beck (trans.), University of Chicago Press, Chicago, 1949.

8. Cf. Prolegomena: To Any Future Metaphysics That Can Qualify as a Science, Paul Carus (trans.), Open Court, La Salle (Illinois). Chapters of which bear these titles.

9. The method for locating these "conditions" Kant terms "transcendental analysis" - it is a process of elimination in which one accounts for all those aspects of experience derived from terms of sensation, and the residue is explainable in terms of the structure of the mind, or what he calls the "categories of the understanding". Thus the content, or the "matter", of experience, the 'a posteriori' sensuous content, is supplied by sensation, and the "form" of experience, what enables us to understand it, is supplied by the mind. This last feature is the formal component which comprises the conditions of knowledge, and its members are universal, conceptual, and 'a priori'. Cf. Critique of Pure Reason, pp. 120-126.

10. Critique of Pure Reason, p. 138. The passage continues: "this is exactly what we desired to prove". (!)

11. Critique of Practical Reason, A.555, quoted and commented upon in H.B. Acton, Kant's Moral Philosophy, New Studies in Ethics, Macmillan Education Ltd, London, 1970, p.45-46.

12. Critique of Practical Reason, quoted in Lewis White Beck, A Commentary on Kant's Critique of Practical Reason, University of Chicago Press, Chicago, 1960, p.139.

13. P.F. Strawson, The Bounds of Sense, Methuen, London, 1966, p.12.

14. Interestingly, this treatment of remorse provides a path which leads to the existentialist conception of anguish. The difference utilised in the existentialist literature, as for example the one which Sartre draws, between anguish and fear, mirrors that of Kant between remorse and regret. For Sartre anguish is the reflective awareness of the self as freedom. Fear is a relation to objects of the world naturally conceived, but anguish is a relation with my-self. Note however, the content of the rationalist's game - we are seeing Kant using a series of essential definitions which are then fitted onto the experiences that people report. These rigidly categorise reality and if the objection is raised as to the truthfulness with which any of these, say remorse, cover some empirical happening, the "well then it was not truly remorse" argument can be used. The fact that existentialism plays much the same game may be evidence of the close affinity of existentialism and (failed?) rationalism.

15. The bent of utilitarianism has been to do away with qualitative distinctions of worth on the grounds that they represent confused perceptions of the real bases of our preferences which are sentient and quantitative. The hope being that once we have done away with strong evaluation we will be able to calculate - but the Benthamite basis of calculation was prefaced upon the commensurability of the units totalling up the significant units of pain and pleasure. Utilitarians are right to see their enemy

as the mechanism of strong qualitative evaluation, for the mechanism of the Kantian Practical Reason simply cannot be reduced to mere calculation. Moreover, it is more than the difference between quantitative and qualitative evaluation, or the presence, per se, of higher desire, but is the ability of desires to be distinguished as to worth - and thus the idea of a table of values. The Kantian individual refrains from lying, not because that will have such or such a consequence, but because that simply is base.

16. Kant holds: "Man is a being who has the power of practical reason and is conscious that his choice is free (a person); and in his consciousness of freedom and in his feeling (which is called moral feeling) that justice and injustice is done to him, or by him, to others, he sees himself as subject to the law of duty no matter how obscure his ideas may be." Anthropology, p.185.

17. Critique of Practical Reason, p.30.

18. R. F. Holland, "Education and the Spirit" in Against Empiricism: On Education, Epistemology and Value, Basil Blackwell, Oxford, 1980, p.70.

19. Kant's Moral Philosophy, p.51-52. I have omitted Acton's emphasis upon Rationality being "spontaneous and uncaused" or "essentially free and autonomous" as we place more emphasis than he does upon the determination of the intelligibles.

20. There are interpretations which stress the crucial role 'God' plays in the Kantian scheme. For example, that expressed throughout The Idea of Progress, where progress and men's actions are ultimately tied in with the hand of Providence.

21. Hans-Georg Gadamer, Truth and Method, G. Barden and J. Cumming (trans.), Crossroad, New York, 1982.

22. I. Kant, The Metaphysical Elements of Justice, John Ladd (trans.), (Being part 1 of The Metaphysics of Morals), The Library of Liberal Arts, Bobbs-Merrill, Indianapolis, [1797] 1965.

23. I. Kant, Foundations of The Metaphysics of Morals, Lewis W. Beck (trans.), Library of Liberal Arts, Bobbs-Merrill, Indianapolis, [1785] 1959.

24. Kant further states that "the present foundations, however, are nothing more than the search for and establishment of the supreme principle of morality." Foundations, p.8.

25. Critique of Pure Reason, A 841 = B 869. Quoted in Acton, Kant's Moral Philosophy.

26. Foundations, p.56.
27. Foundations, p.53.
28. In effect Kant recognises 'market mentality' as an entirely different specie of social ordering - one determinate upon sensual gratification and payment for compliance (commodity fetishism). Its structure is opposite to that of a *sensus communis* and thus lacks the resources to enable reason to bind.
29. Anthropology, p.191.
30. Idea for a Universal History, p.16.
31. Contained in Kant, Critique of Practical Reason and Other Writings on Moral Philosophy.
32. Anthropology From A Pragmatic Point of View, M.J.Gregor (trans.), Martinus Nijhoff, The Hague, 1974. p.183.
33. Anthropology, p.191.
34. "Theory and Practice", p.74.
35. Religion Within The Limits of Reason Alone, Theodore Green and Hoyt Hudson (trans.), Harper Torchbooks, Harper & Row, London, 1960, p.87.
36. Religion, p.87.
37. Religion, p.89.
38. Religion, p.91.
39. Ibid., p.113.
40. Ibid, p.114.
41. See later discussion on Kant's vision of historical progress and works such as John F.Rundell, Origins of Modernity; The Origins of Modern Social Theory from Kant to Hegel to Marx, Polity Press, Cambridge, 1987.
42. Grey, The Enlightenment: an interpretation, p.519.
43. Theory and Practice, p.77.
44. with following quotes Ibid., p.78.

45. It is a standing objection that Kant gives us a theoretical situation inhabited by very abstract or empirically 'irrelevant' "persons", who preserve a dignified separateness, or autonomy, at the expense of denying their very reality as actual, empirical individuals (i.e. of their 'real' individuality). This was noted early: Hegel saw in Kant the mistake of idealism in separating itself from the world and held the critical philosophy of Kant as creating a dilemma where it seeks to provide the existence of God (the absolute foundation of good in the world) via the science of reason, but this being unsatisfied it is handed on to faith in the Critique of Practical Reason which presupposes God as the practical supposition. For Hegel Kant is forced to realise the failings of critical philosophy; a failure centred around the impossibility of knowing the "thing-in-itself". [Hegel, History of Philosophy, Vol 3, pp.428-30. Other references in text as (HP III, p...)]

Hegel read Kant's critical philosophy as proposing "first of all to supply a criticism of our facilities of knowledge; for before obtaining knowledge we must inquire into the facilities of knowledge." (HP III, p.428) Kant is depicted as having an instrumental rationale for the pursuit of knowledge believing it "an instrument...whereby we endeavour to possess ourselves of the truth." Man looks for truth "with spears and staves", working with a confidence which is undeserved since "to investigate the facilities of knowledge means to know them; but how are we to know without knowing...it is impossible to say. It is the old story of the scholastic who would not go into the water until he could swim." (HP III, p.428)

Hegel has two responses to his uncovering of the dilemma of reflexivity in Kant. First, the practical: there must be a certain jumping into practical life - problems of absolute speculation which appear in contradiction to the way of the world are only examples of the consciousness revelling in its one-sidedness. Second, the development of the inner dialectic: reflexivity is simply part of the apparent paradox of contradiction. Kant's need to separate reality and his construction of dualisms is as a response to his epistemological timidity. "Kant shows here too much tenderness for things; it would be a pity, he thinks, if they contradicted themselves. But that mind, which is far higher, should be a contradiction - that is not a pity at all. The contradiction is therefore by no means solved by Kant; and since mind takes it upon itself, and contradiction is self-destructive, mind is in itself all derangement and disorder." (HP III, p.451) To have reflexivity without a confidence capable of going beyond the confines of 'contradiction' results in the creation of the void. Reason must provide a logic in which the law of non-contradiction is not absolute, where reflexivity can resolve itself - such is the finding of the path of reason in time. "Pure thought has advanced to the opposition of the subjective and objective; the true reconciliation of the opposition is the perception that this opposition, when pushed to its absolute extreme resolves itself...To know opposition in unity and unity in opposition - this is absolute knowledge; and science is the knowledge of this unity in its whole development by means of itself." (HP III, p.551)

World spirit moves through the passages of contradiction, synthesis and reflexivity: reason does correct itself and we partake in that success wherein "the world-spirit has at last succeeded in stripping off from itself all alien objective existence, and grows divinely reconciled in the knowledge that it has constructed 'from itself what for it is objective'". (HP III, p.551) So divinely happy as the constructions of philosophy have now consumed the categories of theology rather than ignored them.

46. See for example, Ezzat A Fattah, "Making the Punishment Fit the Crime: The Case of Imprisonment, The Problems Inherent in the Use of Imprisonment As A Retributive Sanction", Canadian Journal of Criminology, 1979.

47. Daniel N. Robinson, "Moral and Social Science and Justice", in Issues in Criminal Justice, Fred Bauman and Kenneth Jensen (eds.), University Press of Virginia, Charlottesville, 1989, at p.17.

48. H. Pepinsky, Crime and Conflict, pp 112- 3.

49. A. Yakovlev, "The Criminal Law: Individualization of Punishment or Equality Before the Law?", Papers on Criminal Policy, HEUNI PUBLICATIONS SERIES, No. 7, Helsinki, 1986, p. 60

50. Jerome Hall, General Principles of Criminal Law, (2nd ed.), Bobbs-Merrill, New York, 1960, p. 455.

51. Cf Henry Hart, "The Aims of the Criminal Law", Law and Contemporary Problems, (1958) 23, pp.401-41.

52. The theory of progress in Kant is taken up by Hegel, Marx and Lenin, to name a few, who push the tension inherent in 'the world as reason and the world of present appearance (irreason)' to the point where revolution becomes the instrument to attain that state of reason and bourgeois morality becomes communist 'post-morality'. The resolution of the tension in rationalism thus implies we take our leave of this world in favour of the 'other'.

53. See in this respect Agnes Heller, Beyond Justice, Basil Blackwell, Oxford, 1987. Heller states in her final chapter, "Goodness is beyond Justice.....The good life is beyond justice." And, as "justice always has a moral component", the good life must be beyond morality as well. Being moral was, however, a precondition for achieving this (pp.320-327).

54. Karol Soltan, The Causal Theory of Justice, University of California Press, Berkely/London, 1987, p.65.

55. This particular version of the desire for the 'post-moral' is an outgrowth of a strong attitude which sets love above law, rejects utility and objectivity rejects violence, proclaims that all men are of one family, asserts the insufficiency of purely material ends and regards human temporal existence as incapable of being made perfect, but declaring the implication of perfection keeps it as a telos. These share what can be termed

the impact of the 'Romantic' strand of the Enlightenment which links a theory of progress to the notion that man has a whole, a human nature which is naturally of reason and benevolence, which is somehow obstructed, repressed or restrained in modernity. What runs through Kant, and rationalism in general regarding its social commentaries, is an unresolvable tension between the 'faith' that the essence of the world is 'Reason' and thus the present must partake of the Reason and the empirical observation that much of the social world imply cannot be called rational. Kant therefore is forced to defend much of the irrationality of the present as being involved in the progress of reason and man. Take the notion of the Ethical commonwealth, this is the end of Kant's social theory of progress. The history of man is seen as the progress from his dependence upon nature and natural instinct into civilization and morality. The key to movement, to change, to progress, is man's increasing use of reason and his apprenticeship in the art of free self determination through reason which in time overturns instinct and sentiment.

56. "Moral and Social Science and Justice", p.28.

57. S. Freud, Civilization and its Discontents, J. Strachey (trans.), Norton, New York, 1961, p.81 ff.

58. We have already noted how others such as Foucault see this 'disciplinary' function as essentially part of modern science.

59. This is latent in systems which have held to the totality of 'reason', for example Hegelianism. A modern enterprise in reflexivity of the rationalist conception of the moral basis of the criminal law, for instance, 'pragmatically' need not be an uncritical 'consensual' approach, nor an overconfident 'critical' one, but in neo-Hegelian terms a question of what exactly are the standards of moral argument to which it commits its society. But this reflexivity is what both the consensual and the conflict schools avoid. The consensual by, an identification of the social convention of the time as the proper public morality expressed via the criminal law, the conflict by a reduction of the 'moral expression' of the criminal law to instrumental action for other, causal entities, divorced from that law. A reflexive moral conception of the criminal law would, conversely, ask what moral principles the law embodies, what is the principle that is being addressed here and are there conflicting principles, in each and every case, and how this interrelates with the others held in any system. Such a reflexive project would escape mere descriptive immanent critique in its peculiar Hegelian 'reconciliation of philosophy with reality' through a post-modern raising to consciousness the non-surpassing of the present - the present is the home of the post-modern and thus is to be worked within; salvation from the present is denied.

In its particularities any case, any imposition of punishment, would serve as a test case of critical morality (thus similar to the Hegelian notion of Aufheben but without the metaphysical guarantee of the Absolute). Using Kantian terminology each actual case of criminal law, each trial and

imposition of sentencing, would be an analysis of concepts of autonomy, of freedom, of choice (or lack of it), and a raising to light of those principles which, when so raised, the expectation of its ideal would be such that one was justified in stating that the other should, reflexively, agree to accept it as a principle of social life (note that the Kantian would ask that the other accept it as 'true', the pragmatist would ask for acceptance as an element of social life); the concepts of obligation and its correlative, duty, then define the conditions for allowing punishment. The pragmatic grounding lies not in a dual anthropology but in a 'thick' reflexive contextuality.

60.Cf John Braithwaite's analysis on 'blame' and 'shame' in Crime, Shame and Reintegration, Cambridge University Press, Cambridge, 1989.

61.A Etzioni, "Organizational control structure", in J.G. March (ed.), Handbook of Organizations, Rand McNally, 1965.

62.Importantly, although the substantive moorings of traditional fixed points of reference for social/individual identity were in transition Kant keeps the cognitive infrastructure. The moral consciousness is still the notion that the ego has the expectation that norms should be judged in the light of internalised [entities] now principles.

63.Certain motifs are usually referred to in this context, for instance 'nationalism' and 'racial pride' which are drawn upon to give an artificial sense of communis in modernity.

64.'Capitalist consumer demands' are but a sub-specie of modernity's holding up economic growth and efficiency as key social indices of progress which exist alongside notions of the modern identity which equate the good with growth and accumulation [i.e. the Weberian recognition that the rational control over one's self over the occurrences of life could be reflected in the accumulation of 'goods'] and in their own way indicative of the relationship between collective identity and the central motivations of capitalism; growth and competition may well require a 'non-moral' vision of the 'good life' as in the Humean legacy.

65.I take the quote from the appendix to Bernstein, without the underlying appeal to Platonism that followed this line. Bernstein, prev. cit., p. 264.

66.After Virtue, P.254.

67. "Reply", p.281.

68. Cf., James O'Conner, The Fiscal Crises of the State, New York, 1973.

69. Michael Mann, "The Social Cohesion of Liberal Democracy", 35 American Sociology Review, 1970, pp. 423- 39

70. Cf Dahrendorf, Law and Order, also Phil Scraton (ed.), Law, Order and the Authoritarian State: readings in critical criminology, Open University Press, Milton Keynes, 1987, expressing "the view from below".

Chapter Seven: Reflections on Wittgenstein and the 'style' of the pragmatic imagination.

Part A.

I

"The later Wittgenstein certainly was a pragmatist: the meaning of a proposition (or rather a 'speech act'), and hence its truth value, is given by the social context of the 'language game' it is a part of."¹

The concept of a language game is, however, more than simply a conceptual scheme, and it is of importance to see how Wittgenstein arrived at this notion.

He begins his best known latter work, Philosophical Investigations, with an attack upon the designative theory of language - a paragraph from Augustine concerning the process of learning to speak a language is held out by Wittgenstein as an example of learning dependent upon the picture theory of meaning.

For Augustine:

"the essence of human language...[is that] the individual words in language name objects - sentences are combinations of such names - in this picture of language we find the roots of the following idea: Every word has a meaning. This meaning is correlated with the word. It is the object for which the word stands"²

For the later Wittgenstein, this view, which he had based the Tractatus upon, is seriously defective in ignoring the context of the activities in which words are embedded. He now holds that words do not have an independent meaning apart from activity, and the combination of activity and language he calls a "language game". It is the operation of the language game which actually provides the bedrock, or limits, of human thought. The notion of an essential meaning of "words" is replaced by the notion of "meaning-in-use". It is this "meaning-in-use" which fulfils for Wittgenstein the function which foundationalism (or as Wittgenstein put it, the notion of a secure bedrock) provides for empiricism and rationalism.

Hume had begun his search explicitly directed at uncovering the basic bedrock for knowledge: and it is as well to recap upon the empiricist version of his findings and Kant's interpretation of them. Hume approaches the matter in rationalist fashion: a rational justification must be given for every stage in the process of gaining knowledge and the fundamental foundation must be shown. In this search we may rely upon the universal notion of causality (otherwise expressed as "necessary connection" or "constant conjunction") which we observe pervades the empirical world.

But when we turn to examine the very concept of causality we become immersed in the paradox of reflexivity. All that is found behind the concept of necessary connection are (causal) judgments of "contiguity and succession" and it is "in vain to rack ourselves with further thought and reflexion upon this subject". When we seek to propose another concept to explain causation we either analyze it in turn and reduce it to a further, deeper concept and so on, or, if man seeks to avoid such a continuing regress, "he [then] runs in a circle, and gives a synonymous term instead of a definition." (T. p.77)

We cannot demonstrate a foundation in our reason for our belief in the uniformity of nature, nor can "probability" arguments be conclusively relied upon as they rest upon the belief in this regularity itself. Thus we can, at least, know a form of negative knowledge:

"Reason can never shew us the connexion of one object with another, tho' aided by experience, and the observation of their constant conjunction in all past instances. When the mind, therefore, passes from the idea or impression of one object to the idea or belief of another, it is not determin'd by reason..." (T.p.92)

Part of the empirical foundation for knowledge, such as causal belief, is found in the operation of the psychological relation of association - the basic level of empirical epistemology is thus found linked to "custom" or "sentiment".

Hume makes a further move into what seems the most irrational and arbitrary pragmatism possible wherein he claims

"'Tis not solely in poetry and music, we must follow our taste and sentiment, but likewise in philosophy. When I am convinc'd of any principle, 'tis only an idea, which strikes more strongly upon me. When I give the preference to one set of arguments above another, I do nothing but decide from my feeling concerning the superiority of their influence. Objects have no discoverable connexion together; nor is it from any principle but custom operating on the imagination, that we can draw any inference from the appearance of one to the existence of another." (T.p.103)

Here we are plunged into the abyss, the hermeneutical void where all discourse is uncontrollably irrational, all is "without a meaning" (T.p.267). Out of the void we are plucked, not by our own endeavour, but by the "current of nature" which directs the basis of our psychological associations. The reality of external nature provides for us and saves us from "the necessity of Pragmatism".³

Kant acknowledges the rationalism implicit in Hume's original drive, analyses Hume's difficulty and provides his own corrective in his process of critique, distancing and alternative provision of foundationalism. Thus Kant states:

"Hume recognised that... it was necessary that these concepts should have an 'a priori' origin. But since he could not explain how it can be possible that the understanding must think concepts, which are not in themselves connected in the understanding, as being necessarily connected in the object, and since it never occurred to him that the understanding might itself, perhaps, through these concepts, be the author of the experience in which its objects are found, he was constrained to derive them from experience, namely, from a subjective necessity (that is, from 'custom'), which arises from repeated association in experience, and which mistakenly can be regarded as objective"⁴

Kant draws a distinction between the noumenal and the phenomenal worlds, and the possibility of true knowledge of the noumenal is guaranteed by the transcendental categories of the human mind. But Kant was not as aware as Hume of the bind of reflexivity and when future commentators explicitly apply the reflexive treatment, as with P.F.Strawson, Strawson is led to conclude:

"Kant's arguments for these limiting conclusions are developed within the framework of a set of doctrines which themselves appear to violate his own critical principles. He seeks to draw the bounds of sense from a point outside them, a point which, if they are rightly drawn, cannot exist." ⁵

Against Hume, Wittgenstein did not expect there to be a rational justification for every level of knowledge - no "explanations" can be given for bottom level features of understanding, only "descriptions". Moreover, these descriptions are not known from outside of language games, but only from inside one or other such game. It is not possible to stand on a position outside of language games and judge the relationships between the words, sets, propositions, and an objective "reality", and thus judge whether language is correctly picturing, or correlating with, or representing, reality. We are permanently within some or other language game, and there can be no transcendental appreciation of the adequacy of the language game. He draws thus upon his feeling of unease where in the Tractatus he had followed the Kantian path and drawn a boundary between the sayable/knowable, and the unsayable/unknowable. Such a drawing of the bounds of sense led Wittgenstein to conclude:

"anyone who understands me eventually recognises them [these boundaries] as nonsensical, when he has used them - as steps - to climb up beyond them. (He must, so to speak, throw away the ladder after he has climbed up it.)" ⁶

Now in On Certainty Wittgenstein held that thought always existed in a context of life; further, this was not an arbitrary irrationalism, or a void as Hume had feared, but the actual human rationality of our life forms themselves:

"All testing, all confirmation and disconfirmation of a hypothesis takes place already within a system. And this system is not a more or less arbitrary and doubtful point of departure for all our arguments: no, it belongs to the essence of what we call an argument. The system is not so much the point of departure, as the element in which arguments have their life." ⁷

When we refer to objects in the world and suggest correlations, and so forth, we are operating within a language game, and how the world divides up to us is conditioned by the structure of that language game.

The task of the inquirer is to draw out the intricate workings of the various language games - of the rationality of our ways of life. By this procedure we consciously strive to avoid our desire for a transcendental standing point creating a 'false' reductionism by denying the necessity of 'explaining' the operation of "foundationalism" - instead we attempt to demonstrate the processes wherein the limits of actual thought and experienced 'reality' become evident, or attested to, from within the living structures of language games.

Wittgenstein called his approach therapeutic, and claimed that he was proposing something quite different from the traditional approach to explanation. His version of philosophy was to be open-ended and non-authoritative:

"Philosophy simply puts everything before us, and neither explains nor deduces anything - Since everything lies open to view there is nothing to explain. For what is hidden, for example, is of no great interest to us."

But he went on to say in the same paragraph:

"The work of the philosopher consists in assembling reminders for a particular purpose."

Philosophy was to be of practical use in the process of people's projects, purposes, and life forms. To say that we always operate within a language game is to accept a radical understanding of the contingency of social practices as defining what we are, and our human inter-relations as constituting the social - to say, however, that these are contingent does not mean that they are arbitrary, if that means that we are entirely free to leap totally out of one historical situation and simply choose to create ones position in some other set of contingent social practices; but neither does it mean that we are to accept the warm "organic" cradle of the fundamental "current of nature". We can instead look at the substance of our language games as constituting the material expression of our lives, and seek to appreciate the rational traditions within them, while, alternatively, always posing the question of transformation: we seek to be concerned with our "series of reminders" only because

it is these which offer some real hope of solutions to cope with the concrete "problems" of mankind in their various socio-economic-political positions.

The supposition that we can find some item absolutely independent of already operating language games upon which to base the construction of a new system is mistaken - instead of being concerned with the notion of some fundamental foundation to the bottom level features of language games we should get on with the business of identifying how we actually use and live inside our existing ones and what are the implications of their use in social life. Reflexivity and epistemological reflection leads us to realise the general need to base our actions upon some foundation, but this is embedded not in a universal scheme of pure reason, nor the constraints of a depth empirical framework conditioning existence, nor arbitrary desire, but in the operative forms of life we inhabit. Foundationalism is addressed thus:

"How am I able to obey a rule? - if this is not a question about causes, then it is about the justification for my following the rule in the way I do. If I have exhausted the justifications I have reached bedrock, and my spade is turned. Then I am inclined to say: 'This is simply what I do'." ⁸

At first sight this appears even more irrational than Hume's conditioned sentience, the irrational nature of the foundation of epistemology which this appears to offer is, however, addressed further:

"'So you are saying that human agreement decides what is true and what is false?' - It is what human beings say that is true and false; and they agree in the language they use. That is not agreement in opinions but in form of life." ⁹

Pragmatic agreement is not an agreement of definition, but an agreement in words and (i.e. linked to) activity. Danford summarises the general emphasis of Wittgenstein's comments on language as follows:

"The point of these remarks is that the notion that language is no more than a communications code by means of which we make statements to or ask questions of each other makes us look elsewhere for the thoughts or ideas, or 'meanings'

conveyed by language. On this understanding we have a tendency to overlook the fundamental fact that using language, or speaking, is a human activity."¹⁰

Our attention is turned back by the pragmatic imagination to the conduct of life and the formations which human sociality develops. Specifically Wittgenstein calls us to investigate the operation of "language games", the words and the actions in which they are woven, "in the practice of use", as when "one party calls out the words, the other acts upon them".¹¹ Learning our language means learning how to exist inside differing language games, in which words are used in differing ways. These language games are forms of human action, of activity; they are something humans do, and are not just instruments in the process of attaining something else, of reaching another place.

II

Language games are human activities - thus the meaning of words is internally connected to the part the words play in the various language games in which they occur. As Danford interprets Wittgenstein, understanding a word is like understanding the part a particular operation plays in the function of a complete activity, like understanding a lever in the cab of a locomotive: fully understanding it requires an understanding of the whole mechanism, that is what the whole mechanism is for. Understanding the part requires some grasp of the whole of which it is a part. In the case of a language game, this entails understanding what the human activity is, what it is for, why it is played. Words, or at least many words, are used in many different activities. To understand the full meaning of a word requires some grasp of all the activities, the social wholes, in which the word plays a part. Thus the meaning of words can only be understood if we understand the purpose or ends of the human activities of which the words are part. Ignoring the different language games and their ends or purposes when seeking the meaning of a word is like trying to understand the brake lever in a locomotive without

understanding what a locomotive does, or what it is for.¹²

Reflexively, we are here in some difficulty - for there is the danger that this approach merely temporarily submerges the necessity for the external reference point which will re-emerge at a later stage - the stage requiring 'objective knowledge' of the operation of the whole: the teleos of language games similar to the purpose of the locomotive. To the extent that such knowledge is ever claimed to exist in a closed and certain form, pragmatism breaks down; what is important is the recreation of the speculative grasp of wisdom, which Apollonius referred to as 'a speculative grasp based on inference from "some understanding" [which] we can wrest to deny the void', for as Dewey once said:

"Inference is the advance into the unknown, the use of the established to win new worlds from the void".¹³

Wittgenstein uses two tactics to determine the purpose of a language game. One is when the game seeks to reflect what he calls the 'laws of nature', the other is when it consists of learning the meaning inscribed in the living, traditional, practices of man, i.e. life forms.

"To invent a language could mean to invent an instrument for a particular purpose on the basis of the laws of nature (or consistent with them); but it also has the other sense, analogous 'to that in which we speak' of the invention of a game." (P.I. para 492).

Obedience to the purpose of the language game Wittgenstein calls "Grammar". Grammar is revealed by the process which we call in ordinary language, 'obeying a rule':

"to obey a rule, to make a report, to give an order, to play a game of chess, are customs (uses, institutions.). To understand a sentence means to understand a language. To understand a language means to be master of a technique." (P.I. para 199).

Grammar is the living social procedure through which language evolves and meaning is guaranteed. To obey a grammatical 'rule' is to continue to practice the customs moulded by the community of man - this is the faithfulness of the present to the traditions of the past - the inheritance of the meaning

continually worked out by communal man in his life practices. But there is another function which language serves; this is the disciplinary language which seeks to represent the laws of nature. Grammar avoids arbitrariness by the regulative criteria of being faithful to the material it seeks to describe, and the purposes for which it describes it; loyalty and consistency to the laws of nature work themselves into grammar through man seeking 'reliability' in what he says, and in his practices. Furthermore language is alive - we invent new games, new practices, give rise to new interactions or moves between participants which create new purposes for the life of man. In the process of growing we intermix rules, customs and conditions of use, under the influence of our inventiveness. Wittgenstein continued his paragraph (497) by stating that the very grammar of the word language was connected to the grammar of the word "invent" - The laws of nature are linguistic conventions for creating an orderly complement out of the vast quantities of observations and experimental happenings.

The Wittgenstein turn reinterprets the history of science as the rise and decline of various "absolute" laws of nature - the meaning of each successive scientific fashion becomes apparent when it seeks to expand its own game - what corrects the assertions of each attempt is that men are in some way linked to the observed "facts" of nature in attempting communication - the inner monologue of one specific scientific game may be self-sustaining - but the criteria of meaning-in-use leads us to consider the actual effects of the game in practice. From communication comes pragmatism - we shall examine this with relation to criminological theories in part three but here we shall be concerned to note our distance from Lakatos' claim that the grammar of each language game is so deterministic that each game is incapable of change and development. The charge is important as the criteria of meaning-in-use makes the pragmatic claim of direct embodiment and transformation of social reality. As Lakatos put it the image of the Wittgenstein imagination is

"that of a society without radical alternatives, where one can only 'improve' but not replace 'the current repertory of

concepts', a society whose membership depends on oaths of loyalty to specific doctrines ('commitment to collective ideals') and where only 'professional forums' can judge the implications of these doctrines for specific cases. In this closed society critical reappraisal and modification are allowed only if done by 'qualified judges'. The layman is powerless, the elite self-perpetuating."¹⁴

The elitism Lakatos sees as associated with pragmatism originates in the move "from the classical conception of truth - a proposition is true if it corresponds to the facts, to a belief is 'true' if it gives rise to useful or effective action" for now the "third world" of absolute epistemological purification is "redundant". Further, pragmatism cannot give a "universal criterion of progress", which Lakatos takes to imply

"that any change in science means by a Hegelian Cunning of Reason, progress in science...selective survival is the criterion of progress."¹⁵

But pragmatism should not be viewed as failed rationalism for it is the very persistence of "facts" under the regulative ideal of 'inarticulable reality' which feeds into pragmatic 'progress' in science. Progress is achieved by various scientists inevitably forced into attempted communication and constituting new language games by the dictates of meaning-in-use. The elite cannot determine the activities of the game as the game must be actualised, and this actualization involves various games without a single plane of foundationalism. The focus is not on the rationalists' abstract movement of pure reason but is centred around a basically "human" focus in which ultimately it is man via the gathering of information and adopting modes of shared "use" which creates progress. There is no template of absolute progress; no deterministic foundational pattern to be discovered - only traditions to be lived within - but traditions that are living. Thus they must be open to projects of immanent critique and reflexivity when problems of communication arise. A fully pragmatic tradition is one which is self-conscious of its own pragmatism, of its own human creation.

III

The critical empiricism of Popper is at points similar to some pragmatic themes. In Objective Knowledge Popper held:

"from Plato until today, most philosophers have either been nominalists or else what I have called essentialists. They are more interested in the (essential) meaning of words than in the truth and falsity of theories." ¹⁶

Pragmatism can be seen as most concerned with the adequacy and quality of theories, or adequacy of suggested language games, than in seeking essential concepts, laid down once and for all, or allowing the anarchistic play of labels to hold sway. Instead it seeks to draw out distinctions operative within theories and the flow of words, demonstrate their effectiveness and efficacy as they recount the diverse strands of the human narrative(s).

A central move of Wittgenstein was to place the question of 'essence' or 'meaning' as a subject to be investigated in the context of humble life - in a sense we side a little with Hume as we read:

"we are under the illusion that what is peculiar, profound, essential in our investigation, resides in its trying to grasp the incomprehensible essence of language. That is, the order existing between the concepts of proposition, order, proof, truth, experience, and so on. This order is a SUPER-order between --so to speak --SUPER-concepts. Whereas, of course, if the words 'language', 'world', have a use, it must be as humble a one as that of the words 'table', 'lamp', 'door'. (P.I., p.97.)

When we recognise that in the life forms in which we exist "grammar tells us what kind of object anything is," (P.I., para 373) we are also, in a sense, with Hume, for, although this is a highly contested part of Wittgensteinian scholarship it is apparent that Wittgenstein holds the view that to be able to tell what kind of object anything is it must already be fulfilling a function. That is to say, the identification and 'knowing' of an object is contemporaneous with the positioning of that object in the life practices we inhabit. In other words; accepting that an object can be defined as X, means we must live our practices with it as X, or in terms more familiar to a lawyer; the formal identification of a thing (concept, right, duty.) must always be

accompanied by the substantive meaning-in-use of that thing (user, redress, access etc.). To do otherwise would mean we had not been faithful in identifying this entity, or had really identified another. The extent to which this is similar to Hume is in the sense in which to be able to receive an object in use (grammar) precedes what we call the object (language) - that is, we cannot identify an object as such until the life conditions make possible the linguistic conditions. But we depart from the empiricist reading of Hume in that man is creative in this activity: nor does this development of grammar tell us what a thing is, other than what it is now within contingent practice - there is no meta-grammar to be found which ties language to one form as the rationalist may lead us to believe; grammar is the living instrument which serves to "show the post where this new word is to be stationed" (P.I. para 257), but this is always to express the rules of the game, rules which may develop and whose breach may give wrong meanings, but there are no 'rules' of the rules able to be objectively established.

As grammar is the life forms we inhabit, one word may have a position in different language games - the meaning is its meaning-in-use or the conditions which sustain its actual use within these practices - and these practices are a complex of many influences together constituting the process of human activity and communication. Any given word varies according to the context and use within which it exists - under different systems of language games varied uses make sense, and are rational, while at the same time the common use of the word provides a valid linguistic basis for such variety. Understanding the word adequately demands that we sift through the uses of the word to determine the character of the language game in which it is deployed and, thereby, indicate the grammar of that language game; for the grammar of that language game determines its being posted as it is. This can be both critical and conservative to someone desiring to state that a given word actually 'meant' something contrary to that which the meaning-in-use of a game appears to have developed it into.

Take as an example the creating of the terminology of 'prisoners' rights'. Let us suppose that some discourse has uttered a statement which we want to take as substance for this concept, say, a legislative act containing certain (supposed) directives as to the conditions in prison. Given that the interpretation which the prison authorities have accepted appears to our critical inquirer to be contrary to the 'spirit' of the legislation, what does Wittgenstein suggest as a remedy? In Philosophical Investigations he states:

"Following a rule is analogous to obeying an order. We are trained to do so; we react to an order in a particular way. But what if one person reacts in one way and another in another to the order and the training? Which one is right? Suppose you came as an explorer into an unknown country with a language quite strange to you. In what circumstances would you say that the people there gave orders, understood them, obeyed them, rebelled against them, and so on?

The common behaviour of mankind is the system of reference by means of which we interpret an unknown language." (P.I., para. 206).

Yet recourse to the common behaviour of mankind is ambiguous: Wittgenstein has also given the pragmatic advice to "look at the sentence as an instrument, and at its sense as the employment" (P.I. para 421), but instruments do not have a single employment, and there can be no single practice of using instruments. Yet our common language tells us that 'Legislation can be an instrument of reform' and this is to give it a role in one vision of the language games of penal reform where legislation is not an idle exercise but is undertaken for particular purposes. Enactment of rules, descriptions and like forms are typically addressed to an audience for the purpose of bring about or modifying patterns of behaviour; of elucidating responses. But use and application are variable in scope, the essential view of language at least gave the assumption that there was some ideal form of explanation which will not only be definite, but also bridge the gap between meaning and application - agreement, albeit imposed, as to this ideal essence could be enforced - but what of the variability of use? Recourse can only be made to the living conditions or background of the legislation - in a sense to the interpretative

emphasis of Gadamer which appears to stress the possibility of achieving a privileged vocabulary, or conceptual scheme, for interpreting, at this historical moment, the correct meaning of the enactment. However, Wittgenstein is not primarily concerned with the truth of the code of the enactment but he is concerned with the link as it comes in use-in-practice. The claim of our critical interpreter to uncover the code of the text is only effectual if it is itself an active game - perhaps the game of critical penal interpretation of state practice. Our inquirer may well scrutinise the various purposes he discerns in the actual moves which led to the legislation, the speeches of its framers and so forth; more than this he may look to the various considerations which gave rise to this legislative activity and consider these as guides to proper practice - for although Wittgenstein counters the notion that there is an essential determinacy to the sense of words, there is no such thing as the absence of sense - there is always a sense to be constructed, ideally that 'sense' is created in the operative grammar which processes the new word's introduction - but this is also 'open' to participation in such practices. Thus, because there is no absolute determinate essential sense the task of grammar and the shaping of the techniques of applying any expression is a task open and demanding of participation. In the end the actual meaning of the 'rights' of the enactment will be those brought out in its meaning-in-use, and this will be a matter of the pragmatic construction of life practices.

This appears to many to be where pragmatism breaks down. Lakatos, in the review already cited, holds that pragmatism thus ascribes the proper meaning of an entity to the actual practices which result, but as he rightly says, these practices may be relativist and subject to the outcome of sheer power (coercion). Thus pragmatism, it is said, loses any critical edge and appears to accept a background notion of some cunning of history as its metaphysical guarantee. In Wittgenstein's teaching his concerns largely focused on bring notions down to their use in life - the point being that when we speak we speak always against the

backdrop of particular circumstances, as individuals rooted in particularised socio-temporal, historical, cultural, political and economic contexts. In such contexts we do have the tools of criticism and desire, tools to use to transcend the flow of coercion by breaking its immanence. In a social context where some measure is being pushed through, the use-in-practice may, temporarily be the subject of 'Might' (coercion) but power is multi faceted, multi layered, and the various traditions of grammar (and the rhetorical demand of our faithfulness to accepted methodology of grammar - the strength of the tradition) can interpret and reinterpret the ploy of coercion and so obstruct it.

This methodology is represented or constituted as our historical ways of life - those forms of grammar which we have fought over and brought about in the complexity of historical struggle. As opposed to the elitist fear of Lakatos the very point of the 'grammar as technique' argument is in the sharing of the language game - for the language formally lives in the shared techniques of all - we cannot have the imposition of an essence created once and for all and which is designative of supra-reality. The reliability of the grammar comes from the collective permission that each can afford to give to all and which all can afford to give to each to use. This language is a chief indicator of what society can say - and the reality of social practice is the process of grammar.

IV

The real fear of those like Lakatos is that pragmatism is actually not pragmatic: that is, that it has nothing to with practice and with the conscious and rational guidance of the transformative desire. This centres on the question of how we are to understand dicta such as "philosophy may in no way interfere with the actual use of language; it can in the end only describe it." (P.I. para 124) The dilemma is actually about foundations,

for Wittgenstein continues the paragraph: "for we cannot give it any foundation either". Philosophy in the pragmatic mould cannot give it a foundation because there is no universal plane of sense, instead the practice must be understood on its own terms, thus non-foundational philosophy must "leave everything as it is". But Wittgenstein states that his concern is with real life: the next paragraph states the project of recovering the tradition: we cannot "resolve a contradiction by means of a mathematical or logico-mathematical discovery", but we aim to "get a clear view of the state...which troubles us: the state of affairs before the contradiction is resolved". Wittgenstein states:

"this does not mean that one is side-stepping a difficulty. The fundamental fact here is that we lay down rules, a technique, for a game, and that then when we follow the rules, things do not turn out as we had assumed. That we are therefore as it were entangled in our own rules. This entanglement in our rules is what we want to understand (i.e. get a clear view of). It throws light on our concept of meaning something. For in those cases things turn out otherwise than we had meant or foreseen. That is just what we say when, for example, a contradiction appears: 'I didn't mean it like that.'

.....the civil status of a contradiction, or its status in civil life: there is the philosophical problem." (P.I.para 125)

Our practical concern includes the concern to actualise intentions, to demonstrate the immanent critique, and to investigate the constraints in the social body which create the gap between theory and practice, the entanglement of the language games.¹⁷

V

We could speak of the coming of pragmatism using the supreme rationalist narrative form of the Hegelian path of the objective spirit which, caught in the post-modern realisation of reflexivity, brings us, post-history i.e. post the looking forward to the future of the grand-narrative, to the present, a 'pragmatisation' of belonging.¹⁸ The objective-subjectivism of

meaning in the latter Wittgenstein is the subjectivism of a location in forms of life - it is non-Kantian although there is some similarity in the themes of categories, logic, grammars, and language games being related to the interaction of social man and material environment as opposed to the recognition of the structure of the world - yet whereas for Kant the structure of the world was ultimately knowable and we had the unchanging categories of the understanding with which to project the tool of universal syntax, and whereas for the early Wittgenstein the purpose of that syntax was to picture, via experience, the knowable structure of the world, for the latter Wittgenstein the categories of the understanding, the visionary games of language, were in constant flux. The self both belongs to the flux of multiple language games and is constituted in the experience of being a player in such games. Its nature is its agnostic expression - the language games it helps to develop and in which it continues to participate grant an openness of expressive conceptions rather than the closure of the designative.

To appreciate this, let us place it in contrast with one other recent perspective on human nature at odds with rationalism and empiricism. In response to the deterministic flow of empiricism and categorizations of rationalization "Existentialism" postulated the total openness of human nature. Thus for Sartre:

"If man, as the existentialist conceives of him, is indefinable, it is because at first he is nothing. Only afterwards will he be something, and he himself will have made what he will be. Thus, there is no human nature, since there is no God to conceive it. Not only is man what he conceives himself to be, but he is also what he wills himself to be after this thrust toward existence."¹⁹

In "existentialism's first move" man is to be made aware that for "what he is...the full responsibility of his existence rest[s] on him.." Man has no essence except the radical freedom of choice - he is not linked to the power of reason, to any intuition of 'right' and thus there is no necessity to chose the rational, such an expression is meaningless but neither is he determined - he bears the full weight of his fate and actions. Pragmatic man is, alternatively, social man, he has no existence apart from

human interaction and it is that human interaction which provides the tools, primarily language, by which he articulates the unnatural, acts upon it and thereafter treats that articulation as an expression of his constituted nature. The comparison with the existentialist position is revealing. Sartre says of talk of cowardice:

"when the existentialist writes about a coward, he says that this coward is responsible for his cowardice. He's not like that because he has a cowardly heart or lung or brain; he's not like that on account of his physiological make-up; but he's like that because he made himself a coward by his acts."²⁰

Sartre places responsibility completely on the individual - the freedom of the existentialist is a freedom of anguish and despair as the individual shorn of 'illusion' feels the loneliness of his sole responsibility - yet cowardice needs the 'other' to exist. It needs the other, the judgement of the other, even if that other is only the intrasubjective 'other' of interiority. It needs the other to utter the language, to narrate the story of what cowardice is, to tell in what parallel situations particular actions amounted to cowardice. It needs the other to keep the articulations going - it needs the other to provide new units of discourse, new moves in the games of life forms, new rights, new allocations of gender role. It needs the other to 'game' with, and thus the other is not itself to be self-sufficient, for then the other could not be human, only God (the God that was man), or nothing (the absence of man). For Sartre "L'enfer, c'est les autres" (hell is the others), but equally he would be forced to utter in pragmatics, so too is heaven, but neither state can exist without interaction, without involvement.

Part B

Pragmatism inherent in modern moves.

I

Rawls' restatement of his theory of justice in "Justice as

fairness: Political not Metaphysical" develops his epistemic modesty into a full pragmatic defence of his theory.²¹ The theory now is one of limited applicability (it is a theory for a particular society in a particular time: it applies to the basic structure of a modern constitutional democracy); it has shallow foundations (the foundations are assumptions and conclusions about the nature of those societies, assumptions which can be revised and must continually be examined for their adequacy and fit to conditions - the bedrock is their life in the here and now); it is autonomous (that is it does not require a grand moral theory or social theory as to the nature of man for its applicability - it is not based upon absolute moral truths but certain features of our understanding as we have thrown these up over time); it is based upon epistemic modesty or abstinence (Rawls does not claim that his theory is 'true' in the empiricist or rationalist sense since if this claim was to be upheld it must flow from some comprehensive moral doctrine or ontological universals for man and social life). The opponents to his theory, for example, Joseph Raz, are quick to use the reflexive paradox for either Rawls is being nihilist about truth, they say, or he is claiming his theory is true. "There is no room for epistemic distance" says Raz.²² But this is to ignore the type of epistemology Rawls is using which is very similar to that we have seen Rorty identify. Simply put, to the pragmatic imagination there is no possibility of getting to a position outside of our various intellectual systems to demonstrate comprehensive, universal foundations. All tactics of transcendence of intellectual systems are that, tactics of transcendence, which must draw upon a stance internal to one or other system - the transcendence of one system to create a new game is always within a game, even if it is a new one.

Arguments to transcend self-enclosed discursive fields, of philosophy, or of science, to disrupt their self-confidence and image of autonomous development and to demonstrate their linkage to forms of life are part of the pragmatic imagination. This is not, however, a tactic specific to the pragmatic label. One such

enterprise is mounted by Ted Honderich in Punishment: The Supposed Justifications. Honderich adopts in the course of this work a rather Humean way with retribution which ties punishment to satisfaction of emotional states. He provides, in other words, a 'natural history' of retributive thinking.

Honderich attempts to give us a Kant that makes [empiricist] sense. His style of empiricism takes us from the recognition that for Kant "the point is that [the offender] has acted wrongly or immorally as distinct from only illegally" to a notion that desert is centrally connected to "satisfying the desires of the person or persons he has offended against".²³ Proportionality comes about as

"penalties may be regarded as equivalent to grievances in the sense that they precisely satisfy them". And "as for judgments about responsibility, they may be described as factual...a considerable range of conditions may reduce a man's responsibility for a particular action." (P.p.31)

For Honderich the rise of retributionist thought in the 1980's must be analyzed to ascertain the empirical "reason for action, [the] one which moves ordinary men, men with an ordinary lack of what can be called moral sensitivity". The reactive attitudes are implicitly seen as the key to the continuing existence of the retributive tradition, and this gives us an "axiom of inquiry" that the history of "the retributionist practice of punishment has sense, clear sense, at bottom" (P.p.215). Honderich contends that we will not find a rational justification for retribution in the texts of retributionist moralists, in other words that retributive practices are not legitimated or directed by (abstract) moral reasoning but that this does not mean that the practices are not founded on something. For Honderich the

"truth of the retributionist tradition...[is]..that it seeks to justify punishment partly or wholly by the clear reason that it satisfies the grievances created by offences, through causing distress to offenders, and that it takes penalties to be unsatisfactory if they do less than satisfy grievances or do more than that, and satisfactory if they just satisfy it. Here, the sense of saying that penalty P is deserved for A's offence O is that P will just satisfy the grievance to which A has given rise by O.

The requirement of an equivalent penalty, in this sense, is

a direct consequence of the fundamental contention: that punishment is justified partly or wholly by grievance-satisfaction. To do less than satisfy it would simply conflict with the fundamental contention. To do more would be to cause distress which would fail to have the given justification".

In adopting this approach we deny "respect for what most apologists for the tradition, notably moral philosophers and jurisprudents, have said for it". Honderich clearly recognises that the moral claims of retributionism are put forward by those who do not talk the language of sentient desire, effects and satisfactions, but he denies that there is any "sense" to their methodology; "there would be more call for respect if they were successful in providing the supposed reason" (P.p.234).

Ultimately Honderich also recognises the necessity for transcendence. Since any system of legitimation for punishment based upon the satisfaction of grievance-desires in any society must consider how it is possible to rank grievances and desires: "clearly they cannot be taken just as they are, unreflectively, as automatic justifiers, or automatic part-justifiers."

How to judge them? Where is the place to stand which will allow contrast? Honderich draws upon the tactic of seeking a conception of the good or the fair or the right society.

"We shall necessarily regard the satisfaction of grievance-desires from the point of view of what we take to be the fundamental moral principle for the ordering of our lives together in society".

Why is this necessary? To save ourselves from the pure empiricist grip of a Hobbesian scenario.²⁴

Honderich clearly finds it unacceptable to "embrace" the view of punishment he proposes if it "unreflectively takes grievance-desires as given." What is a valid desire? What are the categories of desire? The response is that whatever the total 'truth' of punishment is it "is necessarily bound up with political philosophy" and ultimately "with the question of the fundamental principle or principles for the judgement and

guidance of societies". Again we read that "philosophical and jurisprudential reflection on punishment has in fact led a life of its own, for whatever reasons, and continues to do so. It cannot properly do so." (P.p.238) On the contrary,

"there is not the slightest possibility of dealing adequately or even pertinently with the question of its justification by attending only to the supposed intrinsic good of the suffering of the guilty, without reference to the rest of their lives and the lives around them".²⁵

This essential interconnectedness of concerns calls for linked solutions and the self awareness that the conclusion to which we have come is not that "the problem of the justification of punishment is something which, although it presupposes or depends on something else, can be considered independently." This is a highly endorsable position; it is strange, therefore, that Honderich did not keep to his own dicta when he examined the work of others in his earlier text. Kant, after all, only warranted three passages picked from a small section of the Philosophy of Law which were not linked to any discussion of Kant's Political Philosophy or a proper examination of Kant's metaphysics. Hegel is dismissed even quicker: he is held as a paper target of "another retribution theory of very secondary interest", and is equated with "'annulment', a cancellation or a return to a previous state of affairs. This alone is what justifies us." (P.p.45) But this is to deny Hegel's logic of Science, his progressive dialectic, his theory that punishment is necessary to aufheben or dialectically bring to light the "right" contained in the law offended against (literally, to resolve in a higher unity). To Hegel punishment is no synonym for vengeance, it is part of the process of the continual coming of age of "Reason". Honderich was content to dress his quote from Hegel with the trappings that "all this, of course, is obscure. It is by Hegel", as if the two sentences were equivalent and later states that "to reproduce this doctrine more faithfully and intelligibly would require a considerable and tedious excursus into the philosophy of absolute Idealism", equating the doctrine of Hegel with the "ratification" of James Fitzjames Stephen and the denunciation theory of Lord Denning. It is clear that Honderich is actually

making an implicit summary of his Hegel when he states "this is nonsense" (P.p.46), but how can he do so consistently with his later conclusion without a discussion of the political and social philosophies of these writers? Why, if his conclusion is that the problem of the justification of punishment cannot be considered independently, did he have such a narrow reading in these cases? Perhaps the answer is that he cannot allow for alternative "senses"; the table of de-marcation must be preserved and only his version of "sense" engaged.

II

The Norwegian Nils Christie is one contemporary writer who has attempted to provide a reconstitution of a feeling of *sensus communis* and a notion of a humanist penology. To Christie "the outcome of an epoch of rational useful thought", and that game of discourse "soundly embedded in science"²⁶ guiding the practices of the modern state ensures that "we end up in a system of enforced consumption where one of the commodities becomes social control, served by a comrade-functionary close to that type of personnel we otherwise meet in totalitarian societies". (LP. p.69) Behind the discourse of objectivity "crime control has become a clean, hygienic operation", whereby, "pain and suffering have vanished from the text-books and from the applied labels." (LP. p.16) Christie's attack is not that of the formalist Kantian, but a softer, localised humanism. Christie does, however, make full use of the rhetoric of deontological reasoning. He pulls on the "objectivist" clothing of a "moral imperialist", stating that his bedrock is "that it is right to strive for a reduction of man-inflicted pain on earth", and that "there is no other defensible position than the struggle to reduce pain". A rationalist binding is apparent in that even though Christie criticises present argument for the bind of abstraction, his own movement relies upon that tactic - i.e. because punishment is defined as pain to reduce pain is to reduce the amount of punishment, and vice versa.

Central to Christie's argument is the idea that 'problem' has undone itself, and demonstrated its inconsistency - for although "we have abolished hell, and have pain-reduction on earth as one of our major goals", we construct a discourse which allows the practice of applying pain, which, although

"in dissonance with some major ideals [can] be carried out in an innocent, somnambulist insulation from the value conflict. The pains of punishment are left to the receivers. Through the choice of words, working routines, division of labour and repetition, the whole thing has become the delivery of a commodity."(LP. p.19)

Essential features of the human condition are being overlooked in the removal of the reactive attitudes from the legitimacy of social functioning - The "abstracted" concepts of "Crime and punishment" exist "on the same level of abstraction" where they demand and create an abstract logical structure that is then reapplied to society through the mediation of power by impersonal role incumbents. Conflicts have become ignored as property and are taken away from the social humanity of the original parties²⁷ - theories of punishment are primarily utilitarian in their legitimation, since "absolute" theories of punishment would not be commensurable to the framework of our societies.

This terminology of the "absolute" is recognizable as the reactive attitude in Christie's definition:

"absolute, because no reasons are given. You punish because you punish just as you are sad because you are sad".(LP. p.100)

By contrast utilitarian theories appear

"a true reflection of our societies as often presented to us: Societies of calculating individuals, deeply embedded in the exchange of commodities to maximise individual benefit. We have distant democracy, well suited to a distant penocracy, well suited to serve a large scale society using taximeters to control the price of all acts."(LP. p.101)

This distance distorts and in reality Christie contends

"it is absolute theories of punishment disguised as utilitarian which in a society of representatives create the strong incentives toward using pain".(LP. p.105)

Alternatively he argues that if the activity of punishment was "seen as absolute, and executed by those close to the scene of misbehaviour....applied between equals standing close to each other", a situation would exist that would "pay tribute to local values", and our view of the large nation states "seen as natural solutions" changed to "problem-creating ones".

Christie recognises communication and the analogy with language as the key to the operational constitution of 'justice', contending that "through interaction we build up a sense of what is right language, as well as the right answer to deviance. Sense of language as well as sense of justice are thus social products". Such contextualism leads him to define modern criminal justice in terms of state domination, thus at present, "state law is the grammar. The ideal type of participatory justice would be one based upon the participant's own sense of justice - their legal local dialect".(LP. p.114)

Christie displays a pragmatic awareness of the link between language and modes of life - whereby actions, concepts and motivations are open to metamorphosis only by and in the articulation of language games, changing shape to shape, being to being, consciousness to consciousness: but importantly, it is not language that determines justice, and thus we can not join any hope that there is a Justice as in any belief that language contains in itself the notion of consensus, both as to substantive cognition as well as reciprocity, but the Wittgenstein pragmatic concern that things are done through living out language and pluralistically shaped in the doing, and that the form of language game gives rise to the form of justice. Christie's attack upon the authority of the state to construct the 'grammar' is as an expose of the deceptive tactics of monopolistic notions of authority and the constraining, entrapping and deceptive linguistic ties of any functional super-language, and is in line with the desire to open up the various texts and language games of modernity for greater participation and wider role playing.

Christie's primary hope is that for the individuals of our societies participatory justice would restore "participation in his own conflict". Crime is not simply a problem, it does not inhabit the terrain of 'problem' solely, indeed

"it is important not to presume that conflict ought to be solved. The quest for solution is a puritan, ethnocentric conception".(LP. p.92)

Neither is the form of participation Christie espouses related to administration, for that "again is a narrow ethnocentrically determined choice".

Christie points us to the belief that a community, as a mode of life for humanity, is not something that can be produced or engineered by some form of technical administration or by the technique of utilitarianism. This domination of the concern with outcome in the practice of social life is to Christie a reductivist and destructive feature of modernity - it is a domination which furthers the breakdown of proper discursive communities. In the game prefaced upon "state grammar" central features of humanity have been systematically excluded and prevented from participating in actual participatory dialogical communities. In opposing this Christie's sense of participation "does not direct attention to the outcome, but to the act"; the centrality of participation in life as action, a theme he pursues in "punishment as mourning".

The central features of the conditions in which Christie sees participatory penology are "small scale-societies with lots of mutual dependence and where the participants cannot be replaced" (LP. p.89) It is crucially one in which there is a great deal of shared knowledge about participants, their roles and histories, a factor which Christie sees as more important than any question of the equality of power. In this type of society a version of the Durkheimian thesis on the minimalisation of penal pain would follow, and this would be a society where the application of pain (punishment) would not be laid down by any formula of dosage,

either retributionist or utilitarian, but would be up to the participants, through their reactive attitudes, to impose.²⁸

It is a problem with a simple reactive approach to punishment, however, that there is nothing in the concept of personal reaction, or its emotional underpinnings (or indeed their possible genetic basis), to suggest any limitation or correspondence concerning the magnitude of reaction - retaliation or forgiveness. Even in a society of common knowledges, when an individual is injured and experiences a desire to retaliate, why should he want to inflict any particular level of injury on the aggressor? It must be quite rational to assume that there would be many cases in which the simplest and easiest response would be to remove, i.e., kill or exile, a wrongdoer rather than to undertake a process of accommodation. If Christie's response is to rely upon his criteria within organic solidarity of 'non-replaceability', then this is to slide into functionalism and the utilitarian justification he attacked. Without the indicators which embedment in some form of general functional-structural social theory, as Durkheim's thesis on the diminution of penal levels relied upon, there can be no assurance that any localised grouping of reactive occasions would result in the production of any optimal 'penalising' or natural level of pain infliction. Christie recognises that

"to control such cases, we need large systems with independent non-vulnerable state power - in other words exactly the social conditions that..create possibilities of using [high amounts of] pain in social relations. To control cruelty, we might need more state power. But creating State power might lead to more use of pain.

I see no way out of the dilemma in principle...[only] to say: so little State as we dare". (LP. p.115)

In some versions of social change it is in this situation that the historical development of retribution takes over with its demands for proportionality and responsibility. In presenting an "economic" approach Posner suggested that in small-scale societies there is little need for a utilitarian calculation of reductionism, as the knowledge base of such societies ensures that the probability of apprehension and punishment is almost

complete. In such a situation and when coupled with the private reaction of individuals or kin groupings etc., it is understandable that the discourse of punishment may refer to punishment as the paying of a debt, and that doctrinal texts (the Koran, the Old Testament) ensure retribution as an equality between offence and penalty. In conditions where reaction is private, and the probability of detecting and punishing offenders is high the range of considerations is lessened. Retributive principles result in both limiting and regulating the desire for vengeance, and also safe guarding against the arbitrary use of power (in doing so a side effect is to protect society from measures designed to combat crime at any cost - and thus ensure the continuance of a certain amount of crime: a society which allowed absolute repression or vengeance may have no crime).²⁹

From such a perspective the demands of social organization of the modern nation state ensure that neither simple reactive response nor the qualifications of retributory justice are functional when the conditions of Christie's localizations are not fulfilled - i.e. when enforcement is not private and where the probabilities of detection and punishment are not high - and this reflects in the lack of interest in retribution for most of modernity by modern governments with the increased concealability of offending resulting from social complexity, mobility, and privacy.

In arguing for the destruction of the mediating techniques of the modern state and the utilitarianism which accompanies it, Christie has a problem, for in also rejecting the "hold of abstraction" and the conceptual retributionism which accompanies that, he has reduced the legitimacy of punishment to personal interaction. Christie is relying partly on those rather 'romantic' analyses which seek to recreate the position where

"small democracies make it easier for citizens to internalise norms and values, hence to increase voluntary compliance and reduce coercion. Alienation and anomie - loss of community - are much more likely in larger democracies".³⁰

Similarly, to a 'liberal' reading, MacIntyre in After Virtue is

demonstrative of the occasion where people toward the end of an era lose their faith in their institutions; and finally abandoned their belief that these institutions might still be reformed from within.³¹

MacIntyre's disbelief is two fold - it concerns the operation of the actual institutions of the modern 'liberal-democratic' nation state, and, the institution of moral language. The political/moral language of modernity still contains a vast array of terminology but this vocabulary simply does not add up to a coherent discourse any more. The 'solution' he appears to offer is to reconstitute such a sense of coherence by a contained moral-political language game set in the utopian community, the motif of which he takes as a developed communal mode or monastery. The Benedictine Rule is offered as a model for administrating this kind of equalitarian order, small enough, personal enough, to create a mediating and reflexive language game incapable of overwhelming and extinguishing normal diversity of talents and individual personality.

The danger with the Christie move is that we may give up conceptual mediation and achieve a position where the only objectivity may be that of an arbitrary personalization - paradoxically individualism could indeed be "absolute", and emotivism reign. The suspicion of ahistoricism can also be levelled on this talk, for are these localizations to forget the airs of enlightenment penology? Is there to be a mass amnesia to conjure purity? Another criticism of Christie is that this talk is simply irrelevant to the increasing wider social concerns of Criminology. This is a criticism that he has in effect been concerned only to counter the modern conservative monopoly on 'effective discourse' concerning street crime or interpersonal conflict. In this area we should also be aware that although proximate interaction (informal, implicit, customary forms of social control) may be engaged not only as a softer and more humane mechanism (that can be questioned) of control, that such proximate control tends to cover a much wider range of behaviour

than does the remote form (formal, explicit, legal). Much of the social control bonds of those societies which appear reliant upon strong informal control - i.e. 'traditional' societies and in certain modern societies as in Japan - are given up in systems which have more reliance upon formal - i.e. as in the 'West' - which is why, from the perspective of autonomy daily life in the West appears (subject to the critical revisions of those like Foucault) freer than Asia.

Furthermore, even if a Christie type arrangement comes about this does not mean a settled system; for proximate interaction is not necessarily more effective or humane (etc.), being only possibly more effective (etc.), for behaviour accepted proximately, but not elsewhere, for sanctioning [as the mediation schemes have discovered, i.e., a vast range of mediation on 'conflicts' which would not have been dealt with by the more formal agencies (police, social services) are now the subject of these mediation schemes]. Also, proximate interaction simply is irrelevant to many of the concerns at a higher level; for instance, corporate crime, environmental danger, which can only be tackled by a higher degree of articulation in the rhetorical battle over the value ranking discourses of modernity.

III

Stanley Cohen grasps the pragmatist mantle in the name of defending the gains that "morality" has achieved in criminal justice. Cohen cannot share the Christie faith in the minimization of the state - hence utilitarianism can be attacked but never overcome since crime control systems are simply what criminal justice is about in modernity. "Moral pragmatism" is required as the necessary tactic of our age. This states that the language game of utilitarianism and the goal of reducing crime must be disrupted at the point where it implies the destruction of "cherished values" such as "doing good" (in "the sense of the rightness and fairness of punishment for the collective good"),

and the defence of "values in themselves". Thus,

"while strategic goals are certainly justifiable, for example using the struggle for justice as a way of exposing injustice and using benevolence as a way of exposing inhumanity, these goals should not override immediate human needs".³²

The Cohen of Visions of Social Control is right, in this respect, to call himself a pragmatist and his elucidation of what pragmatic implies is directly in line with part of that tradition.

"The 'pragmatic' element stands against all forms of premature theoretical and political closure, all quests for cognitive certainty which rule out certain solutions as being conceptually impure or politically inadmissible. [Thus] If the guiding values of social intervention are made clear (justice, good or whatever else might be offered) then the only question is: what difference does this particular policy make? Each proffered solution must thus be weighed up in terms of its consistency or inconsistency with preferred values, the alternative solutions realistically available at the moment of choice, and the likelihood of the programme being able to realise (intentionally or otherwise) the desired goals with the minimum cost".³³

However, Cohen states that

"utilitarian considerations should, where possible, be secondary to attaining these values for their own sake and whatever their other results, [his preference] is to be pragmatic about short term possibilities but to be genuinely utopian about constructing long-term alternatives".³⁴

His pragmatism then is a defensive response - Cohen embraces pragmatism because it is tactful to do so at present; it is as a consequence of the fact that

"alongside an analytical view of current social-control systems, can be placed a more pragmatic sense about possibilities for realising preferred values".³⁵

In other words, for utilitarian reasons. His own bottom line is apparent in his conclusion that there is only one political philosophy "consistent with sociology, namely anarchism." But anarchism has traditionally rested upon a 'faith' in man to find the true 'natural law' of sociality through the minimisation of organization, through the maximization of voluntary co-operative enterprises, and the denial of politics. Anarchism, after all,

can be read as not merely the de-statisation of the social, but the total de-politicisation and can be seen to rest in the same 'unpragmatic' faith Christie shared - in the end Cohen appears to seek for pragmatism only to save himself from despair at the power of utilitarianism and the collapse of a secure foundationalism upon which to situate reference points.³⁶

IV

Christie's analysis equates in spirit to Habermas's "colonization of the lifeworld". This notion of Habermas is not, we should note, the earlier marxist concern to locate in the rationalization of the life world expanding capitalist interests (i.e. the 'market' mentality of social control and system behaviour with a conformity compensated by rewards dependent upon the role of private consumer and public client of the welfare state) but more a juridical conception of Weberian rationalization; a notion which has led to the concept of the "juridification" of social existence.³⁷

For Christie the role of the state has been to appropriate social conflict from the possibility of being something in which individuals were fully participants and where individuals - offender(s), victim(s), witnesses and other interested parties - have the power, opportunity and right to work through. Instead the legal regulations of the modern state ensures that the citizens are but clients of the processes and products of such regulations. There is thus a strong relationship of dependency between such individuals and the system of administration; this analysis is similar to Donzelot's "tutelary complex".³⁸ The very structure of such administration leads to bureaucratic implementation of the social guarantees of the modern state, which as Habermas states causes "pressure towards the redefinition of everyday life situations". The individual citizen is thus primarily regularised into defining his public social existence in terms of strategic-rational, acquisitive

relationships to bureaucracies.

For Habermas this subjective redefinition of public life in terms of strategic rationality may have deleterious effects over time on the propensity of citizens to engage in various forms of cooperative social and political action.

This reflects in two primary ways.

First, a redefinition of the client's lifeworld arising from the fact that juridification requires an incessant process of "compulsory abstraction" of everyday life situations. This is twofold in its effects: a) it is a cognitive necessity for everyday life situations to be subsumable into legal categories (i.e. not only rights/obligations but offence/non-offence; reportable/non-reportable; specifically the categories of theft, rape, fraud (etc,)); b) it is a practical necessity for administrative control to be exercised. The deleterious effect is the creation of a reifying influence upon the nature of interpersonal social relationships, the destruction of any shared 'common sense' in interpersonal activity which facilitates harmonious understanding other than this juridification. When combined with the enhanced claims to expertise of social workers, police, law-officers, and other administrators concerned with the juridified categories of life this produces an insidiously expanding domain of dependency.

Second, man's relationship to reason becomes primarily a living notion of strategic rationality. This becomes the dominant criteria of rationality in socio-political life, dominating questions which could alternatively demonstrate that they have both normative and explanatory significance. This is reflected in criminology, for example, in Matza's revolt against 'correctionalism' in the name of 'appreciation' which opened up inquiry into alternative directions.³⁹ In the 1970's 'radical' criminologists called into question the legal definition of crime and hoped to open up the very subject matter of criminology to alternative issues. In doing so, however, they often demonstrated the very hold of 'juridification'. The Schwendinger's, for

instance, argued that to restrict criminological concern to violations of state-made law was to accept the definitions of harm and wrongfulness that the state asserted and they argued for a redefinition of crime as a violation of human rights; in this way they hoped to include as crimes activities of the powerful.⁴⁰ In calling for the redefinition of crime as violations of human rights these radicals relied upon a product of previous 'juridification', i.e. the concept of human rights themselves, and thus the actual argument was over the control of juridification (the power to utilise it) and not the process itself. Louk Hulsman, conversely, refuses to offer an alternative set of conceptions arguing the abolitionist perspective that the terminology of 'crime' should be extinguished without anything being put in its place.⁴¹

Some recent approaches on interpreting criminal statistics implicitly use a recognition of juridification. For instance, research undertaken from the perspective of strategic rationality has freed criminology from the assumption guiding the early positivist approach to criminal statistics that crime, of its nature, is something which is reported to the relevant administrative authorities, i.e. the police. This assumption can now be seen as a form of juridification, i.e. that crimes of their living conceptual nature are naturally "things" that are necessarily reported and handed over to the expertise of the police. We now hold that the social reality of crime (a 'highly contestable' term which is here used in the sense of the subjective definition of the common sense of the participant observing that the 'event' is 'reportable') is something that may or may not be reported depending on the subjects subjective conception of the coefficients in a strategic rational calculation (i.e. in this case an effective translation of strategic rationality into contextual rationality). The British Crime Survey can thus provide certain information as to the offence type reported and various reasons for non-reporting.⁴² However, the question is still framed in terms of why the victim did not report the offence rather than a questioning of why was

it thought that this event should be reported? In related criminological literature Pepinsky points out one effect that the realization of the 'unreality' of official criminal statistics has had. Previously the ability to define the crime rate of a society resided in the methodology of official processes - the resulting compilation was the amount of crime a society had. The supplementation of the official statistics by self report and victim studies in search for a calculable 'dark figure' and knowledge by which the official statistics could be extrapolated into the 'real' gives a non-participatory influence to individuals to increase information demands for greater administrative control (since the 'real' crime is so much higher). For Pepinsky this 'rationalization' of statistics on crime gives the basis for the rational response of more intensive policing since

"the American response to the perception that the crime problem is growing has been one of increased reliance on a growing criminal justice bureaucracy to arbitrate conflict.... furthermore, Americans have proved unable or unwilling to manage their day-to-day interpersonal affairs without official criminal justice intervention. If the defining principle of democracy is that citizens shall govern their own affairs, this trend in response to crime literally represents a kind of decline in the level of democracy.."43

We should note that Habermas stresses, in effect, that juridification is linked to a dependency in imagination as to how we think, define and norm areas of life such as micro politics, family relations, welfare provisions, education, old age, as well as physical and mental health and well being. The corrective to juridification which Habermas offers is implicitly the liberating power of social theory, the provision of alternative modes of understanding to the juridic, to accomplish a wholesale modernisation of modernity. The pragmatic interpretation sees progress via the seizing from groups of games in the activity of creating new games; that is, to engage in a conscious metaphysics of 'constructivist social reality'. To the pragmatic imagination this is the methodology of social evolution, an understanding that denies to the rationalist the timeless essences of non-human moral ontologies and to the empiricist the deconstruction of rationalist categories into mere materialism. Looking again

at the comments of Robinson referred to in our last chapter his dual ontology becomes untenable. In his understanding the entities of 'moral science' flow from the geometrical structures built upon foundational premises and these entities, for example rights, "are the most unnatural entities in the universe, existing as they do only in the realm of moral reasoning and never in the realm of space and time". Their historical or social origins are entirely beside the point, the entities of moral/rational discourse "do not occur in nature and are thus not natural; they are sublime, and it is the task of civilization to keep them so."⁴⁴ But to the pragmatic imagination it is not the case that "no description of the bare facts of the material world, no matter how complete or precise, can address these moral entities which arise from rational discourse on subjects of moral consequence" for the existence of rights is their very operation within the language games of the social body. And that is an operation which is observable and whose experiencing determines what the 'meaning-in-use' of the regulatory idea actually is.

V

Excursus on an example of Language Games in Criminal Justice.

The significance of language games can be further gathered by focusing onto a specific area of current Criminal Justice practice: the question of the exclusion of evidence obtained from the accused. This may also serve to focus elements of contemporary epistemological conflict at a clearly visible level contrasting two prominent continental figures: the German neo-rationalist Jurgen Habermas and the French pragmatist Jean-Francois Lyotard.

Habermas declares that the 'telos' of our discursive engagements, i.e. the intermixing of language games, is to reach 'truth'. Habermas reaches this position through what he calls a programme of "universal pragmatics" and there is no doubt that he derives much from the Wittgenstein understanding that language is embedded in life - so much so that Habermas sees language so interconstituted with social practices and not solely linguistic in nature that language (in the sense close to language games) is "a medium of domination and social force" as well as of communication. Many commentators have remarked that Habermas sees as our goal a utopia of a 'noiseless reconciled community'⁴⁵ which is to be achieved by stripping the barriers away from pure communication.

His analysis was first situated in the narrow critique of science: in Knowledge and Human Interests he saw the 'problem' focused drive of modern science linking the production of knowledge with certain interest structures which shaped and contained the objects of analysis and structured their range of possible meanings. He thus presented a typological Interest-Knowledge structure of domination and the hope of an emerging emancipatory counter-interest. However, in his 1973 'Postscript' Habermas revises the determinism of his typology as a consequence of his desire to save both (1) the fruits of science and (2) the development of a notion of the social evolution of reason (the drive of the Enlightenment) from the charges of anthropological irrationalism his notion of strict interest creation appeared to present.⁴⁶ He introduces a division between 'Action' and 'Discourse' where 'action' refers to the interactional coarse process where information is gathered through sensory experience and exchanged through ordinary language; 'discourse' refers to the realm of communication which is abstracted from the context of everyday life. We move away from the ordinary language and 'humble' concern of Wittgenstein to reincorporate the process of epistemological purification.⁴⁷ The participants in a 'discourse' have primarily epistemological motives; they are not concerned to perform actions or share experiences, but rather to search for arguments and justifications - the only motivation allowed in this search is the co-operative drive to arrive at an understanding. From this division Habermas holds that while the object domains of the sciences are differentially constituted by the interests which operate at the level of action, the validity-claims which these sciences raise are subject to the unitary conditions of discursive argumentation - this is so as the 'objectivity' attainable by science is based upon a suspension of 'action' constraints, and this alone "permits a discursive testing of hypothetical claims to validity and thus the generation of rationally grounded knowledge".⁴⁸

Habermas' criticism of the Wittgenstein notion of language games was that "in Wittgenstein and his disciples, the logical analysis of the use of language always remained particularistic; they failed to develop it into a theory of language games."⁴⁹ By the time he arrives at The Theory of Communicative Action it is clear that Habermas is concerned to postulate a universal 'grammar' - the existence, or at least the notion of which, is presupposed by the very notion of the 'grammar' of individual games; this he calls the 'ideal-speech-situation'.⁵⁰ Our ability to communicate has a universal core, basic structures and fundamental rules that we implicitly master and recognise when we learn to speak a language. This notion of language is also a radical social critique, a radicalised, pragmatised social epistemology - pragmatised because we are totally concerned with the transformation of critique into life practices flowing out of our recognition of the primacy of epistemology to action and our nature as active. True human interaction will be guided by the notion of this pure grammar - our Kantian faith now rests in the notion of the ideal-speech-situation. "On this unavoidable fiction rests the humanity of relations among men who are still

men".⁵¹ Truth is a validity-claim redeemable in an ideally structured theoretical discourse which relies upon the possibility of using reasons or grounds to gain intersubjective recognition for validity claims able to be subjected to rational criticism.

Habermas specifies that an important effect of this methodology and scheme for reaching truth is to preserve consensus against force - what is proposed is an appropriate 'reflective mechanism' for dealing with problematic validity-claims - that is, modes of abstracted pure argumentation. We, in turn, are bound to the ultimate goal of truth (in its definition by consensus) by our entry into language and communication, further as "the conditions for the truth of statements is the potential consent of all others....Truth means the promise to attain a rational consensus." We are bound by this prescriptively and under the rule of the 'rational' the substantive truth of the assertion of the statement becomes something pertaining to statements which can be either true or false (not sentences or simple utterances).⁵² Truth is a validity-claim connected with constative speech acts; to say that a statement is true is equivalent to saying that the assertion of the statement is warranted, and the assertion of the statement is warranted if and only if that statement would command a rational consensus among all who enter into a discussion with the speaker. A rational consensus is a consensus which is argumentatively obtained under the conditions of an ideal-speech-situation - the pragmatic drive of this is to face up to the socio-cultural matrix of individual action situations and transform them in the effort to create conditions as close as possible to the ideal-speech-situation.⁵³

Habermas states that he is defending the enlightenment commitment to reason; to the pragmatist he is defending specifically the constructionist project with a vision of the speculative unity of all knowledge, and the linkage of man to such knowledge; a "meta-narrative" which the pragmatist Lyotard is at pains to say is vanquished. For Lyotard we must face up to the 'fact' that we have arrived at 'post-modernity' and recognise that the image of the ideal-speech-situation is simply another narrative entity which fits as a regulative device onto one of the discredited notions of progress, namely pure emancipation.

To Lyotard the emphasis upon consensus is indicative of the desire for a stable 'order of reason', and he holds that instead of it being possible to envisage an ideal of a core set of rules governing all language games "it is clear that language games are heteromorphous, subject to heterogeneous sets of pragmatic rules".⁵⁴ Consensus cannot be the goal of dialogue as "consensus is only a particular state of discussion, not its end. Its end, on the contrary, is paralogy".⁵⁵ Instead of 'discourse' linked to obtaining consensus Lyotard declares we turn to the notion of "justice as a value neither outmoded nor suspect. We must thus arrive at an idea and practice of justice that is not linked to that of consensus".⁵⁶ Instead of consensus we are presented with the concept of the 'temporary contract' about which the

consequences are "ambiguous"; this is an ambiguity which preserves the openness of the concept and allows the notion of the temporary contract to be related to another notion: "knowledge of language games as such and the decision to assume responsibility for their rules and effects."⁵⁷ That is to say, reflexive pragmatism.

With this epistemological framework in mind the language game of police power in producing evidence for the criminal trial demonstrates differing interpretations mirroring the division between Habermas and Lyotard.

Let us take the American discussion first. The President's Task Force on Violent Crime presented this picture:

"the citizen wants safety and expects justice, but too often he or she gets neither. Trials and the subsequent appeals that seem to go on without end have been turned into a search for error rather than a quest for truth (which was the original purpose of the trial and advocacy system in this country). After a trial in which all kinds of technicalities are introduced, there are the endless appeals, in which the conduct of all the actors protecting society are examined through a microscope to see if somehow the appellate court can't find some basis on which to overturn the conviction and either throw it out entirely or send it back for more and more trials."⁵⁸

The charge is simple: the American court system presently operates in a way contrary to the Habermas scheme and our critics desire it to become more attuned to the search for truth. At present the higher, 'discursive engagement' of the appellant courts, operate a 'reflective mechanism' which seeks not to purify the epistemology of the contents of the statements and thus obtain a rational consensus over the ontological content of the statement, i.e., the 'truth' (the question did he do the offence?, the truth of the contested evidence), but the deviant moves (faulty behaviour outside the sphere of reason) of the actors in the sphere of action (did anyone breach constitutional protections and 'rules' of obtaining information) concerning the set mode of the game at present. We do not redeem the information/knowledge claims of the statements in the light of the ideal-speech-situation (what would the pure access to information decide), but search out the breaches in action of instrumental information gathering.

To the critics' call for change the response of the Civil Liberties movement is similar to the Lyotard dicta: "knowledge of language games as such and the decision to assume responsibility for their rules and effects". The rules and effects relate to rights and liberties of the subject vis a vis the State. But Lyotard would have us believe that this is a dichotomy which is in continual tension and wherein any 'consensus', i.e. stabilised game, is only temporary, and will surrender in time to "the heterogeneities of desire".

The Scottish Judge, Lord McCluskey, in his 1986 Reith Lectures

appears to come down in favour of Lyotard:

"it is, of course, extremely important to strike a just balance between the freedom of law-enforcement agencies to investigate crime effectively and the necessary liberties of the subject. But this balance is not, I believe, a balance that can be struck once and for all time, and for all cases."⁵⁹

He went on to talk in terms very close to the temporary contract of Lyotard specifying that restrictions on civil liberties may be freely accepted by most citizens "when they see their society threatened by some great and imminent danger, for example, in time of war, or when terrorists are perpetrating outrages, or if the country is facing a great and growing problem of hard-drug abuse or organised crime". One wonders quite how the contract is to be arrived at - McCluskey's answer is through politics, the decisions of elected bodies and not the courts.

To the pragmatist this is a narrow conception of politics since, accepting that the decision of the elected body, for example parliament, offering a linguistic statement is politics, the placement of that statement into other language games outside of the parliament, the performance of the living language, is political in the sense of giving coherence to that statement - giving a living meaning to that statement is surely as political as its first utterance. How can it be that the argument which sets out in some statute an arrangement which offers us, or a particular party, a set of 'rights', is political while the activity which makes that set into a grammar of life is not? How can politics be merely 'parliamentary activity' and everything else be 'social organization' - a matter of sociology and technocratic managerialness?

The pragmatic imagination affirms the role of practice, of praxis, of society as construction rather than society as a given. Thus all forms of social knowledge, and the entities of that knowledge, for example 'rights', have both explanatory and normative aspects which are always present (even though in any analysis one or the other may be emphasised or neglected). Thus rights, including human rights, are not discovered in the Eighteenth century when mankind's enlightened Reason breaks free of darkness and discovers the structure of rationality which demonstrates the essential link of humans and rights, they are instead actively constructed, and their continuation is not given. Their continuation, and their embodiment in the grammar of life requires effort, vigilance, and various states of mind, one of which following Dworkin with respect to present liberal-constitutional states (in Law's Empire) we may call integrity, but which in their operation are an exercise in participation in the political play of that society and are hence political in the original sense of the word (As brought out in the writings of Hannah Arendt, for example). To the pragmatist civil society is not merely a reflection of the political creation but the meaning of the created entity is only 'truly' knowable in civil society - hence the state civil society division is overplayed. It is not, as a crude pragmatist once put it, that statute does not become law until it has been interpreted and applied by the

courts, but that the effective meaning of that statue is its placement in the various grammars of the language games of that society - the differences between the desire of the legislative as to what the play may be, and the placement of the court, and thereafter the placement of the courts ruling by relevant parties and other authorities may be great.

Human rights, to the pragmatist, can be acknowledged as a corollary of the Kantian imperative to treat humans as individuals by virtue of their autonomy - this abstract conception (autonomy) is not related to any particular conception of the common good or ranking of goods⁶⁰, instead it allows a constructivist perspective devoid of intensive knowledge as the necessary presupposition. There is some combination of 'ideas' which allow this constructivist process to be effected, namely the Kantian belief in the rational human capacity for autonomy, a requirement for the linkage to reason and the developing critical rationality which will subject desires to personal ordering coherently, and certain concepts of the empirical conditions of life, but these are open to variation in the vision of the good life which any individual may hold, dislocates the grammar of the games of the time, creating a space which allows conditions, plays, and movements through which individuals may partly design their lives.

The allocation of rights, secured as acceptable entities in the games (trumps in mainly utilitarian games as Dworkin put it in Taking Rights Seriously), allows individuals to use these as tools to make their own projects in life. In the acceptance of this, what once was disruptive, revolutionary, a false move, becomes natural. Autonomy, for example, becomes seen as the natural capacity of mankind - the rationalist finds reinforcement in the way of the world for what he postulated as man's natural facility oblivious to the fact that it was his supposition which created the idea which, when placed in practice as varieties of grammar, constituted and determined the natural.

Notes.

1. Imre Lakatos, "Understanding Toulmin", [Book Review] Philosophy, 1974, p.132, n.31.

2. Ludwig Wittgenstein, Philosophical Investigations, G.E.M. Anscombe (trans.), Basil Blackwell, Oxford, [1958] 3rd ed. 1967, p. 2e. Para number 1. Further references in this chapter to this work are annotated as (P.I., No. 1.); the number referring to the paragraph.2.

3. I take the phrase from the title of R. W. Sleeper's work of John Dewey: R. W. Sleeper, The Necessity of Pragmatism: John Dewey's Conception of Philosophy. Yale University Press, New Haven and London, 1986.

4. Critique of Pure Reason. P.127.

5. Strawson. The Bounds of Sense, p.12.
6. Tractatus, p.151.
7. On Certainty, Blackwell, Oxford, 1969, p.28. (No. 204).
8. Investigations, p.85, (No. 217).
9. Ibid., p.88, (No. 241)
10. Wittgenstein and Political Philosophy, p.82.
11. Philosophical Investigations, p.7.
12. This paragraph largely summarises p.85-6 of Danford's Wittgenstein and Political Philosophy.
13. John Dewey, quotation used by Sleeper as his forepiece The Necessity of Pragmatism, p.1.
14. "Understanding Toulmin", p.141.
15. Ibid., p.130.
16. K. Popper, Objective Knowledge, At the Clarendon Press, Oxford, 1972, p.123.
17. In this we are close to the pragmatic element in Garland - in "Towards a Social Analysis of Punishment" and Punishment and Welfare Garland certainly sounds as if he is a pragmatist at times: 'penalty' is adopted as a progressive term of social analysis for the rationale that "it is useful in so far as it avoids the connotations of [alternative concepts]", the aim of the work is presented as being to "describe", he repeats the emphasis on praxis, and in concluding Garland states that his emerging concern is with "the status of official penal discourse and its relation to actual penal practices... penal discourse is as much concerned with its [official face]... as it is with organising the practice of regulation". Is it pragmatic? Although Garland accepts the tactics of methodological pragmatism (in particular forms of immanent critique) he retains the drive to metaphysical foundationalism. For the Garland of Punishment and Welfare reality is still singular and uniform, awaiting discovery, it is just that it has got complex - we may still find the correct solution to problem as we now recognise "that the practices of modern penalty rest upon a determinate framework...which in turn presupposes a specific field of political forces". Our aim is to "describe this underlying generative structure, along with its political conditions - to show how it operates to fix the contours of the penal complex". That is to say, our aim is to present the "truth" of the modern penal complex.

Indeed the Wittgenstein approach to the statement Garland takes from the May report (i.e. "We think that the rhetoric of 'treatment and training' has had its day and should be replaced. On the other hand, we intend that the rhetoric alone should be changed and not at all the admirable and constructive things that are done in its name", would be quite different. To Garland it is a matter of breaking down such discourse into its constitutive effects, or to put it in a more developed form, to expose the lines of relationships which temporarily, determine and constitute it. With a Wittgenstein approach we seek more a running commentary on the traditions embedded in the notion of 'treatment', something not to be dissolved but tackled at the level of 'common language' analysis, i.e. at the level where 'humanitarianism' is a viable concept. Our critical task is to revive the 'human' focus in a transformational imagination retaining faithfulness to the core and vital elements of our traditions.

18. Our narrative holds that much of pre-enlightenment thought presents a 'classical' model of the unification of the cosmos and self, the identity of the self stands in the terms of the narrative of the whole, the cosmic order, and self-knowledge and prescriptive utterance is equivalent with attaining a true vision of the cosmic order. The world and its happenings is a text whose interpretive reality is held out for use as illustrative of the meaningful way.

With the enlightenment a reorientation occurs and what was previous order is demarcated as irrational, the result of servile anthropomorphism (Hume), false inversion (Kant) and man breaks free to engage with nature (both his and the external) to create actual 'true' definitions. True definitions are a question of locating the true set of mental capacities, atomistic phenomena, constituent nature or structure which 'objectively' exists.

When the search for such objective human nature is disappointing, as for Hume, the motif of interconnectness of nature and organic flow entails that correct nature or structure will be demonstrated in "experience(s)".

The unity of the Humean experience finds little place for the control by the rational, yet the Kantian desire for the autonomy and moral freedom of the human, dignified self, which he sees as necessary to transform tradition into the 'modern', takes man into the modern dilemmas of the division theoretical versus practical, moral agent versus organic natural being. The Hegelian unity synthesises experiences, reason, the moral and the organic as the journey of the world becomes the self-realising historically expressing narrative of a universal 'self-positing Spirit'.

In turn this unity splits into its dialectic parts - universal materialism, universal idealism - with the active role of the mediatory being, man, becoming individualised at the hands of the ultra-moderns Nietzsche, Kierkegaard, and in another form, Sartre, into a self-defining process.

The solution of Wittgenstein is of an interactive process of individual with community which results in definitions built from the level of the individual language game. This highlights the notion of the temporal, and concern with the small scale communal and relegates the universal as a lesser concern.

19. Jean-Paul Sartre, The Philosophy of Existentialism, Philosophical Library, New York, 1965, p.35-6.

20. Ibid., p.49.

21. "Justice as Fairness: Political not Metaphysical", Philosophy & Public Affairs, 14 No 3 (Summer 1985), p. 225ff.

22. Joseph Raz, "Facing Diversity: The Case of Epistemic Abstinence", Philosophy & Public Affairs, 19, No 1 (Winter 1990).

23. Punishment: The Supposed Justifications, Penguin Books, Harmondsworth, Middlesex, England, p.28. Further references to this work appear in the text annotated as (P.p....)

24. That is, the "whatsoever is the object of any man's desire... that is it which for his part calleth good." Leviathan Part I, Ch. 6. Fully fledged this argument holds there is no room for a system of principled differentiations of significance for being human. To be human is but to be the subject of desires. Fully fledged sentient life does not allow the discourse of mediating social thesis about the potentiality of the morally good society - or a society which gives a basis for the fuller realization of a range of talents etc.

25. Punishment: the supposed justifications, p.238. This must rank as the standard critique of "Just Deserts".

26. Nils Christie, Limits to Pain, Martin Robertson, Oxford, 1981. These quotations from p.28, others as noted in text, annotated as (LP. p...).

27. See Nils Christie, "Conflicts as Property", British Journal of Criminology, Vol 17, No.1, (1976) pp. 1-15

28. To a certain extent the thesis of Christie relies upon the central vision of the Sociological approach to the function of law - that is to see it as concerned with the satisfaction of conflict. Christie's terminology of "conflict as property" sees the development of formalised law and the operation of criminal justice as the alienation of people from the sharing in their own conflicts. Most advocates of communal justice take this notion of the role of law as their foundation and advocate various communal and informal modes of operation. To an extent the pragmatist must agree - the solution to the conflict-problems of individuals will be effectuated in the lived-in-world not an

abstract world of concepts, however, the notion of a truly "communal law" and the championing of the "localisation" which accompanies it is liable to several serious objections. The difficulty is that to return to 'informal justice' in today's world means a return to unguarded and unguided power flows and drastic imbalances. But most importantly they deny a major feature of the use of law in modern society - that is to use the actual conflict as a particular out of which is created a generalised set of norms and future expectations for others in different parts of the society. As a critical perspective upon the notion of informal justice see Richard Abel (ed.), The Politics of Informal Justice, American Press, New York, 1982.

29.Cf., Richard A. Posner, Chapter 6, "A theory of Primitive Society"; chapter 8, "Retributionism and Related Concepts of Punishment" in The Economics of Justice.

30. Robert Dahl and Edward Tuft, Size and Democracy, Stanford University Press, Stanford, 1973, p.86.

31. Compare the 'solution' of MacIntyre in After Virtue to that of Daniel Bell in his 1976 The Cultural Contradictions of Capitalism, and Ralf Dahrendorf in his 1985 Law and Order. The 'Liberal' tactic is the rebuilding and reconstruction of present institutions via a renegotiation of the "social contract".

32. Stanley Cohen, Visions of Social Control: Crime Punishment and Classification, Polity Press, Cambridge, 1985, p.153.

33. Ibid., p.253.

34. Ibid., p. 252.

35. Ibid., p.261.

36. The Cohen of Visions of Social Control appears as a neo-natural law development of the Cohen of the late 70's. In "How Can We Balance Justice, Guilt and Tolerance?" [New Society, March 1, 1979, at pp. 475-476. Cohen lamented the imaginative inability of social theorists to create serious alternatives to conservative crime-control policies, policies which he saw as "just as firmly entrenched as ever". As also were the "illusions of conventional, positive criminology", which "retains its credibility as a science, despite the fact that in terms of its success in explaining, identifying or treating criminals, it should long ago have been relegated to the status of alchemy, astrology or phrenology." This deconstructive attack led Cohen to follow it up with "Some Modest and Unrealistic Proposals" [New Society, March 29, 1979, at pp. 731-734.] where the familiar cry of no change in criminological reality without major change in social structure was made. Cohen's programme for change then included the education of politicians and public as to the complexity and

truth of the 'total picture' of crime, a phasing out of prisons, incarceration of a selected few dangerous offenders, the development and experimentation of new modes of dealing with offenders, and accepting the push of the Just Deserts principle that "punishment should be allocated in proportion to the perceived seriousness of the act." A move which is not only "a return to justice" but also one "back to the bewildered embrace of lawyers who always thought we were their enemies". But this is a move back before Hobbes for Cohen stresses again with Aquinas that the rule of law can be both "tyrannous and unjust".

37. See Habermas, Theory of Communicative Action, Vol 1, Reason and the Rationalization of Society, translated by T. McCarthy, Boston Press, Boston, 1984.

38. The Donzelot analysis bears the marks of a marxist heritage which serves to bring out an irony for bourgeois ideology. The developing state is seen as operating so as to maximise the social rationality of the Bourgeoisie and attempting to transform working class family situations into the atomistic relationship of the bourgeoisie nuclear family - socially independent for class solidarity with a possessive individualism coming out of a rights orientation which develops as the dominant social relationship. The 'indirect co-optation' of the working class family was dependent upon a strategy of setting up a system of rights/welfare to free the working class family from their dependence upon relatives, class organizations to the extent that they were feared to exist and develop (etc.), and to create autonomy. But the creation of these juridical/welfare relations created not autonomy but dependence upon the administrative regulations and administrative institutions of the state.

39. David Matza, Becoming Deviant, Prentice-Hall, New Jersey, 1969.

40. Herman and Julia Schwendinger, "Defenders of order or Guardians of Human Rights", Issues in Criminology, (1970) 7, 72-81.

41. Louk Hulsman, "Critical Criminology and the Concept of Crime", in H. Bianchi, R. Van Swaaningen (eds), Abolitionism, towards a non-repressive approach to crime, Free University Press, Amsterdam, 1986.

42. See the summary in Walker, Sentencing, Theory and Practice, p.60.

43. "The Room for Despotism in The Quest for Valid Crime Statistics", in Theory in Criminology: contemporary views, Robert F. Miller (ed.), Sage Research Series, Sage, London, 1977, p.75.

44. Robinson, "Moral and Social Science and Justice", p.28 and p.40.

45. Fredric Jameson in his introduction to Lyotard's Postmodern Condition calls it the "vision of a 'noise-free', transparent, fully communicational society". P.vii.

46. In a sense Knowledge and Human Interests is a work heavily reliant upon notions of early pragmatism - that knowledge was produced for specific purposes for humans and took its validity in the satisfaction of those purposes. Nietzsche expressly took this view at times.

47. In The Theory of Communicative Action Habermas expressly develops Popper's notion of the 'third world' of the 'objective content of man's knowledge' - the realm of successful epistemological purification. Jürgen Habermas, The Theory of Communicative Action: Volume One, Reason and the Rationalisation of Society, Thomas McCarthy Trans, Heineman, London, 1984, pp. 76-79.

48. Theory and Practice, p.20.

49. "A Postscript", in second edition of Theory and Practice, p.160.

50. The move is highly indicative of the rationalist imagination - Kant did exactly this with his argument that our concept of an 'individual' necessarily means that he/she must also be an aspect of an universal - 'God'. This implication, he holds, is rationally contained within the concept of the individual.

51. Jürgen Habermas, quoted in Studies in the Theory of Ideology, John B. Thompson, Polity Press, Cambridge, 1984. p.267.

52. My paragraph here draws heavily upon the summary of Habermas by Thompson concerning Habermas and 'Truth' in Studies in the Theory of Ideology, pp 267-275, I am here largely repeating his "fourth thesis", p.373-4.

53. The ideal speech-situation is our new vision of 'post-modern' society; Habermas derives his social concern out of his Frankfurt school brand of humanist Marxism. He sees himself as concerned to free man's inner and social being from the constraints of modernity; specifically to emancipate man from the domination of specific language games by transformative action given guidance by a radical vision of the universal 'rational' structure at their core.

54. The Postmodern Condition, p.65.

55. Paralogy is the central concept. The play of language games is conducted at the level of 'parole'. The quest, which is linked to the 'joy of invention' is the uncovering of 'deviant' moves to any fixed or set notion of the game. It is the presence of such false, or new moves which is the driving force behind the

evolution of language. The dominant activity is combative in the sense of agonistics and the pleasure of the new move "depends on a feeling of success won at the expense of an adversary - at least one adversary; the accepted language or connotation". (Postmodern Condition, p.10) Lyotard contains an implicit prescription as paralogy appears to have a positive aspect when it mirrors the model of "an 'open system' in which a statement becomes relevant if it 'generates ideas', that is, if it generates other statements and other game rules". (p.64) In general "rules" are prescriptive utterances which prescribe what the moves of the language games must be in order to be admissible - the pragmatics of science function in their imaginative or differential or paralogical activity to point out these meta prescriptions (equal to sciences presuppositions) and to petition the players to accept different ones. Social pragmatics do not have the simplicity of scientific pragmatics - but is an interweaving of networks of heteromorphous classes of games. In the social process creative evolution acknowledges "the heterogeneity of the rules and the search for dissent" (paralogy) which stands in contrast to the notion of Habermas that "humanity as a collective (universal) subject seeks its common emancipation through the regularizing of the 'moves' permitted in all language games and that the legitimacy of any statement resides in its contributing to that emancipation".

56. The Postmodern Condition, pp. 65-6.

57. Ibid., p.67.

58. United States Department of Justice, Attorney General's Task Force on Violent Crime, Final Report, August 17, 1981. Quoted in Criminal Justice Reform: A Blueprint, Patrick McGuigan and Randall Rader (eds.), Regnery/Gateway, Free Congress Research and Education Foundation, Chicago, 1983, at p. 17.

59. Lord McCluskey, Law, Justice and Democracy, The Reith Lectures, 1986, Sweet and Maxwell, BBC Books, London, 1987, at p.38.

60. See R. Dworkin, "Liberalism", in Public and Private Morality, Stuart Hampshire (ed.), Cambridge University Press, New York, 1978.

Part Three:
Developing Terrain:
towards Reflexive Pragmatism in Criminal Justice.

Chapter Eight: The 'truth' of Criminal Justice: The Domain of Criminological Knowledge and Modernity.¹

I

Criminology is a blanket term for our understanding of crime and of the state's handling of crime and related matters. The central feature of criminology is thus 'criminal justice' (and this is so whether or not we consider this a matter for sociology). Whatever the socio-cultural context there are at least two intersecting areas or conceptual terrains. Namely the question of crime (here we may include deviance, as well as the criminal or the deviant) and the notion of justice. In this chapter our concern is with models or forms of epistemological structuring focusing around the question of what the just judgement would be in criminal justice.¹

In the current interest in revisionism the ideas of "the Greeks" provide a common narrative beginning. The use made of this period varies: some ascribe to the idea of Plato the role of the father of rehabilitative philosophy.² Michael Moore, for instance, in the midst of his comprehensive Law and Psychiatry: rethinking the relationship refers to the Platonic view as "the medicalization of morals" but such an ascription, at least when clearly drawn, obscures. Moore turns to the Republic noting that Plato held there that justice and injustice "are in the soul what the healthful and the diseaseful are in the body" and that "virtue... would be a kind of health and beauty and good condition of the soul, and vice would be disease, ugliness and weakness".³ Moore associates the Platonic conception with firm lines and confident marcation which are in turn to be rejected by us in our general perception of the "oddness of platonic

¹We are here talking about 'criminal justice' not dispute resolution nor general instruments of social control; as S.Roberts points out on Order and Dispute, to assume that dispute resolution takes place everywhere within essentially legalistic categories is to observe the world through Western (eurocentric) lenses and not to let the world speak on its own terms. We, however, are concerned with the Eurocentric traditions for that is where 'we' are.

ontology...[and] his kind of objectivist ethics".

This traditional and still dominant view of Platonic justice sees its essential methodology as first producing a 'true' theoretical discourse of the ontology of the cosmos, i.e. a theoretical description of the 'true' being of the world and society, and that in turn society will be just if it can be brought into conformity with this true being. It is an interpretation of Plato which also forms the essential straw man which Jean-Francois Lyotard's enterprise of a 'post-modern' judging is to be ranged against.⁴ Instead of this Platonic model Moore sees the "naturalist tradition", of which Aristotle is placed as the originator, as more in line with our current empiricist frame of thinking.

The contrast with Aristotle is also pursued by Lyotard but for a different reason - Aristotle is seen as beginning a politics of judging. A mode of judging which takes place in the midst of opinions rather than in the grip of a comprehensive episteme. In such a way the central problem of the Platonic - how to create the transference of drawing a just prescription from a description which is 'true' - that is the problem of how we go from "from the true to the just", is avoided. (Note the 'Platonic' conception of justice has existed for most commentators as a generalization that there must always exist a theoretical solution to the problem of the 'just'. The just is definable 'a priori' for what is just will necessarily be dictated by the 'true' state of being for any entity and we start from the presumption that any entity has one true state of being, one true 'nature'.) Such a conception for justice, which appears to place the possibility of justice dependent upon the specification of the ontological structure of the cosmos, has always aroused the ire of those who have denied either the primacy of the ontological thesis, or the possibility of man to know it.⁵

The 'Platonic' image is attacked for two main reasons: one is a

general suspicion of any thesis of an absolute framework of a steady ontological structure which may become depicted in theoretical discourse (as with the thesis of the intelligibles which lie behind the confusing array of the sensual); a second is the question of quite how is it that any particular judge, or engager in practical reason, is ever supposed to become familiar with this ontology.

This second criticism is presumed to dispose also of the Aristotelian tradition of teleological ontology. This is not a simple disagreement about the ontological thesis but a criticism which seeks to demonstrate the circularity and denial of reflexivity within which the epistemological methodology of the idealised 'greek' judge is seen to exist.

The circularity argument holds that both the Platonic and the Aristotelian create a circle to avoid the problem of an infinite regress in the creative movement of coming to know the just. The circle is seen in these terms: moral, including judicial, understanding depends on vision; the virtue of appreciating vision depends on character, yet character can be properly shaped only in accord with a prior vision, which has created the structural conditions for proper character to be instilled in the person. With Aristotle this is seen in the necessary relationship he postulated between ethics and politics: the Nicomachean Ethics concludes by pointing to the Politics suggesting that the problems of ethics and justice are a subsumed part of the general problem of how best to constitute the political community. To act justly is a virtue and for this "the soul... must first have been conditioned by habits to the right kind of likes and dislikes..." But the character with the right kind of likes and dislikes can be fashioned only in a properly ordered, virtuous community. Good ethics requires good politics - but good politics requires good ethics. For the practices of the good society depend themselves on moral understanding, and practical actions within depend on vision - vision depends on character; character must be shaped by those who came before us.... We then must ask: 'Who comes

first the just man or the just society?' Is society able to become just and to be recognised as just because of the actions of individual just men who create that set of conditions, or, is the individual only able to act justly and to recognise justice within the practices of the just society and the concepts and tools of articulation which such a society provides for the individuals within, but not outside, it.⁶ The problem of the infinite regress is seen in the question of what justifies the wise or virtuous man's claim to a vision of moral truth? By whom was their character originally shaped - this regress can only, it is thought, be cured by Aristotle postulating a good lawgiver, and Plato a philosopher-king.

To MacIntyre this line of criticism rests upon a fundamental misunderstanding of both Plato and Aristotle. For MacIntyre the distinction traditionally drawn between Plato and Aristotle neglects the extent to which Aristotle can be seen "as Plato's heir" and whose explicit account of a structured community, the polis, is the necessary context for understanding the 'foundational status' of the just.

Although it does appear that for Aristotle justice is implicated in the teleological account of the cosmos, in the operation of finding a common measure for judgement the action boundaries of the frame of reference are drawn much closer to individual man. The account of the justice of any act, any decision, cannot be seen as free standing only answerable to theoretical accounts of the totality of the cosmos, but is part of the living practices of the polis. All practices are, however, interrelated and guided by the existence of a common standard; it is the choice of, and in turn the respect for, a common measure which makes the polity survive.

The common life of a society was to be a life beholding a shared purpose and commitment, and within this context it is the rule of justice linked to that purpose which makes possible the exchange of things and which allows the establishment by men of

their self-identities (i.e. their narrative role and character). The character of individual men is a reflection of their respect and practice of the virtues, and yet virtue requires the existence of what is agreed as a vision of the just society to flourish. Virtues take their strength from their practice in an ordered hierarchy in which activities are purposeful in their contribution to those sets of relations which lead to the furtherance of the good for society.

Which in turn means that society needs a highly articulated conception of the common good and of the hierarchy of goods which orders social relationships from the defence of the polis to the duties of the household. Each conception of a good has its own account, but this is always an account which can never be presented in theoretical insularity since it is a question of the practices of the polis. The question of what is just can never be answered by a theoretical system (a theoretical solution) centred around a theoretical definition of what is just but must be uncovered in a dialectic of practice and the theoretical which practice embodies and in turn places under stress. The question of 'Justice' can never be given a theoretical solution but only a practical one within the social context of the polis. As MacIntyre summarises:

"Aristotle's accounts of practical reasoning and of justice require one specific type of context, that of a society structured in terms of systematic forms of activity, within each of which specific goods are acknowledged and pursued, while within the overall social order the activity of politics provides for the inhabitants of the polis ways of understanding and pursuing those goods in an integrated way, so that the good and the best may be achieved".⁷

Aristotle's presupposed social context is one in which evaluation is primarily in terms of the achievement of the ends of activity, and the individual envisaged by Aristotle engages in practical reasoning not just qua individual, but qua citizen of a polis. In such a context the epistemological grasp of the basic goods of human flourishing can be ascertained by a reflective grasp of what appears self-evidently good for men. It is not derived from observation of some profile of nature from the outside; but it

is rather a process of non referential understanding from the inside. Such a process is therefore heavily context dependant and with the breakdown of these forms of life, or the acknowledgement that social reality does not provide such a context, this mode of epistemological reasoning is unable to be accomplished.

It is a commonplace to acknowledge how in an expanding world the reconciliation between the Aristotelian science of the teleological conception of ontology and a growing rational theology which reduced 'mystery' into the Being of a personalised God gave irrational theology a power base to legitimate a political domination of church and sovereign through Christendom - a domination torn asunder in the changes of the Enlightenment.

II

The post-Enlightenment period produces essentially three Epistemological models for criminal justice. Two models which dominate any historical survey of criminology, namely the classicists and the positivists, and the present, the 'post-positivist' or, alternatively, to treat it by the most visually dominant trend, the 'neo-classical'. The usual histories of criminology stress the thematic division between the classicists represented by names such as Beccaria, Blackstone and much of Bentham, who to varying degrees intermixed ideas of choice, free will and rational calculation, and the positivists, represented by Lombroso and Ferri who, with their modern adherents like Skinner or Eysenck, accepted the idea that human behaviour is determined by forces over which the individual had little or no control.

Historically, most accounts dictate, in the late 19th and early 20th centuries the positivists defeated the classicists and elevated the intellectual disciplines associated with criminal justice to a form of scientific status concentrating upon the study of the offender and his circumstances. The modern,

'post-positivist' situation is ushered in when David Matza's 1964 Delinquency and Drift is seen as taking criminology to task for holding to an 'old fashioned' belief in 'hard' determinism; criminology it seemed had not kept pace with developments in the philosophy of science which had displaced this notion by 'softer' versions. The 70's and 80's then abound with a grand expansion of 'paradigms' and 'conceptual schemes' concerning crime and deviance. Criminology is held to be freed from the ideological shackles of a false positivism, and a whole range of theorizing is announced which either emphasises 'praxis' or declares its role as actually 'giving the deviant a voice'. Then comes the cold reality of 'just desserts'! An expression of criminal justice focused on both deterrence and retributive ideology - the individualistic motif for practice which positivism espoused becomes out of step.

The conventional accounts of criminological development, i.e. Vold (1958 and 1978), Radzinowicz (1966⁸), The New Criminology (1974), see criminal justice as reflecting the Weberian discussion of the development of criminal law as surmounting its 'irrational' roots and its development and differentiation in terms of the process of the rationalization of societies in general and of the law in particular. Weber's typology of legal conflict is carried out in the dimensions of rationality versus irrationality and formal versus substantive.

Vold, for example, starts his narrative with the freeing of intellectual thought on crime from the domination of semi-religious Demonological explanations. Demonological explanations make use of the principle of other-worldly power to account for events, the rejection of demonism turns man's attention on to this world and the inherent structures of the world. The Humean attitude is openly scathing of popular fallacies and is also a criticism of the current legitimative conceptions for authority. These popular beliefs tied to the practices of wergild, a contest of sin and crime, trial by battle, trial by ordeal, compurgation, and the use of miraculous

signs or omens to indicate guilt or innocence, in a ritualization of life. Behind such popular attitudes were also, however, sophisticated intellectual systems which drew out the remaining traits of what is sometimes referred to as "classical realism".⁹

What is characteristic of these systems is the interdependence of each part in an overall conception; an interdependence which borders on the aesthetic. In the scholastic system of Thomas Aquinas, for instance, the emphasis is on a synthesis of classical philosophy, christian theology, and the concerns of politics. The duty of civil participation, natural political action, must be viewed in relation to citizenship in the kingdom of God. The synthesis requires a duality of movement - philosophy begins with the immediate objects of sense experience and reasons upward to more general conceptions, until, in neo-Aristotlean schemes, the mind fastens upon highest principles or first causes of being, ending in the conception of God. With theology the movement begins with the idea of God, the revealed concept, and moves downward seeing objects in the light of that relation. The movement of philosophy begins with diversity and chaotic impressions linking and classifying in search for a coherent set of final positions, or truths - the movement of theology begins from such a conception. Within such a synthesis elements have both a natural situation and a relation to supernatural ends. Loose ends are linked together - any semblance of 'mystery' assuaged. The state is a natural institution, deriving from the nature of man, and is orientated towards satisfying and encouraging man's natural potentiality. It cannot, however, direct man to his supernatural end, that is the province of the church. The two cannot, however, be separate as both are within the scheme of creation and the power of creation is, ultimately, responsible for the whole of the cosmos. Guidance by Natural law is, thus, ultimately derived from guidance by Divine law - those who seek knowledge of their good will, ideally, find direction in the Natural law and, subsequently, the Divine law.¹⁰

The entire scheme of society and its laws are evaluated by a

notion of the whole. A notion which in its heritage draws upon a sympathetic dialectic with the legacy of Aristotle where the choice of, and respect for, a common measure is what allows the polity survive in the face of the disruptions pluralism would give. The identity of the elements of justice, and what designates their place in the right order of that society, the rule of justice at the foundation of the socio-political association, is the centrality of the common good. The common good allows the positioning of individuals since

"the goodness of any part is considered in comparison with the whole... Since then any man is a part of the state, it is impossible that a man be good unless he be well proportioned to the common good."

Law is "a rational ordering of things which concern the common good, promulgated by whoever is charged with the care of the community".¹¹

Penal activity is not merely to reflect the power and authority of the sovereign but to be aligned by reason and aimed at benefiting the common good. The penal practices of the body share both in the rationality of obvious power but also intellectual acknowledgement for the defilement which sin brings is close to the symbolism of the physical. Aquinas states

"now, when the soul cleaves to things by love, there is a kind of contact in the soul; and when man sins, he cleaves to certain things against the light of reason and of the divine law... the loss of splendour, occasioned by this contact, is metaphorically called a stain on the soul."¹²

It is a touching, a diseasing and contagion of the social world which demands a cleansing. This is a cleansing for which soap and water will not suffice but demands a ritual purification, a prescribed and sanctioned ceremony. Intercession by the power of God is required in the satisfaction of evil since the disobedience of the dictates of true law represents the absence or privation of something which is itself good. A privation which comes about by a deterioration or misuse of man's reason by deference to the force of passion, or a training in vice not virtue. Evil is the possibility of wrong choice which accompanies man's freedom, but choice is not something radically free springing out of an existential void but part of the practice of

life - the development of man's practical rationality. [Or in the language which MacIntyre earlier identified with the virtues, the development of 'character', see After Virtue.] Moral evil is the product of the will, whereby the essentially good element in the willed act lacks its true end. The privation may be righted by Divine grace; the human condition is incapable in itself, it simply does not possess powers of governing itself - it is created and ultimately dependant.¹³

IV

In Foucault's analysis of "governmentality" the practical politics of ruling which lies embedded in the intellectual legitimation of ruling pre-Enlightenment Europe, and which is displayed in the advice Machiavelli gives to the Prince, "posited the Prince in a relation of externality and singularity and consequently of transcendence to his principality."¹⁴ The ruler becomes ruler by inheritance or violent conquest, he is a product of the past or by an act of the present in which he imposes himself from outside, in either case he is not essentially part of the terrain of the ruled but remains external to it. The link he maintains with the territory of the ruled is synthetic and "there is no fundamental, essential, natural and juridical connection between the prince and his principality". There is a division, a dual anthropology of existence and of power. The will of the prince is not a product of the will of the ruled, the interests of his rule are not inherently their interests. This leads to a conclusion, "deduced as an imperative: that the object of the exercise of power is to reinforce, strengthen and protect his principality which is not meant in his object sense as the entity constituted by the subject and the territory, but rather in terms of the Prince's relation with what he owns, with the territory he has inherited or acquired, and with his subjects. This fragile link is what the art of government .. is to take as its object." The source of the power which is peculiar to the Prince is outside of the territory, the source of other powers

internal to the operation of that territory which means that:

"while the doctrine of the Prince, as well as the juridical theory of sovereignty, are constantly attempting to draw the line between the power of the prince and any other form of power, because its task is to explain and justify this essential discontinuity between them, on the other hand in the art of government the task is to identify the continuity, both upwards and downwards."¹⁵

The displacement of this motif occurs around the Enlightenment when the modern concept of economy comes to designate "a certain level of reality, a field of intervention, through a series of complex processes" and where, moreover, the central focus of the 'common good' becomes replaced by "an end which is 'convenient' for each of the things that are to be governed". Which in turn implies that the social body requires not the touch point of a common good but "a plurality of specific aims". The area now revealed Foucault places as an intersection of "security, territory and population"; an area where the finality of government resides in the things it manages and in the pursuit of the perfection and intensification of the processes which it directs and the instruments of government, instead of being laws, now come to be a range of multiform tactics. Legality is crucial to sovereignty but is only one aspect of governmentality. The concept of population allows sciences of government to isolate the reality to be governed as one reflective in rates of death, cycles of scarcity, levels of morality and mortality, in other words the development of statistics, the quantification of phenomena specific to population.

Thus for Hume dominant social institutions arise not so much from natural inclinations and knowledge of the good but from the fear of natural inclinations and the path to institutional reform is via knowledge of the facts of the human condition. But these are isolated facts - it is no longer for Hume possible for one man ever to claim that he can know 'the human condition' in its entirety, all he can know is some or other facts 'of' the human condition. This change is slowly apparent in the projects of writers who change both the nature of their concerns (their ambitions as to their coverage of humanity) and the 'facts' they

report.¹⁶

What is apparent is an intermingling, a variety of claims and tactics. Defences of present structure, as in the writing of Blackstone for example, must in the concerns of criminal justice, be placed alongside the many reforms proposed (under the influence of Beccaria), and inside particular visions of progress. Whilst sceptical of grand claims law is slowly becoming adjusted to a conception of engineering social benefit on a scale which goes beyond the local and is not sovereign focused. In Lockean fashion Blackstone, for instance, sees the object of law to secure fundamental rights which "consist, primarily, in the free enjoyment of personal security, of personal liberty, and of private property".¹⁷ The role of law is not to lead people in the exercise of their virtue or to encourage behaviour conducive to developing a notion of an overriding telos of individual and common good, but to discourage (through penalising) conduct harmful to the fabric of social organization (organization that is in line with the new non-teleological notions of social welfare). More and more the 'justice' of the structure of the law is a vision of adequacy to various implicit and explicit social-political goals rather than that the law supposedly represents and structures a system of 'natural' status and teleos.

Sovereignty coexists; the image of law Austin gave was of "the command of the sovereign backed by threats and habitually obeyed".¹⁸ But this concept of Law is based on an empirical reflection of the fact of hierarchial social power which the ethos of crimio-administrative writing in its "liberal" clothing moved to contain in a 'legal-rational' framework - it has lost its normative dimension in a new claim to be a product of epistemological empiricism, to be a reflection of empirical reality, the way things really 'are'. The status of law is problematic; it becomes part of the tensions of modernity. One strand is the criminological 'liberal'¹⁹ criticism appeared necessary to apply 'reason' to a harsh social order in which recourse to power was often arbitrary; criticism which must play

a game of satisfying the allure of sovereignty while capturing its power in the confines of a reason which claims to represent the social. The period 1688 to 1820 saw a rise in capital statutes from 50 to 200 and the spread of the criminal law attracted an ambiguous response. As the 'thought' of the social came, it appeared, to exist freed from the confines of tradition and religious hierarchy potential anarchy was avoided by conceptual boundaries and balancing of decision making in formal frameworks which structured decision possibilities. The growth of the criminal law as a principal method of formal social control and the strict operation of the law with the methodology of crime control of the time having its crux in the symbolic execution of the law through its capital aspects was also a centralization of the power and 'will' of control.²⁰ A centralization of power to punish wherein, as a later marxist commentator put it, even the aristocracy of the eighteenth century might agree that,

"the ideology of the ruling oligarchy, which places a supreme value on property, finds its visible and material embodiment above all in the ideology and practice of the law. Tyburn Tree, as William Blake well understood, stood at the heart of this ideology; and its ceremonies were at the heart of popular culture also".²¹

This marxist interpretation is, however, a product of a later period of intellectual reason. Hegel, flushed with the imagination of rationalism, gave the driving force to modernity as the coexistence of law and morality.²² Social progress moved via the determination of the Concept and the Concept delivered freedom in the development of individual and institutional rights, articulated in social contracts constituting and formalising property rights as personal and alienable. Via property, via the relations which law allowed, the individual reflected his worth and expressed his personality. Via institutions, via the relationships of the state which public law allowed, modern society set itself apart from the pre-modern as the expression of the free and rational and reached for the epoch of the absolute. Marx's inversion placed this expression of legal rationality, appreciated primarily by the new 'professional', as

the ideology of class and social structure; as the appearance obscuring the reality of class interest. Weber, appreciating the distance modern rationality achieved from community and previous 'objective' moral systems, saw the rationality of law (developing legal norms) as differing in kind from that of religious or moral norms - thus distance existed between law and ethics. The law became a self-contained set of rational procedures whose knowledge base and interpretive methodologies were the property of, and existentially required, a body of professionals and technical expertise.²³

Law's development in social control we may classify in Weberian terms as 'social rationalization' although there appeared different visions of what such rationalization entailed, as indeed were various analyses offered as to the dangers present in society; but progress in rationalization could be sought not only by those who protested the arbitrary power of the rulers but by those who saw the Poor Laws as "a corrupting benevolence", and from those who feared violent unrest, as well as those who assembled humanitarian reasons. The complex of determinants, some of which can be classified as class, religion, and rationality itself, may be as vast as the analyses of interpretators. To deny reducing this production to a master prescription does not mean that certain lengths of chains of determinants, certain "local" determinants, are not at work. Undoubtedly, concomitant and interlocking processes are at work - macro structural-functional processes which contain processes of state formation, of capitalist formation, of legal-rational legitimacy formation, and the impact of legality itself (including the behavioral desires of the professions involved, for example, lawyers, and judges).

An example is the persecution of witches which became a matter of legal activity in the middle ages and was repealed in the course of the Enlightenment. The traditional criminological approach, as in Vold for example, places belief in possession by the devil and associated evils such as witches as products of demonism - an epoch which saw witch trials is superseded by a

different specie of social epistemology, namely naturalism. But how does naturalism come about in criminal justice and how does it affect witch hunts and trials? The assumption may be that increasing education defeated the belief in witches but most of the educated peoples of the middle ages appear to have believed in witches, as Trevor-Roper put it:

"the more learned a man was in the traditional scholarship of the time, the more likely he was to support the witch doctors. The most ferocious witch-burning princes, we often find, are also the most cultured patrons of contemporary learning."²⁴

Trevor-Roper does, however, place the image of epistemological transformation as ultimately determinate, giving credit to the writings of Descartes for having

"dealt the final blow to the witch craze in Western Europe. [What] ultimately destroyed the witch craze, on an intellectual level...[was] a philosophical revolution which changed the whole concept of nature and its operations".²⁵

Jerome Hall identifies the factors of change as a complex interaction of truth, religious toleration and the rising active role of the professions, namely the lawyers and judges who were called upon to conduct the witch trials. The labelling perspective would remind us that the witches were actually weak and mostly old women who posed little threat to the concentrations of power in the social order and provided little resistance to their use as "outsiders" in a process of labelling which served to maintain boundaries and reinforce dominant conceptions of truth and authority in these societies. As Hall points out the actual decline of witch trials cannot be simply attributed to the philosophical systems of Descartes since the dissemination of his thesis occurred after the trials became obsolete. A range of social processes were at work: the impact of a scepticism concerning absolute claims of truth based on the old metaphysics, the impact of religious toleration, and the changing rise of the professionals. Thus: "The chief cause of the sharp decline in prosecution for witchcraft was the influence of lawyers and judges". The repeal of specific acts, such as the Witchcraft act of 1736, can be attributed to a changed attitude

particularly of "the judges, lawyers, grand Jurymen and petty Jurymen whose collective resistance effectively brought the trials to an end." The attitude of the professional was a reflection of a different truth and of rising toleration. Toleration was a matter of compromise and the inability to conclusively demonstrate the singularity of truth's manifestation.²⁶ The rise of toleration entailed the decline of persecution as a technique (that is to say belief in the effectiveness of that style of enforcement of control); the rise of scepticism reflected in the changing attitude of the lawyer to the questions of evidence and acceptance of external authority within the confines of legal judgement.²⁷

V

The decline of the persecution of witches was a subset of a later movement of what scholars as far apart as Radzinowicz and Foucault have catalogued and offered interpretations of as "the end of the spectacle" wherein the power which displayed itself via the ceremony of public punishment was replaced by the prison,²⁸ although it appears safer to accept a thesis of gradual development rather than a sudden transformation.²⁹ This change undermined "theatrical" penalty which had "echoed a long tradition of public punishment", and which Bentham described as "an imposing commentary - a sensible and speaking image of the law" (emphasis added), wherein the power of the sovereign was expressly tied to the truth of law and the truth behind law (the right to rule).³⁰ In the context of this methodology of connection, of power wherein the rationality of law is open in its message of subjection, of an ownership of the seat of power, the Classical school of criminology, as exemplified in the work of Casame Bonesana, Marchese de Beccaria [*'dei Delitti e delle Pene'* (On Crimes and Punishment) published in 1764]³¹, takes its life.

Vold characterises the Classical school as "administrative and

legal criminology, concerned with setting out a scheme easy to administer",³² and Beccaria as

"protesting against the many vagaries and inconsistencies in government and the management of public affairs.... He proposed reforms to make practice more logical and rational".³³

The criticisms of classicism which commentators concentrate upon are well known and Vold implicitly uses Weber's formal/substantive topology in echoing the positivist response, wherein the epistemological growth of legality ignored social reality:

"puzzling questions about the reasons for or causes of behaviour, the uncertainties of motives and intentions... were ignored for the sake of administrative uniformity. This was the classical conception of justice - an exact scale of punishments for equal acts without reference to the individual involved or the special circumstances in which the crime was committed."³⁴

Radzinowicz, aligns himself with a sophisticated version of the narrative of humanitarian progress:

"the rigidity of the classical school on the Continent of Europe made it almost impossible to develop constructive and imaginative penal measures.... because they would have conflicted with the principle that punishment must be clearly defined in advance and strictly proportionate to the offence."³⁵

By contrast the authors of The New Criminology adopt the methodology of immanent critique. Within Beccaria's work is a contradictory tension in both proposing the notion of equality and also defending the possession of property. The democratic stress of early utilitarianism is seen as nothing more than the ideology of the rising bourgeoisie and social contract theory as ideologically part of their protection against feudal interference; ideology which bore little relation to middle class practice. For the authors of The New Criminology uncovering such contradictions reveals that

"a system of classical justice of this order could only operate in a society where property was distributed equally... Such distribution was never contemplated."³⁶

Yet what is the context for this change? Punishment in feudal

society can be seen as reinforcing a particular form of social relations - a set of relations in which law, religion, politics, and economics were involved - in sum the whole set of socio-political relations were intertwined and co-determinate. The transformation of Christendom from a condition of numerous small divided feudal societies to one of a few large and absolutist states concentrated social power in the personalised will of the ruler who often side stepped feudal institutions in a general appeal to individuals as subjects (universalised appeal). Rule, however, is suffused with personal use of power.

Beccaria, on the other hand, appears as part of an emerging defining process whereby the growing civil society is placed as the sphere of private interests and the state, the region of public authority, is divorced from it; the process of definition concerns the mediation of power which is invested in the sovereign as supreme superordinate, namely upon what conditions is the exercise of this power to be just? The situation of "corruption and excesses of existing institutions" wherein "punishment was arbitrary and barbarous, 'due process' of law being absent or ignored and crime itself being ill-defined and extensive"³⁷, was one where what passed for the institutions of state and society was barely distinguishable from particular holders of uses and loyalties over property and services. The move to 'rights' and 'due process', the move to the rationalization of state and society, is a move to divorce the reason of the state from the actual empirical self-interest of concerned individuality. The actual, immediate will of the present always seemed the will of self-interest - the will of the state, conversely, could be freed from such and invested with a new legitimacy by becoming identifiable through the notion of the 'general will'. This new creation, the general will, is not the will of egotistical individuals in present situation but their abstract consciousness as rational human beings and citizens of the state.³⁸ Beccaria is the central pivot for criminology in such a move. A move which those who came after, even when as with criminological positivism they offer a critique and a

transposition, find themselves trapped within its framework.

Essentially Beccaria determines his text as the rhetorical break between theology, politics, and the application of punishment - a move from practical action as political service to administrative action as obedience to rational performance.³⁹

The text is built upon the work of others; its methodology is to grasp the narratives already accepted as images of the human condition and to inter-play them to create the new social space of a 'rational penology'. Specifically, Beccaria placed the birth of criminology in a narrative tradition containing a past grand event of political activity (the transformation of the state of nature to civil society existing within the abstract framework of law), which set out a context for what could then be seen as essentially social, as opposed to political action (i.e the act of penal judgement).⁴⁰ The 'political' is placed into a differentiated sphere through the assumption that administration can benefit from 'cognitive transparency' and the clear identification of objects which this allows us in the problem field before us; but the truth of these objects is the creation of philosophical mediation which guarantees successful behaviour because of a perfected theory of behaviour which the individual recognises by his self-conscious participation in this philosophical insight into the nature of reality. The result in the classical reforms was the creation of a 'tariff system' where a table of sentences matched to offenses by length and severity were in turn linked to the gravity of the offence. Logically this also required a defining and ranking of offenses in strict order, and this, preferably, required the creation of a comprehensive criminal code. Criminological positivism, in turn, turns to an alternative imagination which, however, keeps the notion of security for judgement under the guidance of those who know the terms of the scientifically discoverable Newtonian flows and interactions of the world. The identity of the prince of law (i.e. the applier of law) changes in a declaration that responsibility can legitimately be handed over for large sections

of the organization and administration of our various societies to the expertise of the scientist and the technician, supposedly creating 'value free' expert spheres of decision making. A situation which the Portuguese scholar, Boaventura de Santos, refers to as the hold of "cognitive domination".⁴¹

VI

How was the epistemological framework for justice in classicism constructed? Essentially it was a philosophical justice. A justice whose truth was necessarily constructed amidst the destruction of the Neo-Aristotelian synthesis which had underpinned the grand schemes of Natural Law of Aquinas and others. Devoid of such a cosmos as background stability the ontology, the physics, and the theology, which combined to allow the postulation of a common good, and the geometrical proportions (i.e. the 'mean') necessary for positioning and which guided prudential reasoning were cast adrift. In a world whose physics came to be thought of as 'Newtonian' man can no longer think of looking to the idea of natural form of entities as the guide for decision - the idea of living in accordance with the rhythms of the cosmos no longer has meaning.

In such a time there is a dual need: firstly a need to quieten scepticism and fill the epistemological confusion which borders upon being a void; second, the social need to constrain and position power within a legitimative strategy no longer able to be fixed into notions of a stable and unchanging cosmos or a teleological one. Moreover, whatever the answer was to be, its social context was to be set amidst the demands of the socially progressive class of the time, i.e. the bourgeoisie, for a legitimation which went against any notion of the wise in favour of the universal and the openly visible; that is to say that the epistemological strategy should be congruent to the environment in which it has to play its part in evolution.⁴²

The philosophical construction of modernity provided an answer. Modern man would create his own beginning, out of his own endeavour - his reasoning and his philosophical reflection upon his experiencing. The question of criminal law and justice - of prudential reasoning and the disposition of offenders - of the compatibility of man, sovereign and society - required thinking upon a new foundation. As Evald stresses it was no longer possible to start from the conception of a natural whole with which to dialectic the particular - it was no longer possible to create a central referential point in the concept of a common good. The socio-political argumentation of society could in no way look to a system of shared expectations, as with the model of the polis, since society no longer could have the supposition of a common good as measurement, for the polis - regarded as the natural site for the idealised political animal that was the 'greek' man - was no longer able to be thought of as a natural entity.⁴³

In many ways the distinguishing feature of modernity is that it has always thought of itself as "unnatural", as alienated from, or a distortion of, the natural.⁴⁴ In the context set for Beccaria the question of the nature of society, was revisualised as the question of what the nature of society was to be, i.e. it was now reposed as a problem to be resolved. Beccaria as the originator of a Criminological rationality fit for modernity faces the reflexivity of a thinker who must propose, and yet explain, the epistemic capacities of the human thinker towards the world. The presuppositions of the Aristotelian formation, that man's pretensions to knowledge could be fulfilled, that one could affirm that knowledge of the world could be achieved as something finite and definitively complete, were based on the implicit premise "that the human capacity for knowledge is in principle equal and adequate to its natural object"⁴⁵. Beccaria, however, in facing a world becoming modern, cannot propose a reason which in any form can claim to penetrate (because it is essentially part of) the thoughts of the hidden God and bring out the divine conception of the world. Linguistically the absolute

cognitive pretension of the Aristotelian theory of knowledge - the natural coordination of subject and object - had to be surrendered. Joining himself to the cognitive efforts of others Beccaria's tactics were:

1) to provide a narrative history to position the present. Here Beccaria is at odds with Humean legitimation in that he utilises the 'fiction' of the social contract as the past reality of an historical act (whereby independent and isolated men, weary of living in a continual state of war, sacrificed a part of their liberty so they might enjoy the rest of it in peace and safety). This is in turn linked to an ontological doctrine (namely that man's rampant individualist nature ensured that every man was willing to put in the public fund only the least possible proportion, "no more than suffices to induce the others to defend it. The aggregate of these least possible portions constitutes the right to punish; all that exceeds this is abuse and not justice; it is fact but by no means right".). The necessity of punishment is presented as empirically based on the nature of man's position and governed by man's reason for its legitimation. Punishment was in the class of "tangible motives" required "to prevent the despotic spirit, which is in every man, from plunging the laws of society into its original chaos".(B. pp.11-13) In a universe which was not moral neither could the multitude be naturally moral. Men could not be left to their own devices to socially co-exist.⁴⁶ The paradox of crime was that it was both rational and irrational. It was rational for an individual to choose to commit a crime - he may well have his reasons which Beccaria acknowledged were possibly political - and yet crime was a social irrationality. The irrationality of crime stems from its contravening the rationality of the social contract. Man's selfish rationality has identified subjection to the power which the social contract grants as the most beneficial mode of social existence and the rational choice of an individual to choose criminal behaviour, i.e. behaviour outside the terms of the contract, is to choose the irrationality of behaviour beyond the social contract. It is an irrationality to be constrained by a

fully rational crime control mechanism.⁴⁷

2) To ensure a separation of functions where the administration of law is separate from the political question of the content or style of law. The narrative participation of individuals in an ongoing social contract united men under the authority of the sovereign. In the substantive institutions which took the name of justice, neither the people nor the judges were empowered to interfere by continually making, or altering law, or have discretionary power to choose penal measures. Judges were not to be allowed discretion: Only the sovereign was so entitled as he was "the legitimate depository of the actual wills of all".

3) To subject empirical diversity to a conceptual objectivism. Beccaria holds

"there is nothing more dangerous than the popular axiom that it is necessary to consult the spirit of the laws... Our understandings and all our ideas have a reciprocal connection; the more complicated they are, the more numerous must be the ways that lead to them, and depart from them. Each man has his own point of view, and, at each different time, a different one. Thus the 'spirit' of the law would be the product of a judge's good or bad logic, of his good or bad digestion; it would depend on the violence of his passions, on the weakness of the accused, on the judge's connections with him, and on all those minute factors that alter the appearances of an object in the fluctuating mind of man."(B. pp.14-16)

Subjectivism is acknowledged and constrained; it is not possible for the knowledge of the individual to be knowledge of the 'truth' which the individual can himself grasp the totality of, instead he shall be introduced to 'truths' which need to be positioned by co-operation with others. No possible embracing, objective viewpoint of society in itself can be presented⁴⁸ - there is but individual, localised, situated and therefore limited, viewpoints of the whole - the linkage of each to the whole is but the empirical bonding of personal need and satisfaction.

Beccaria follows the lead of Hobbes and places (exposes?) individual men in the state of nature in a chaotic state - the

need for self grounding creates a solipsist bedrock. The need for a commonality for judgement cannot be satisfied in the absence of a reference to any natural objectivity, man can have no other measure than himself, a situation, a "state", in which no common measure for the multiplicity of judgments that each makes of himself and others can be provided.⁴⁹

There is, however, need - dire need. Need articulated by the empirical knowledge which demonstrates the natural limitation of death, the ultimate limit of hope. To avoid death (of individuals, of society) is the potentiality of the 'social'.⁵⁰ A potentiality made possible through the grand act of politics, the central focus of which is a common act of judgement which gives the maxim: 'Give up to others the minimum necessary to avoid death'. The state of war, the empirical bedrock of man's basic nature, can be broken only by the transcendence of this natural location. The referent which objectivizes the status of man must come from the impasse of the empirical natural condition - the solution of which must come out of empirical knowledge but be able to be set against the scene made visible by that knowledge. The need of man demands a breaking with nature, the setting up of a counter-power to nature - the political Leviathan.⁵¹ The naked irrational flow of power is incorporated and rationalised in the creation of a nexus of political power, sovereign power - the overcoming of natural terror by submission to legitimate power.⁵² A power which contrasts to nature its own sovereign - Law.⁵³

4) The realization of these background conditions (or assumptions) concerning key 'facts' of social existence demonstrates the need and right of a mechanism of control. The operation of the mechanism can become an organizational concern taking a set of operative conditions and debates as its own.

The social is safe within the confines of that regime of law, safe within a containment, a subjection to that political creation.⁵⁴ Beccaria holds that man does not need to come out of

himself and participate substantively in a common realm. He may rest in essentially solitary existence - but if imposed upon he can impose back. Paradoxically, although the sovereign is to embody the "common will" the principle does not draw the substantive thoughts of the individual will into the common - on the contrary it specifies that man will regard himself as the stranger to/of all others and they of him. And in such strangeness all are equal. Each is thus the abstract equal of all others, and in that abstraction equality reigns over any "fact" of their difference.

The legitimacy of the rule of Law is posited as the necessary creation or rational reflection on the empirical operation of the world.⁵⁵ Empirically, Hobbes states, all men are equal in the face of death, and the power of any is not sufficient to disallow the potentiality of death at the hands of any other. Additionally, the empirical result of individualism is that men must judge themselves as equal, not because of a natural ordering of telos made visible to all, but because in the absence of such, none will accept being unequal to others. Hobbes declares that even if there were a difference in natural power it would never be so great to make all men agree as to

"who has the superiority of power over the others, and who is so stupid that he cannot rule himself? In fact, everyone naturally considers that he is at least as capable of ruling another as the other is of ruling him."⁵⁶

Thus, because of the absence of a common reference an equality (abstract) in law must be accepted;⁵⁷ moreover, it is known that it must be contrary to the facts but the facts also determine that we must act as if it is not!⁵⁸

5) Beccaria's thesis, finally, is a rhetorical testament to progress. Progress which comes about as an event which breaks upon history: part of a progress of epochs wherein the first was the formation of the great societies of men organised around the "false divinities" of "primitive errors". Now is the second epoch "where truth, after progressing slowly at first and then rapidly, sits at last as a companion to monarchs on their

thrones and enjoys a cult and alter in the parliaments of republics". (B. p.96-7)⁵⁹

Under the influence of Beccaria's pen we shall move beyond those present laws which contain "the dregs of utterly barbarous centuries", we "directors of the public welfare", and we shall create a sight that will lie before our eyes illuminated in the peaceful splendour of progress. This transfer of a whole structural scheme of aesthetic, theoretical, technical, and moral progress within a collective idea of unified history presupposes that man sets himself as the only one in charge of this totality, that he takes himself to be the one that 'makes history', but he makes history progressively under the guidance of 'proper knowledges'. It is then that he can hold it possible to deduce the movement of history from the proper self understanding of the rational subject. The future can become the consequence of our actions in this present, and these are moved by our present understanding of reality.⁶⁰ Thus the 'plea' of Beccaria, a discourse aimed "not to demonstrate what the law is, but rather to incite men to make it what the author thinks it ought to be", (B.xviii) has its own philosophical consciousness.

VII

Both Hobbes and Beccaria avoid, however, the question of what is going to be the actual substantive content to this notion of equality in the social sphere. It is an issue which surfaces later in critiques of the liberal equality of modernity and takes a particular critical conception with Marx and his own modern measure of commonalty, namely, "a comprehensive social theory" which fully explains the reality of human nature. But in Hobbes and Beccaria it is the absence of any reference except the philosophic "experience" of the state of nature which drives us to set posited law as "the order of things" and to achieve a new regime of 'objectivity'. Equality (of Being, of Rights), is thus posited as an unreflexive axiom of judgement.

This amounts to a substitution, a reintroduction into legal and political judgement, of an objectivity which the void of the natural state had done away with; the reintroduction of that notion once linked to the consideration of nature, now linked to the idea of equality, the clarity of philosophic-legal form. Moreover, it is the arrival of a complete cognitive transparency for our act of judgement which will allow the tribunal of power to compare terms, crime-punishment, without the need to investigate the value of each other than as it relates to law.⁶¹ Once the movement is complete a form of empirical objectivity can rule in the social since the act of judgement concerning the entities of criminal justice (i.e. law, offender, guilt, punishment) appears as if it only combined the unproblematic experience of the world which has successfully informed itself of its nature. Paradoxically, although the issue of the classical school concerns the power of the state to punish, 'Justice' is de-politicised in its judgments and the acts of justice in the social is synonymous with the empirical existence of a legal order. True law cannot now appear as a structure of Reason built deductively from the axioms of a foundational common good, it is now the empirical existence of law itself built upon the egoistical experience of the state of nature and our overcoming of that state through the creation of conventions.⁶²

Let us be clear about the complexity of the 'functions' achieved by this part of the philosophical birth of modernity. The emphasis upon control, explicit in classical criminology, should not blind us to the obverse functionality of this methodology of 'problem' in the life of modernity, that is that it entails that 'crime' is a central foundational conception for that modernity. Crime, as a concept and the implicit range of responses of dealing with crime, for example, 'philosophies of punishment', are then notions to be utilised in the constructionist project of modernity. One hidden curriculum of classicism is not so much to devise a mechanism to control and in time eradicate crime, but to assert that 'crime' and its associated conceptual apparatus are central for modernity. The implications of this are clear:

Firstly, crime overwhelms 'non-crime'. As modernity spreads aspects of social interaction which involve 'harm' become questioned in the form - 'can this be fitted into the rational scheme of criminal jurisprudence?'

Secondly, crime becomes the technique of 'formal social control', displacing alternative mechanisms⁶³ - the result is a concentration of functional power in the hands of professional criminal justice personnel. A power which is legitimated according to conceptions of specific role performance. Modern criminal justice organisations are, thus, not only a technique of ensuring formal social control but are also products of the type of social control being aimed at in modernity.

Thirdly, the 'freedom' of crime, i.e. the metaphysics of rational choice, and the imposition of key elements of social judgement as to the constitution of the social self of individuals after the act (and thus the encouragement to think deviance) spreads. When modernity declares its 'right' to autonomy, to the 'liberal' freedom of individualism it declares its right to crime, and also that its citizens have a 'right' to be criminal and thus a 'right' to be punished.⁶⁴

Fourthly, to ensure the freedom of crime as a concept, punishments are required to become 'modern' - too harsh a punishment interferes with the acceptability of 'crime' as the natural form of modernity. That is to say that as well as any 'functional' fit between the demands of social structure and the type of penalty experienced in punishment (see Rusche and Kirchheimer, etc) the practical experiencing of the pragmata of social thought must not be incongruous with the narrative forms of that social structure.

Part B.

I

Positivism.

In contrast to the 'moralist' freedom associated with the notion of crime another line of dealing with the 'social' was already

becoming apparent and was in part a reflection of 'problem'. Even in the idea of creating a rationalised instrument of social control, 'proper' social engineering required a 'proper' understanding of human motives. Helvetius, one of the inspirations for Beccaria, stated his concern that to construct good laws it was "necessary to know the human heart".⁶⁵ Both penology and criminology partly defended the regime of law with a "psychological theory of culture" or, as more usually referred to, "associational psychology". With Beccaria: "Pain and pleasure are the only springs of action in beings endowed with sensibility". But what was meant by these words "pain" and "pleasure" which now defined the grounds for human action?

It involved the denial that there was a particular category of things that was fit to be human pleasures; that is the traditional search for those things qualitatively fit to give human pleasure and thus achieve the end of 'happiness', for so long seen as the true end of human existence, and a category of things which of their essence constituted pain for humanity gave way. Instead the use of these words of pain and pleasure now demonstrated the freeing power of nominalism. A power which destroyed the Aristotelian dogmas and opened a new interest in nature. It was the ontological replacement of the category of substance, that certain things were of their essential nature to be classified as belonging to a category (i.e. pleasure or pain), by a loose and always transient category of quantity which in turn established the idea of handling all possible problems by calculation. The route was, moreover, set for a concentration upon penalty as the motif of social control rather than the 'informal' operation of family, peer group and interpersonal shame.

II

The general justification of the practice of punishment was utilitarian. The problem of the individual, orientated by his

nature to his own ends, and the question of achieving social order, was resolved in utilitarian punishment which gave the legislator a mechanism to control the social, with the social being seen as a mass of individual pursuits of ends. Talcott Parsons has observed that a division occurred at this time concerning the rationality linked to social engineering between those who held a free will approach, and those who accepted determinism.⁶⁶ Utilitarianism developed a thesis of economic style motive as a casual version of free will, and positivism, developing in the influence of St Simon and Comte, accepted total external determinism as the consequence of a wholesale associationism as per Hume. Punishment for the utilitarian becomes a social activity much like economics - individual man is governed by the "hedonic calculus" (the calculus of pleasure), and man's mind can calculate the visible factors rationally perceived in the pursuit of his ends. The publication of the consequences of offending, punishment, will induce rational people not to undertake actions resulting in the imposition on themselves of pain, and so not offend. As for the individual offender, he shall so learn from his experiencing of pain, that he will never again commit the offence giving rise to that pain. Implicitly, as with economics, the proper management of the hedonic calculus in the service of the sovereign's utility, required a collection, categorization and transference of information about the state of offending, and the relative strengths of preferences by individuals. If possible, and implicitly this is possible, preference should be influenced - this we can call education, ideological stimulation, or market development.

The division which Parsons identifies is of importance to the application of 'problem' and solution: the pure thesis that the application of scientific knowledge, praxically reflected, would eliminate crime as an entity, appears not to be central to the utilitarian, but only to the positivist. The utilitarian takes on a concept of 'problem' that is related to how best to manage, to direct and control; and this is essentially a superstructure that can be superimposed over ends. Under Bentham's pen, society

is a mass of physical sentience, an anti-intellectual vision, but which in Bentham's vision reduces the range of emotions and desires of individuals to a commensurable and universal form which gives confidence for the notion of 'problem' to achieve the "greatest happiness of the greatest number". The ritualist elements, the unpredictable nature of human emotionality, the contingent possibilities of desire, all these are denied in this empiricist foundation. The empiricist imagination had earlier revealed the social-material structure of the world as simply a 'trampling march of unconscious power', an attitude where on its extreme views, life itself came to be seen as almost an accidental by-product of a mechanical process. Into this Bentham counters the Aristotelian lineage with a move to methodological individualism. Acknowledging that the phraseology of the common good, or as he puts it, the interests of the community, is central to moral-political discourse, Bentham reinterprets it:

"the community is a fictitious body, composed of the individual persons who are constituting as it were its members. The interest of the community then is, what? - the sum of the interests of the several members who compose it."⁶⁷

In this each person is to count as one and all pleasure is regarded as commensurable and able to be included in the calculation unless good reason condemns it. Empirical fact, not tradition or reference to authoritative books, is to be the guide, and its elements lies below the nominalism of words:

"politics not less than physics is an experimental science: feelings not words are the elements that comprise it".⁶⁸

The empirical reality of the desires and feelings of the social are the material of this science. The liberation of the social from the bounds of traditional authority and false metaphysics releases the potential power of its parts.

A central focus of this time is the handling and praxical recognition of power - the rhetoric of the power to punish is to be made expressly instrumental and consequentialist. The England of the late Eighteenth Century found itself attacked not simply for the excessive nature of the punishments but, to repeat how

Foucault put it in Weberian terms in Discipline and Punish, "for an excess that was bound up with an irregularity even more than with an abuse of the power to punish". Reinforcing the practical reforms of those who "integrated prison reform into a general attack on the administration and political structure of the ancien regime" was an epistemological basis which Ignatieff identifies as "English materialism derived largely from the work of David Hartly and John Locke".⁶⁹ The "positivist revolution" took up the broad themes of Comte's placement of Law as but an emanation of the metaphysical spirit which would be overcome with the advent of a purely scientific or positive age where judgments based on the visibility of scientific facticity would be engaged in.

The challenge to the dominance of legal categories was, in the rhetoric of the 'positive' approach complete, in its purity it was no fusion that was espoused but a complete substitution of legality for 'social science'. Lombroso, for instance, contended that progress lay in the application of science to the administration of criminal law "to emphasise the importance of apportioning penalties, not according to the offence, but according to the offender.." Offenders could not be equal; not equal in possession of stigmata, nor equal in the various measurements of positivism's specifications; they must be unequal in possession of the characteristics of biology, anatomy, psychology, and in time the imprints (deposits) of socialization.

Lombroso represents, perhaps, the most Humean of the early criminological positivists. His dicta of what constituted proper theory echoed Hume's distinction between true and false philosophy:

"nothing is more imprudent than to try to maintain theories .. if they are going to upset the order of society. The sociologist must observe still greater circumspection, for if he puts into operation innovations of an upsetting nature he will simply succeed in demonstrating the uselessness and inefficiency of his science."⁷⁰

The point here concerns what MacIntyre terms in Whose Justice?

Which rationality? the "translaterability of traditions"; as we saw in the chapter on Kant the later bearers of the rationalist and Empiricist imaginations rhetorically identified themselves as belonging to two opposing camps only one of which was right. The cause of positivism, some of its finest adherents held, was to destroy the old illusions. Lombroso's tactics, however, are to demonstrate, in direct Humean terms, how even the 'distorted truth' of the other is contained in the truth of wider natural functioning. This progressive epistemological advance preserves the latent rationality of the earlier system. Thus commensurability is established which converts the items of common sense and legality into facets of a common natural flow which lies beneath the variance of language; the criminal law thus drew from natural process and so the categories of the criminal law, the "juridical figures", actually could stand in close connection to the categories of scientific positivism.⁷¹ Thus: "to the juridical figure of incendiarism, of homicide, can be opposed the psychiatric figure of pyromania, homicidal monomania, paradoxical sexuality, etc.". Similarly the juridical figure of theft is opposed to the psychiatric figure of kleptomania; habitual drunkenness to dipsomania; rape and pederasty to sexual inversion; crimes of lust to satyriasis and nymphomania; idleness and vagabondage to neurasthenia. It is a specific view of law and the structure of the world which reproduces Hume's earlier discussion of the creation of law.

The constitution of 'reality' changes. As the Soviet criminologist Yakovlev put it classical legality "considered that the personality of the criminal does not exist prior to, and apart from, the commission of crime".⁷² However, if science is to constitute the categories for use in judgement then the natural physical/psychological must always exist prior to the commission of the offence. This cannot by definition be the same as the earlier personality, there is no legalistic 'criminal's personality', as a crime is yet to be committed, it is instead the personality of the delinquent, the deviant, or the anti-social individual. The epistemological basis of this, the 'social

justice' of modernity, provides not only grounds for the transference to the therapeutic resolution of crime, but also to the constitutional and informed measures by socialist states to base social defence on the concept of the social dangerousness of the personality.

The central figure of the Judge is called upon to change: the representative of the sovereign should, it followed, be replaced by the person who commanded the facts. As H.D.Lasswell put it:

"Must the psychiatrist, then, unseat the king and actualise in the world of fact the philosopher-king of Plato's imagination....? .. If sufficiently secure of himself and of his field, he may dare where others dared and lost before."⁷³

In Lombroso's texts this linkage between epistemology, the categories of judgement, the act of policy and solution of problem, was possible since all nature partook of one essential connectedness "where the most striking phenomena are in continuity with a series of analogous phenomena less accentuated", which observation of nature, and careful measurement of the facts displayed, could lay open.

However, positivism implied as well that the resulting conditions of these knowledges, the delinquent, has his characteristics valid only under such and such conditions - that the empirical forms of man were relative to social conditions. "Society" being thus both the foundation and the structure of its own being - the criminal milieu being the foundation for the structure of criminality. What this in turn means is that the criminal posited in Northern Italy is only the criminal posited in Northern Italy - he does not travel (i.e. universalise from this particularity) well when subjected to critical scrutiny. The criminal which Goring contemplates in the prisons of England behaves, exhibits, differently to the interrogator.⁷⁴ Already the suspicion looms that the positivist criminal may well be the product of his empirical 'interrogation' - the terror of a different penal arrives - the suffocation of penal empiricism.⁷⁵

The hopes for the total solution to the crime problem ring

through the texts of positivistic criminology and do not need repeating. Their claims range from the totally confident through to lesser optimists such as Ferri.⁷⁶ For Ferri the creation of a more advanced society came about through "penal substitutes" which replace retributive concepts based upon "the abstract idea of law". Criminology contributed to social development through exposing the social injustice of the classical criminal law's preservation of its "theoretical method, the 'a priori' study of crime as an abstract juridical being" and yet it also adopts some of the underpinnings of the classical school, namely "the practical object, the diminution of punishment and to a large extent [crimes] suppression", changes which, led to a shift of approach to the amelioration of the conditions of human existence. Primarily, although Ferri was often indecisive as to the extent that economic distribution would suffice, through a more satisfactory economic organization of society. (CS.p.181) "Science must control" the responsive actions of those organizations that operate in the name of society. (CS. Chapter VI, quote p.120) Judicial procedure must be transformed, for example, the requirement to tell the truth under oath should be replaced by the use of technical and experimental tests of human psychology and psycho-pathology, the jury system abolished, truth determined clinically.

The rhetoric of the texts proclaim that what is at stake is the placement of criminal justice "in an entirely different moral world". A moral world, which is to some, no longer moral, but part of the movement "beyond good and evil", a movement that does not mean, however, "beyond good and bad", substituting 'naturalistic' ethics and a table of natural valuation as exposed by science instead of the abstractions of law and of the transcendental. The conception of individuals is in a sense non-individualist, since they partake of cultural and biological continuities rather than the status of self-determining beings. Scientific reason reveals the natural laws of the physical and material composition of our world, and it is our task to locate and re-adjust society in the light of these. Our task is

optimistic, for even as we face the spectre of social dissatisfaction, unrest, and crime, better things are possible through the power of scientific vision uncovering the root mechanisms; the basis of this optimism lies in the self-conception of such social theory. New social theories are not ideological constructions but the uncovering of truths of man and his conditions. "The old anthropomorphic illusions" are being destroyed and replaced with a vital vision stemming from "the new experimental knowledge". Positivism teaches intellectual "modesty by teaching us to seek the complex causes of each fact", but "the constantly increasing expansion of this study" is due

"to the correspondence which exists between our ideas and the manifest realities of daily life. It is this correspondence which gives a promise of future triumphs, which we await without too much impatience, with the security of the strong with no intolerance, and with the calmness of the soul which trusts to the labour and justice of the future." (CS.p.567)⁷⁷

The epistemology of these claims is secure in its correspondence to the external world and our usage is secured by faith in the socialist value of labour and deliverance of the future. The rhetoric of this vision is both "modest" for the contents of contemporary theory, and "stirring" for its acceptance of the path of justice. Further,

"penal justice as an establishment of violent repression and class domination is destined to disappear, and to exist only as a clinical function.... the development of penal justice has always been, and will always continue to be, in inverse ratio with the development of social justice. As ordinary justice develops and organises, the importance of penal justice will diminish, and as justice ceases to be a coercive external and material mechanism, it will become more and more an intimate general organic sentiment, the product of a social environment which will ensure to every man the material and moral conditions of everyday existence. This means that the disappearance of penal justice as a political institution will coincide naturally and necessarily with the universal predominance of justice as a specific sentiment and force in social life." (CS.p.568-569)

What then will happen to criminology? The criminology Ferri has envisaged has an expressly political and practical role - it is an instrument which takes its nature from the inter-connection of theory and practice - a political role which dissolves its

politics into a judgement which seeks to achieve the correspondence of social activity to the laws of the lived world, and as that task becomes achieved, for which criminology has been an instrument its purpose is achieved and the very project of knowledge growth becomes obsolete. Since its main function is to demonstrate the structure of laws and the underlying operation of observed reality, and so inter-relate to the readjusting ideals, it in turn becomes realised in practice. By its very role as the bearer of the truths of man's situation, the practical result of the acceptance of these truths will sound the death knell of criminology.

III

What is central with this usage of Ferri, who was the most articulate in elucidating the 'point' of positivism, is positivist criminology's ideal of definitiveness. A notion that man can actually look at the reality of the world's processes. The world and the position of man in it can be captured as an object of the scientific gaze and 'Reason' will lead man in the light of that gaze - ideally no exercise of judgement free from this gaze or politics of social being is then required since this reason can encompass all.

It is an ideal which stipulates total truth as a given quality of existence - but this ideal, which must owe its existence to a continuing legacy of the ancient concept of reality, actually has a faith which is at odds with the practical reality of positivism's reach. What the hopes and faith of this discourse denies is reflexivity since the 'essence' of positivism is its denial of 'essence'; the actual status of positivism is as the pick and shovel of a co-operative enterprise to understand the workings of a world whose reality always moves beneath the skin of the observed appearances which positivism works upon. It is this reflexive understanding, the self-awareness that positivism

only works on the surface of the world, the acknowledgement that the great volume of reality is at any time out of reach, that gives to the actual task and situation of positivism the reflexive necessity to acknowledge its moral dimension - a necessity which ensures positivism's bondage to metaphysics.⁷⁸ But criminological positivism forgot such awareness, instead it spoke as if nature held out itself to criminological positivism as the uncomplaining subject for the most profound investigation.^{79/80} Ultimately, however, the dilemmas of classicism, aroused in the Kantian position of 'other causalities' unbeknown to empirical analysis, and the superficiality of positivism, result in unpredictability.⁸¹ Both undercut the universal and comprehensive pretensions of theoretical reason and place us again at the bequest of practical reason, which, undeveloped in the pure drive for true knowledge, lurches into an underdeveloped pragmatic politics of life and which demands newer forms of rationality.

IV

End-state: The poverty of linear progressive accounts of change realised.

One underlying argument of this work has been that the traditional intellectual narrative of work in criminal justice has seen itself ideally as a process of progression via epistemological purification, and is simplistic and limiting. Its collateral that practical matters are, ideally, part of a rational reflection of increasing knowledge of nature attained via the application of newer and better epistemological methods to a universal reality is likewise afflicted.

The first step in redevelopment is to acknowledge the failure of the philosophy of knowledge to solve the problem of purifying itself in the manner demanded by empiricism and rationalism. The solution to reflexivity is to acknowledge the pragmatic condition.

Within criminology the knowledge of empiricism, via positivism, becomes pragmatic under the reflexive turn which dooms both the deviant and the knowledge of deviancy to be the product of society. The epistemological production of positivism, linked to a rational reconstruction via a publicly specifiable and repeatable methodology, implies that the resulting products of these conditions, the knowledge of the delinquent, the deviant, has its characteristics valid only under particular conditions - that the empirical forms of man are relative to the social conditions via which knowledge is produced. Positivism's claim to reality can only be an allusion to a reality which remains always a 'mystery'. The pragmatic conception of the reality which knowledge seeks, on the other hand, announces the redundancy of the ancient concept of reality changing it to a 'reality concept'. An 'idea' which, in its very presentation as a concept of reality, anticipates reality as the always incomplete result of a realization, as dependability constituting itself successively but as never definitive or demonstrating an absolute consistency. This actively pragmatic concept of reality, legitimates the desire of knowledge, or curiosity, as a discovering of the quality of the new, of the surprising and the unfamiliar element, as both a theoretical and aesthetic quality, rather than a curiosity which seeks to look out onto the 'what is'. That is to say it allows and perpetrates the post-modern pragmatic preference or desire for the new [parology] over the positivistic conception of curiosity as the desire for knowledge of that which must be the given.⁸²

That particular outcome, one possible direction for endeavour, is itself indicative of the fact that the endstate of criminology is not restricted to the problem of knowledge alone, which would still hold out the hope that refined epistemological techniques would 'discipline' criminological confusion⁸³, but is indeed wider. We may give this at least four headings, namely:

- 1) the problem of knowledge;
- 2) the problem of the intellectual;
- 3) the problem of the enterprise;

4) the problem of justice;
all of which would be viewed as interrelated. As Maxwell put it the philosophy of knowledge undercuts itself since in attempting to solve its fundamental problem, that is

"the various aspects of the problem of knowledge.... it is essential to construe the pursuit of knowledge as an aspect of life, an aspect of the pursuit of wisdom in life. It is essential to give intellectual priority to action, to life, and to the capacity to act more or less successfully in the world."⁸⁴

But while wisdom is the cognate of pragmatism it is not the inevitable outcome - others are Just Deserts and the plays of a minimalist post-modern.

Regarding the problem of knowledge, critical thought in criminology arrived at the necessity for epistemological pragmatism, albeit unarticulated as such, not so much through the deconstruction of the models of classicism and positivism but through a realization and interpretation of criminological 'truth' as an internal feature of multiple paradigmatical configurations, the considerations of which are not commensurable. The development of multiple paradigms became articulated from the mid 1960's onwards and each constitute their own theoretical object. Jock Young analyses what he calls the six major criminological paradigms⁸⁵ considering each in relation to various dichotomies (structured around theories of human nature, social order, definition of crime, the extent of crime, policy and causation) drawing out various ideal typologies which demonstrate internal coherence at the cost of independence. Although accepting that any individual criminologist, at any given time, may well be in a movement between paradigms, for example from positivist to marxist, Young is implicitly critical of the isolationism which appears essential to the development of each paradigm. Using rather crass rhetorical devices, such as the 'myth of the new theory' and the belief that each paradigm "developed in a series of discrete historical stages, each representing a step in the rational progress towards the solution of the crime problem", to inhabit each paradigm the theorist

appears forced to believe in separate theoretical development as the most viable strategy for progressive intellectual development. Success is thus dependent upon the paradigm remaining true to itself to avoid co-option, emasculation, and corruption of coherence. The result is a "perennial tendency to one sided interpretations of social reality". And, although Young states:

"the problem facing the theorist is to transcend such dichotomies, yet the tendency in terms of the fashionable theory of the moment is to swing backwards and forwards, to bob from one position to the other",

he offers no vision as to how this is to be achieved. His conclusion, instead, refers to the actual "relationship of academic criminology and the real world" and is an inversion of the Karl Manheim stipulation of the "classless intellectual", namely that the ideas of criminology "often have an only too real institutional basis",⁸⁶ the consequences of which he does not draw out.

Thus the problem of the intellectual is drawn in rather unarticulated form to resolve the problem of knowledge. Placing the institutional basis of criminologists as essentially determinate of the production of the knowledge of criminology underpins the 1988 edition of Downes and Rock's Understanding Deviance.⁸⁷ Arguing, in a text true, perhaps, to the symbolic interactionist perspective, that "criminology is still so indeterminate that its authors can always hope to make a mark on it", criminology is seen as a loose mass of 'ideas' which individuals and teams draw upon, or add to on their way to broader concerns, in the pursuit of quite specific institutional purposes (for example, particular research, preparing a text). Downes and Rock's text itself evidences an unarticulated tension in allocating productive force to 'disciplines' or 'individuals'. By comparison to the implicit alternative that such 'disciplines' could and do operate as semi-autonomous epistemic subjects (which create perhaps a social reality of their own in their relationship to investigation), Downes and Rock's text veers towards the view that it is individual actors who by their

intentional actions in the pursuit of diverse ends in varying institutional settings, create disciplines whose existence lacks any inherent coherence other than that which is constructed by the text book writer in the course of his own project of situated practical reason (i.e. the act of text book creation). The danger then surfaces that the legacy of the criminological enterprise, having given up its comfortable motifs of functional evolutionary progress, becomes lost in a dissipated sociology of knowledge which, forgetting its own reflexivity, has no time for vision of any form except an impotent shadow of pragmatism where all are free to enjoy the unconnected relativistic nihilism of their 'explained thought' now devoid of the narrative connection of the 'project' of modernity.

A pragmatic resolution of the explanatory dualism of the first and second problems is to see the development of frames of inquiry in terms similar to that of Imre Lakatos' notion of a "research programme". A research programme is neither owned by the individual researcher but nor is it at the behest of the 'discourse of the discipline'. Knowledge, is however, at any one time the product of some or other research programme. Furthermore, 'progress' is not some notion of coming closer to 'undistorted reality' but a notion that the conceptual framework must be judged by how progressive that research programme is over a period of time.⁸⁸

However, what it means for a research programme in the social sciences to be progressive is not something clearly agreed upon. The 'progressive' element relates not only to the idea of generating cogent interpretations and explanations, for the prediction of novel 'facts' not otherwise uncovered, as do research programmes in the natural sciences, but success for a social science research programme also depends on the practical, normative insight it generates. In this case the question becomes one of the 'moral self-assurance' or, alternatively, the 'critical awareness' criminology can give to societal action and social self-conceptions.

Such a conception for progress can be fitted only very poorly, if at all, into frameworks of progressive epistemological purification since it brings in the dimension of an implicit agenda of critical problematics of a particular field of endeavour. A field of endeavour is wider than a discipline and is in part touched upon by MacIntyre when he stresses its importance for any tradition-constituted inquiry which wishes to rationally evaluate both its forwards and the backwards-pointing developmental aspects. At issue is the "agenda of unsolved problems and unresolved issues by reference to which [the tradition's] success or lack of it in making rational progress toward some future stage of development will be evaluated."⁸⁹ How may success be gauged? It is central to the pragmatic concern that having a better theory is being able to more effectively cope with the world. We can intervene successfully to effect our purposes in a way that we were not able to before. The technological or manipulative aspect is that we can apply our knowledge of what we take to be the underlying mechanisms in order to manipulate more effectively the features of our environment. Developing the aim orientated perspective necessarily requires a wider range of considerations to be introduced than the criteria of the philosophy of knowledge requires, reflexivity asks to acknowledge the presuppositions of the programme. The first aspect acknowledges that one basic question of all scientific inquiry is linked to a descriptive methodology. The aim is to be able to offer a fundamental description or account of the orderly processes and mechanisms of society. This search, the 'what is really going on?' question is necessary to transcend the common sense conceptions of the time. It aims to guarantee a pole for action which is independent of the subjective desires and feelings of man. Certainly whatever desire for change or project is to be accomplished, knowledge of the terrain for action, of the processes to be intervened in is required but Science, proper knowledge, operating under the philosophy of knowledge criteria aims to correct and replace common sense as a foundation for action. But, as has been stressed, on its own terms this quality control of the philosophy

of knowledge undercuts itself. Social science cannot neglect either the assumptions of common sense nor the grand narratives. The assumptions of common sense provide the self-descriptions and internal 'sense' which the life practices of the members of the various societies use to perform their social activities; those of the grand narratives tie together the practices of intellectuals. The defence of common sense serves, in the Humean style of the philosophy of knowledge, to protect the common life from grand theory, from 'false philosophy', for if social science replaces these common sense descriptions by a set of transcending conceptual and theoretical terms linked in flows of determinism then theory takes over completely from the internal sets of self-understandings of which the institutions and practices of the social world are comprised. The traditional conception of social science, naturalism, however, claims that only the model of the natural sciences is appropriate and that the rejection of the self-understandings and internal 'meanings' which the practices of the social world are comprised of is done at the gain of truth and the loss of illusion and mysticism - but such a claim appears barren when we recognise that these very practices are inescapably linked with such sets of self-understandings and internal meanings.⁹⁰ Thus is defused the traditional dilemma between the scientific, or positivist understanding of man and the moralist. The positivist, which claims dominance in explaining society and human 'behaviour' runs counter to those human self-conceptions and romantic ethics which correspond to our human self-vision of moral agency, thus telling us nothing about our selves that we can relate to. The romantic discourse draws upon our insights into moral agency but which lacks empirical vigour. A pragmatic scientific sociology is instead revealed to be an interpretive enterprise always based on assumptions and premises - its scientificity lies in its adherence to methodology. Its reflexivity lies in the fact that the self-consciousness of its methodology is also a self-consciousness as to our methods of understanding ourselves and the methodology of constituting our own insights into life.

Developing self-consciousness is always a practical activity both on the personal and social level. The two are intertwined. Moreover, changing conceptions about ourselves and our society impacts upon social and individual development. Changing accepted self-understandings and internal meanings of practices directly impacts upon social change - as Max Weber told us behaviour outside the realms of shared significance is not truly social action. The hounding of 'witches', the execution of the 'parricide', the rehabilitation of the delinquent, the imprisoning of the 'typical offender' in penal warehouses, all take place in a setting of understandings, partly inherited 'common sense', partly contemporarily achieved and packaged theoretical understandings. Social theory serves to upset settled sets of shared significance when it claims to tell us what is really going on in society and offers us some perspective at odds with our own accepted images or one that is simply 'new/novel'. Such new perspectives may provide the desire for social transformation with articulated weapons. Theory may set out unperceived lineages and causal contexts, or clarify and codify significances implicit in the self-understandings and practices of the times. Such theories can play both a challenging and sustaining role - upsetting legitimacy or reinforcing prior legitimation. They can aid regimes of power and domination, or they can attack such regimes giving direction and impetus to other activities. Theories of the 'divine right to rule' are criminological to the extent that, when faced with a query on the medieval execution, they provide an answer to the question of what is really going on and so point to a 'true' set of descriptive propositions and legitimate interpretative strategies. That situation is analogous to the theories of the natural sciences but the particularity of social theory is that a challenging social theory can directly serve to undermine a practice. Setting up an articulated social theory in place of 'common sense' understandings, or of previous theory, can show that the claims and foundations for practice in the previous understandings are wrong, mistaken or have a quite different meaning. In Beccaria's criticism, for example, a practice is

shown to need rational legitimation, and for which, by neglecting the 'theological', Beccaria demands secular theory; the prior is shown up for a sham and in need of change. People will treat this practice very differently if they can be convinced of the adequacy (truth?) of a challenging theory. Thus, mindful of the political ties of the transformative desire Beccaria frames his social theory with the rhetoric of rational accommodation and progress rather than revolution. Similarly people will look on the practice of criminal justice very differently if they are convinced of the adequacy of the theory of the delinquent and the causal links to 'crime/deviance' - the practical drive of positivism. Again, the commonsense 'liberal' or 'humanitarian' scene of criminal justice looks very different if one adopts a Marxist or a Foucaultian set of theoretical spectacles.

Yet for modern criminological positivism, labouring under the philosophy of knowledge, all concern with change is treated as faults of writing,⁹¹ as evidence of a dangerous concern with effect and with practice as opposed to the purity of theory. But the connection between social theory and change is more than some consequence of an interaction with psychological concerns, for the potential for change in social theory flows from the nature of social life, of social practices and the nature of those practices when one of their constitutive elements has been removed or changed. Practice needs certain descriptions and internal understandings to make sense and to operate in such a way as to constitute a practice, and it is these that social theory may undermine - or strengthen. But there is no movement beyond, no safe 'extra thought' action.

What is the technique of validation/marcation for social theory? Social theory simply cannot be held accountable in the fashion that it is right when it corresponds to the pure and objective 'set of facts' that it is supposed, naturalistically, to be about, since inescapably social theory is about our social practices and their creation and acceptance can alter those practices - they are not about some external domain of

'facticity' unresponsive to the development of theory but are themselves connected to the sets of earlier understandings. The simple claim of the pragmatic enterprise is that social theories are validated in practice. Pragmatism has, however, been condemned for this notion. To link the validation of theory to practice leads to the caricature of pragmatism as the stance that 'what works is right'. But this is one sided. It is one sided since it neglects any consideration of 'quality'. It is also logically incorrect - for how is it possible to understand 'what works' unless there is some set of expectations governing the sets of desired outcomes. Social theories are, moreover, inescapably linked to practice in a fashion which goes beyond anything the natural sciences claim for themselves. The label 'what works is right' can be better seen as actually 'what works [to achieve the kinds of goods that I/we desire] is right' and this is always an effect which is embedded in life games, taking force within and upon the foundations of the practices of life and their central assumptions.

The pragmatic point is that a form of aimlessness occurs when the premises remain unarticulated. If theory is to be validated in practice then it is to be tested by the quality of the practices that it informs; but quality is a valuative notion. It requires a theory of context and of humanity that is truly metaphysical, it requires the co-penetration of forms of social articulation, it denies reductionism. As Unger put it in Law in Modern Society the labelling of 'quality' is a dialectical issue. A methodology of human striving for ideals and of an inevitable clash between the ideal and the actual. It is also an issue that the pragmatic imagination asserts has to be faced in a situation without metaphysical guarantees. No transhistorical, transcultural, absolute structure can be demonstrated as the actual structure of reason or the natural development of the empirical social world. Thus the answer is a living answer found in the context of further articulations of social theory, social philosophy and reflection on the modes of life they give issue to, that is it is a concern with the connection of life, practice and

humanity.⁹²

V

Justice in the endstate: Is there an image of justice internal to Pragmatism?

We have defined modernity in terms of a grand constructivist process part of which was to construct the just society - a society fit for human habitation where criminology's role was to provide the knowledge of crime and its containment and/or eradication. The minor role traditional criminology played in this project is complemented by the wider dreams of naturalist social theory which gave the possibility of a grand co-operative project which worked on the foundational basis of social change and development. In this chapter, however, we have stressed that the question of justice is an issue of judgement, justice is thus an epistemological product. In this pragmatic approach, the just state is not a state of natural flow which may be discovered by man's coming across it, nor is justice a particular activity of humanity which carries within its structures its latent perfection. Instead for the pragmatic imagination to see the just society as the end-state of mankind, as the grand prize of modernity's perfectibility is to live in the illusion of an un-reflexive modernity. What must here be stressed is that giving up the end-state conception of the just society is not a result of lack of knowledge, not a contemporary position to be remedied by better knowledge of the structure of rationality or of the human condition, not a position of scepticism, but a position of the awareness of modernity itself.

Two projects redescribing the progress of justice in modernity which have informed this chapter and which serve as a recapping are those of Ewald and MacIntyre.

In "Justice, Equality, Judgment: On 'Social Justice'"⁹³ Ewald captures 'the problem of justice' as "an issue of judgement" concerned

"not in the determination of a good, but in the gaining of that objectivity of judgment about oneself (and about others) which is the true political good..... Objectivity is the condition of the justice of the judgment, of the existence of a just judgment, and therefore of a right, of a practice of judgment whose constraint will not be merely undergone, but demanded, as making peaceful collective life possible." (J. p.97)⁹⁴

Thus we are told that:

"Justice has more to do with a science of being than of duty. The search for it has not in the first instance to do with the faculty of desiring, but with the faculty of knowing. The realm of justice is at bottom subordinate to the possibility of a true knowledge of men and of things. Laying down the law is always dependent on a type of telling the truth. The problem of justice comes down to an epistemology. So much so that one may make the assumption that there were historically as many ways of conceiving the problem of justice as there were different epistemological configurations. And ipso facto that there could be no new way of conceiving of justice except in correlation with the emergence of a new configuration of knowledge. Thus, the problem we set ourselves concerning "social justice" would come down to determining what might be the epistemological configuration behind it." (J. p.97)

Ewald presents a three-fold periodisation of justice and epistemology: namely 1) classical natural law, 2) modern natural law, and 3) social justice. It is a semi-structuralist analysis (in the sense in holding to the sanctity of the new 'episteme') which grants a total involvement in one of other epistemes of justice; the final image is of 'social justice', the act of judging internal to social theory with no conception proposed of what is the next episteme. In 'social justice' the category of legal reason is replaced, in Foucaultean style, by 'the norm' and the just judgement is therefore the judgement which respects the 'norm', using this as the frame to decide on corresponding practice.

In After Virtue⁹⁵ MacIntyre complements Ewald. MacIntyre's analysis strives to reassert the primacy of Aristotelian, as opposed to what MacIntyre sees as our empty, modern (quasi-'liberal'), conceptions of justice. For MacIntyre modernity resounds with appeals to justice - linguistic utterances devoid,

however, of any patterned references which can give these appeals or purported resorts to 'justice' sense. That is to say that there is no scheme of commensurability or coherent translatability which can assert the dissimilar and similar in these appeals such that they may be ranked. MacIntyre's reading of Aristotle places justice as the first virtue of political life and a community which lacks practical agreement on a conception of justice necessarily, on this reading, lacks the foundational basis for a proper political community. Virtue is understood as a disposition or sentiment which will produce in us obedience to certain rules, or modes of acting. Thus agreement as to what the relevant rules are to be is always a prerequisite for agreement upon the nature and content of a particular virtue.

The position of genuine consensus as to the moral framework of action, presupposed in the Aristotelian notions of the polis and its central measure of the common good is, however, antithetic to the individualist politics of modernity. Instead:

"government does not express or represent the moral community of the citizens, but is instead a set of institutional arrangements for imposing a bureaucratized unity on a society which lacks genuine moral consensus....
.....the nature of political obligation becomes systematically unclear".(A.V. p.254)

In this image of modernity the virtue of justice has become the virtue of bureaucratic managerialism with its own claims to objectivity and authority.

When modern social science moved against the pious claims advanced for reason it showed that the claims of reason were simply founded upon the constructions of reason - abstracted, divorced from any substantive reality the universality claimed by reason was the universality of 'fictions'. Thus for MacIntyre notions such as 'rights' (in the sense of 'the rights of men' or 'human rights' as things alleged to belong to human beings as such) or conversely, utility, are fictions - but fictions with highly specific properties and effects when embedded as poles for language games. Rights, for instance, served as part of the

social invention of the autonomous moral agent. The characteristic of such fictions is clear: "They purport to provide us with an objective and impersonal criteria, but they do not".

The claims of managerial effectiveness came from a different set of purposes and aspirations. These are the 17th and 18th century hopes for social control and social progress via the application of the ethos of science.

"when in the 17th and 18th centuries the Aristotelian understanding of nature was repudiated... the Aristotelian accounts of action were also rejected. 'Man' ceased, to be a functional concept. The explanation of action is increasingly held to be a matter of laying bare the physiological and physical mechanisms which underlie action". (A.V. p.82)

Judgment by the qualities of action, finds itself at odds with the scientific vision. The governing metaphors deriving from the cyclic nature of human life and the teleonic conception of natural growth gave way to the metaphor of mechanism. The 'facts' of human nature derive from the modern attempt "to understand human nature in mechanical terms, in terms that is of antecedent conditions understood as efficient causes". The modern drive latches on universal foundations, thus human activity is reduced to a series

"of invariances specified by law-like generalizations. To cite a cause is to cite a necessary condition or a sufficient condition or a necessary and sufficient condition as the antecedent of whatever behaviour is to be explained. So every mechanical causal sequence exemplifies some universal generalization and that generalization has a precisely specifiable scope. Newton's laws of motion which purport to be universal in scope provide the paradigm case of such a set of generalizations".(A.V. p.82-83)

The legitimated appeal of the bureaucratic is the ability

"to deploy a body of scientific and above all social scientific knowledge, organised in terms of and understood as comprising a set of universal law-like generalizations....

...we can see a progress first from the Enlightenment's ideal for a social science to the aspirations of social reformers, next from the aspirations of social reformers to the ideals of practice and justification to the theoretical codification of these practices and of the norms governing

them by sociologists and organization theorists and finally from the employment of the textbooks written by those theorists in schools of management and business schools to the theoretically informed managerial practice of the contemporary technocratic expert".(A.V. p.86)⁹⁶

Such runs the analysis - the question then becomes what is one to do with this?

First we must be aware that if there was indeed, ideally, an image of justice internal to social theory, and if that is capable of being seen as the last of an historical succession of images of justice, then this image no longer has the legitimation that its adherents once stressed. What is then at stake is the question of achieving an image of justice for the indeterminate concept of pragmatic epistemological foundationalism.⁹⁷

Second, the creation of that image of justice must have some self-referral nature about it. That is to say that if it is truly pragmatic it must be aware that its bedrock is its own reflexivity.⁹⁸ To deny the fixture of meaning takes us into questions of power and social practice.⁹⁹ Which can be read as meaning we give up on the tradition of 'being bound by truth' altogether in the pursuit of contingent practices and the solace of 'commitment'. Some readings of, for example, Lyotard's Just Gaming appear to support this as the only thing that can be done. Rorty's response is the conversation of mankind motif which functions as a 'regulatory idea' where all are, ideally, inhabitants in a grand conversation bringing with good faith our narratives, self-images, where justice will be a living voyage of discovery or social widening of vocabulary achievable when

"readers, or society as a whole, break free of outworn vocabularies and attitudes, rather than [concentrate upon] providing 'grounding' for the intuitions and customs of the present".¹⁰⁰

Conversely Santos's hope is that the 'crisis of epistemology' may allow a shift from

"scientific to nonscientific knowledge and thus from scientific legal knowledge to nonscientific legal knowledge which will not be captured by the polarity of truth and falsity, which has been the basic matrix of the scientific paradigm, but will rather point (like utopia) toward a polarity of liberation and oppression."¹⁰¹

But what in Santos' scheme is there then to actually specify what is domination/oppression and what is liberation? Or to put it another way, using the language of Lyotard in *Just Gaming*, if "human beings are never the authors of what they tell, that is, of what they do"¹⁰², how is the prospect of liberation possible for "the one who speaks"¹⁰³. For Foucault it was impossible to visualise 'liberation' and the various claims made in its name were merely new forms of domination.¹⁰⁴ The pragmatic answer must be that the human subject is always constituted in the various language games he is a part of, the various narratives he becomes the articulator of and of which he himself is articulated through his actions.

This opens up for Lyotard the realization that the power relations between "the pragmatic relation of discourses" is to be seen in terms of boundaries not borders. Discursive interrelation is thus not to

"obey a pragmatics of border to border, between the two perfectly defined blocks or two armies, or two verbal sets, confronting each other. On the contrary, it is a place of ceaseless negotiations and ruses."¹⁰⁵

Thus for Lyotard neither the sociologist, the psychiatrist nor the criminal lawyer are "gods", neither can speak the language of the "all knowing". Instead the sociologists have stories which the lawyer does not know, and the lawyers have their own stories. "And these two sets of stories are, if you will, not two blocks but two centres that send out their elements to negotiate, if one can call it that, on the boundaries. This is paganism." (i.e. speech beyond the throne of 'truth'). The consequence is that "one does not know whom one is speaking to; one must be very prudent; one must negotiate; one must ruse; and one must be on the lookout when one has won". One must be on the lookout because there is no way that one can judge the whole thing; there is no outside and thus no certainty about the course of outcomes and of the true nature of the undertaking. Thus the being of the narrator is necessarily implied in the constitution of the outcomes of negotiations and of the narratives themselves. The constitution of the society, and of the actions of that society

cannot ever be judged "just" or "unjust" except from the internal negotiations and ruses of the operatives who arrange themselves around the various centres. It will be a matter of a point of view, and of the victory of certain points of view, but no point of view will ever be total, nor final.¹⁰⁶

The statement that there can be no just society may therefore stand qualified.¹⁰⁷ For although, there cannot be a just society in the sense of one whose social arrangements are static, whose being has reached the state of unchanging arrangements, whose ontology corresponds to that of the 'truly just', there may well be a society that behaves 'justly'. From The Post Modern Condition and Just Gaming it is apparent that Lyotard would hold that society as one which recognised the heterogeneity of language games, which accepted that consensus (which "does violence to the heterogeneity of language games"¹⁰⁸) is not the goal of society. He would therefore conclude that society is to be guided by "an idea and practice of justice that is not linked to that of consensus".¹⁰⁹ Such an idea is found in the acknowledgement that "every one of us belongs to several minorities, and what is very important, none of them prevails. It is only then that we can say that society is just".¹¹⁰

This notion of Lyotard has consciously the status of 'an idea', not descriptive sociology. Lyotard ends the essay "What is postmodernism"¹¹¹ with a warning:

"it is not our business to supply reality but to invent allusions to the conceivable which cannot be presented. And it is not to be expected that this task will effect the last reconciliation between language games (which, under the name of faculties Kant knew to be separated by a chasm), and that only the transcendental illusion (that of Hegel) can hope to totalize them into a real unity. But Kant also knew that the price to pay for such an illusion is terror".¹¹²

The role of the idea in Just Gaming cannot force the terror of a reconciliation between "the concept and the sensible" - the idea must involve the non-resolution of desire and knowledge.¹¹³ The development for the image of justice then mirrors the narrative image 'truths'' journey into pragmatism, for as Ewald

described it the image of justice was an image internal to the history of epistemology. To avoid what is seen as the weak nihilism of pragmatism the tactics appear to be as follows. To attempt integration via commensurability - but integration is the attempt to overcome the gaps between structures of knowledge into some formal network - its goal, implicitly at least, to achieve absolute consensus. Such an idea carries the solace (the desire) that the synthesis will absolve us from the bewildering array of conflicting vocabularies and perspectives available in the social world, it will reduce the plurality of language games to a managerial core so that control shall be re-established over the totality. However, this is an intellectual solution to the perpetual strife of the social world which in praxis dissolves into what Lyotard calls the terror and what we shall describe as another option - imperialism. The imperialist strategy is to identify and elaborate the key discourse which recognises the 'organising principles' which inhere in the wider social body and through aligning itself with it criminal justice can become a tool in the proper management of that society. But then criminal justice loses any claim to any separate status or separate identity or purpose or self-doubt and is simply geared into maintaining the historical transformations in institutional structures and is theoretically impotent as a site of activity. In its positivist sense criminal justice becomes a terrain awaiting the intrusion and subjection to the progress of positivist science (social justice). The reaction of Just Deserts may be temporary under this scenario for what it proposals is that the contending perspectives within criminology, the social sciences, and criminal law are to be superseded by a more encompassing framework. To a limited extent Just Deserts can be seen as a practical example of a second alternative, namely recourse to procedure without requiring a idea of ultimate grounding. What is provided by Just Deserts is a methodological framework which has the capabilities to define reality for the administrator and to disallow any reflexivity between administrator, theoretician, and the connection of social theory to the constitution of social movements of all kinds. What its

claimants specify in its defence is that it will clarify and force into articulation the choice of the judgmental subject (the judge on punishment) and actually allow this subject more choice - this is a choice which, however, is ideally only at the surface level of social practice and action, it is conditioned by rules specifying the selection of penal outcomes for observable conditions. Just deserts ultimately claims it provides a procedural truth beyond which its users need not search for ultimate grounding.

The third choice is the Rorty style ideal of pluralism, communication, and dialogue - a choice which does not have consensus as the goal, although that may occur in the course of operation. In the pluralist scheme social interaction is the primary concept and it maintains that the inherent complexity and diversity of the structuring of the social world demands the development of a sufficient range of approaches that will allow the subtlety and paradoxes of the social world to emerge. True pluralism is not Millsean tolerance where tolerance is espoused as the methodologically most efficient way to ensure true or most natural forms of social life are engaged in, but is the province of the pragmatists theoretical desire for the new, for paralogy - for creation rather than discovery.

But in everyday language game paralogy is deviance, and to allow the deviant is, on the terms of the modernist notions of development through social control, possible only in the shadow of practical terror. This terror, the visage of penalty, is a presence utilised for social control. Yet the terror which the post-modern analysis also concerns itself with and which the penal system exists in the shadow of, is not the direct terror of obvious penalty. Penalty is terror but is limited terror, the post-modern concern also rises to prominence the terror visited on the losers, on the underclass, on the unwanted minorities - on the excluded from the dominant narrative forms of inclusion.¹¹⁴ But there is another terror that the macro-sociology implicit in some images of the post-modern understands.

This terror is the ending of the restraint of the state, the narrowing of that space which allows the differentiation of the plays, by the imposition of imperialist community, the overproduction of its monopoly on violence (including that of definition). So the pluralism which criminal justice could allow must be a controlled dialogue - control of some form, some regulation is unavoidable. Even post-modernism requires the 'regulatory idea' to preserve dialogue from nihilism.

A current favourite idea in criminal justice is that of the 'community' and the late modern or post-modern reception of pluralism into criminology, under this idea, would be a dialogue in which one pole represents the speaker of the community.¹¹⁵ This is why the philosopher who seeks the "reconstruction of our arguments about punishment", as Lacey does, must return to "the ideal of community",¹¹⁶ to ask: "how would common decision-making be accomplished in an ideal community?" (p.174) There the criminal law would be

"a set of public norms generally backed up by the threat of punishment for breach...employed primarily to preserve the framework of values perceived to be necessary to the maintenance, stability and peaceful development of the community...[where] the central commitment to community would inform a commitment to preserving the necessary framework of values in the most effective way possible (whilst accepting, of course, the possibility of changes in those values through political decision)." (p.176)

The outcome is ambiguous. The ideal of the community here can also be required to deny the activation of difference, to create the overview that the different is the same; that the deviant is the same because he is a member of the same community and in the spread of that community the foundational status for the reference point is secured. The deviant is different, but not in essence, in the essence he is part of the 'commun-', the common. The suspicion looms, however, that the philosopher must call it an ideal because, reflexively, he 'knows' that the community does not exist, he thus makes his allusion to the non-existent in the hope that the rhetoric of the allusion may be the move to create the constitution of the better. Not only to control the

dissipation of the modern but because he understands it is better, not because of his faith in the essential rationality of man, nor in the current of nature, but in man's unity through the duality of mind and body, through the blood of time and in the irreconcilable movements between the memory of the blood and the hope of the future, between the immanence of the games and the possibility of transcendence. In the normative demand for community. Moreover, the community must govern itself - that also is the pragmatic imperative, it cannot look to the security of some template of rationalism, nor to finding the laws of movement, for its members are the active points for correspondence; the social is contingent. Remembering this takes the question back into the construction of the social making directed and aware human action the central focus. Ultimately the postmodern end-state of criminal justice turns from the narrative of goals, of accomplishment, of awaiting the creation of the grand society, and into the condition of doing, of journeying. The aim of pragmatic justice is still the good society, but now it is wrapped in circles of interpretation and practice, methodologically participative, procedurally expressive, rather than crimeless. In such a complex the imagery of justice is an instrument of imaginative conception. A tool which aims to make societies more responsive to the desires and hopes of mankind's diversity, and which rejects the static arrangements of time as anything other than limited experiments, temporary shelters for the human spirit, and says 'we' can do better.

NOTES.

1. In this chapter our concern is to offer a reading of aspects of criminological history with the epistemological concern as our guide.

This reading is done in the light of the work of Alisdair MacIntyre (After Virtue, Whose Justice? Which Rationality?), and Francois Ewald (His article "Justice, Equality, Judgement: On 'Social Justice', in Juridification of Social Spheres: a comparative analysis in the areas of Labour, Corporate, Antitrust

and Social Welfare Law, Gunther Teubner (ed.), Walter de Gruyter, Berlin/New York, 1987).

2. Mary Mackenzie, for example, in Plato on Punishment, University of California Press, Berkeley/London, presents a complex, although primarily a reformist and humanist, Platonic conception.

3. Both quotes from Plato, The Republic, quoted in Michael S. Moore, Law and Psychiatry: Rethinking the relationship, Cambridge University Press, Cambridge/London/New York, 1984, p.116. This is a simplistic reading. R.A.Duff, accepts "that some, like Plato, talk of punishment as an attempt to cure the criminal's soul of its spiritual disorder: but talk of a person's soul is not to be confused with talk of her psychological states; and the cure of souls is not to be confused with the cure or treatment of psychiatric disorders. To say that a criminal is spiritually sick or disordered is to offer a moral comment on the values which do, as contrasted with those that should, inform her life and her relationships with others, not an empirical diagnosis of some impairment in her rational capacities." Trials and Punishments, Cambridge University Press, Cambridge/London, 1986, p. 261.

4. "Plato believes that if one has a 'just' (that is, true) view of being then one can retranscribe this view into social organization, with intermediate instances, to be sure (such as the psyche), but nevertheless the model remains that of the very distribution of being. Society ought to repeat for itself this distribution, which will include also the distribution of assignments, responsibilities, values, goods, women, and so forth." Jean-Francois Lyotard and Jean-Loup Thebaud, Just Gaming, University of Minnesota Press, Minneapolis, p.23.

5. For example Karl Popper, The Open Society and Its Enemies.

6. Cf. MacIntyre, Whose Justice? Which Rationality?, p. 96.

7. Ibid., p.298.

8. Leon Radzinowicz, Ideology and Crime, Columbia University Press, New York, 1966.

9. As in David Jones' selective overview of criminology, History of Criminology: a philosophical perspective, Greenwood Press, New York/London, 1986.

10. There is, however, an openness to potentiality. The issue of predestination has within it the reality of choice. Within the unified system of the good man ideally chooses his good - that ideal is made into reality via education and the performance of practice, the development of a natural aptitude for virtue which needs considerate training.

The offices of the state, in particular the sovereign, are entrusted with authority and power - a power for which an attitude of care, an exercise in virtue, a training in the practice of government is required. Monarchy appears as the best

form of government but in the absence of the proper exercise of propriety, in the freedom of government action rule may become tyranny. [See "On Princely Government", in Aquinas: Selected Political Writings, A.P.D'Entreves (ed.), J.G.Dawson Trans., Basil Blackwell, Oxford, 1959, pp 2-42.]

Tyranny gives an order conducive not to virtue but to vice. [For Aquinas on the State, Laws and Justice, see A.MacIntyre, Whose Justice? Which Rationality?, Duckworth, London, 1988, pp 198-208.]

Government was just in its rule for "the common good". [Aquinas: Selected Political Writings, p.5.]

The state was an instrument existing for "the good of the community", [Ibid., p.4.] and power was to be exercised "for the common welfare of the citizens". [Ibid., p.8.] Thus the Monarch "must be concerned, by laws and by advice, by penalties and by rewards, to dissuade men from evil-doing and to induce them to do good; following thus the example of God, who gave to men a law, and rewards those who observe it but punishes those who transgress". [Ibid., p.42.] The concern of such rule is the "development" of society and in all things the ruler should be conscious that "human law has the quality of law only so far as it proceeds from right reason; and in this respect it is clear it derives from the Eternal law. In so far as it deviates from reason it is called an unjust law, and has the quality not of law but of violence". [Ibid., p.61.]

Although the ultimate foundation of law, the bedrock of reason, lay with the giver of the law, the being of God, the observable reality of power although causally part of God's creation may not be as the scheme of Justice desires (that scheme lies in the thought of God - pure reason), for all is subject to the corruption of man. [Ibid., p.61.]

The exercise of power is to be a moral exercise; the political sovereign has his authority, ultimately, from God, the central referent of the Cosmos, and the purpose of this authority is to provide for the common good. Authority is not to be used as an end in itself or for selfish ends. Nor must the common good be interpreted so as to totally submerge the individual in the collective whole, but must have respect for the good of individual persons. Thus "the proper effect of law is to lead its subjects to their proper virtue... to make those to whom it is given good". [Ibid., pp.59-60.] The "true ground" of the authority of the lawgiver is his intention to secure "the common good regulated according to divine justice" (i.e. the justice of the cosmos - the teleological state of both physical substance and reason).

11. Aquinas: Selected Political Writings, p.57.

12. Thomas Aquinas, Summa Theologica, Part 2, Part 1, Q.86, Art.1. Quoted in Merold Westphal, God, Guilt, and Death: an existential phenomenology of religion, Indiana University Press, Bloomington, 1984, pp. 115-6.

13. See MacIntyre, Whose Justice? Which Rationality?, pp 181-2.

14. Michel Foucault, "Governmentality", Ideology and Consciousness, No. 6, pp. 5-21, at p.7.

15. Ibid., p.9.

16. Thirteen years after Hume's Treatise with Blackstone's Commentaries on the Laws of England direct reliance upon traditional natural law is mainly confined to the introduction: reference to the desire (the will) of God is now not the dominant presence but replaced by concern with the institutions of the society (parliament, the common law).

English local municipal law was "a rule of civil conduct" - as distinguished from a rule of morals or of faith. "Municipal law regards man also as a citizen, and as being bound towards his neighbour in other duties than those of mere nature and religion." [Commentaries, p.45.]

The Commentaries, Humean style, link change to the notion of gradual reform, a mechanism of reform legitimated by the facility of new knowledge and a certain degree of faith in the quality of past performance. The texts blend the rhetoric of intellectualism with the defence of the existing 'pragma' of law's operation in the institutions of the time, thus the true nature of understanding laws is "not only as a matter of principle but as a rational science", [Commentaries, Vol. II, p.2.] but true law reflected the underlying "essence" of social being and law was no simple plaything of the central power. Law's defence, the rationalization of the English common law, appears as an implicit development of traditionalist essentialism, in which the common law is held to express and captivate the "essentialness" of the living categories of what was previously articulated as natural or divinely inspired law as it works through the minds of men in local, particular situations.

This defence declares that the world has reason in its fabric. A reason which is slow and fragile in its development; liable to destruction by unfettered power. [In touching on Blackstone MacIntyre holds that Blackstone gives that God has so constituted human being that the natural passions and the operation of past practice in English society are our proper guides. See Whose Justice? Which Rationality?, pp.228-30.]

The true nature of the "judges... are [as] the depositories of the laws, the living oracles"; [Commentaries, Vol.1 p.69.] judges do not interpret but transmit concepts of the essence of legal foundationalism. This mediates between the living conditions of law, the locality, direct, the apprehended and the centralization of a power which flows from the state. Blackstone lays down certain conditions concerning the central institutions of the increasingly powerful state assuming the sole power over defining, creating and enforcing law. First, the actual operation of the criminal justice process would effectually undermine any 'unnatural' capital penalties which the legislative might create as the sense of justice of individuals would subvert their application. Second, power only from the centre and the resistance of the local will disrupt the orderly operation of

what should be a fully rational process, specifically leading to a confused image as to the likelihood of punishment for the rational criminal. Third, the motor drive of positive change came from below and not from the commands above. Blackstone, it is said, provides "an account of the dominant English social structure according to which the justification of those structures is internal to them. The standards by which established practice is to be judged are, with minimal qualification, the standards already embodied in established practice", an interpretation which MacIntyre places Blackstone as "the legal counterpart of Burke". [Whose Justice? Which rationality?, p.229.]

17. Commentaries, Vol. 1, p.140.

18. John Austin, The Province of Jurisprudence.

19. My use of the term 'liberal' in these sections is both in the sense used to ascribe a philosophic tradition (as in MacIntyre) and in the sense Radzinowicz uses it in his chapter 1, "The Liberal Position", of Ideology and Crime.

20. Blackstone does comment on the birth of the "discretionary imprisonment" beginning to replace transportation. Commentaries, Vol. IV, pp. 371-372 (called "penitentiary houses" in the Edward Christian edition of 1830).

21. See E.P. Thompson, The Making of the English Working Class, Pelican, London, 1968, particularly p.64 ff for a radical sociological interpretation of the strength of Humean Justice as the defence of property. The above quote is from D.Hay et al., Albion's Fatal Tree, Allen Lane, London, 1975, p.13.

22. F.W.Hegel, The Philosophy of Right.

23. M. Weber, Economy and Society.

24. H.Trevor-Roper, Religion, Reformation, and Social Change, p. 172, quoted in J. Hall, Law, Social Science and Criminal Theory, Fred B. Rothman & Co., Littleton, Colorado, 1982, p.60.

25. Ibid., p.64.

26. Let us be clear about the concept of toleration: historically it was a forced position, an uneasy compromise, which T.S. Eliot recognised well when he said the Christian did not want tolerance, he wanted acceptance.

27. If social life is to be subjected to a 'rationalised' legality then the question of who shared power (albeit of another form, the power of enforcement and of dispersal of the reach of law) with the king of law (the maker), was a matter of contestation (particularly if the politics of interpretation of the will of

law and of the delineation of role was not absolutely pre-given). Modern legality, in the sense of enlightenment positivism (e.g. Hobbes, Locke, Austin, Bentham), entails a notion that the truth which law contains is only legal truth, it is only the truth of the law itself which is involved - the truth of law does not partake necessarily in the truth of the cosmos (although the necessity for law may, see H.L.A. Hart) but only in the will of its makers and servants, i.e. the subjectivism of man (hence the route to Dworkin's 'integrity' which attempts to rescue a rationalist structure from positivism).

28.M. Foucault, Discipline and Punish, and Leon Radzinowicz and Roger Hood, A history..., Vol 4, "Grappling for Control", pp 343-353.

29.Cf. Pieter Spierenburg, The Spectacle of Suffering: Executions and the evolution of repression: from a preindustrial metropolis to the european experience, Cambridge University Press, Cambridge, 1984. Spierenburg sets out to demonstrate that "Foucault's picture of one system quickly replacing another is actually far from historical reality. The infliction of pain and the public character of punishments did not disappear overnight. Both elements slowly retreated in a long, drawn-out process over several centuries." p.viii.

30.Quoted in Radzinowicz, A History..., Vol. 4, p. 353. Radzinowicz also quotes Gibbon Wakefield in indirect support of the Foucault position that the continuing spectacle was causing public sympathy for the accused and leading to an irrational use of the power to punish.

31.C.Beccaria, On Crimes and Punishments, Henry Paolucci Trans., The Library of Liberal Arts, Bobbs-Merrill, Indianapolis, [1764] 1963. Other references in text annotated as (B. p....)

32.Ibid., p.22.

33.Vold, Theoretical Criminology, p.22.

34.Ibid., p.26.

35.Ideology and Crime, p. 123.

36.The New Criminology, p.6.

37.Ibid., p.1.

38.See Chapter One of Bob Fine's Democracy and The Rule of Law, for a general discussion of these issues in the context of "Classical Jurisprudence".

39. My subsidiary thesis here is simple: Matza over states the case when he states that 'positive criminology achieved the almost impossible, the study of crime separate from the contemplation of the state', and seeing the positive criminologist as the technician of the state (in Delinquency and Drift, and Becoming Deviant) for the break is already in Beccaria. Henceforth the subject of criminal justice will be the objects of 'the legal system' and discussion conducted within the boundary of 'legal doctrine' and developments of that discourse. Second the general labelling of classical criminology as being about the mediation of power between the state and the individual criminal, while positive criminology neglects the question of power, overlooks the degree to which Beccaria consciously designs an instrument of crime control. Thus the distinction future analyzers draw, for example in Juvenile justice between welfare and justice or the use made of Packer's "Two models of criminal justice", the crime control and the due process, are overstated and misconceptions. A detailed reading of Beccaria, only done in outline here, leaves no doubt that "due process is part of crime control". The elements of 'due process' help to secure its legitimacy and authority, which does not mean to say that they are created merely for crime control since they are themselves reflections of the wider social issues, but that their appearance in criminal justice is not contradictory. This has been recently argued quite convincingly by Doreen McBarnet in her sociological work on criminal justice process (Conviction, 1981). Weber's analysis in Economy and Society created ideal types of 'formal rationality' (consisting of the absence of value judgments and furthering the greatest amount of freedom for economic, political and personal liberty) and 'substantive rationality' (consisting of the resolution of concrete problems and conflicts within the given social order). The liberty of formal rationality is the liberty of the bourgeois state, substantive rationality calls for a 'sociological liberty', a 'factual' liberty. Under legal formality the legal apparatus functions as a technically rational machine, but with a social terrain of unequal distribution of economic resources and power, it cannot achieve substantive ideals of justice. Thus the welfare state comes to oppose legal formalism - characterised by anti-formalism its development is closely aligned with increasing particularization of the state organization especially the legal apparatus and modes of adjudication. But in giving reasons for this development Weber also gives reasons why this need not be uniform and can be a mixed system in any one area. The forces driving legal particularization Weber identifies as twofold: first, professional differentiation and the increasing visibility and potency of economic interests; and second, the desire to escape from formal legal procedures in favour of legal reasoning more suited to individual cases. The effect is to question the dominance of legal logic and categories, as well as the hegemony of legal doctrine. Thus sociological, ethical and economic reasoning increasingly comes to replace legal terms in the increasingly differentiated modern states. Importantly this movement is expressed by, and operates through, groups of professionals who wish to avoid becoming 'legal automats'. This role of the professional as the actor in the system is strong

and, implicitly, different groups of actors may have different particular interests. Thus the legal apparatus can be seen as a site of continual interplay of 'rationalities' and professional interests which mean that any 'model' categorizations can only serve as ideal types.

40. I am here influenced by the terminology Hanna Arendt uses in distinguishing the social and the political. Richard Bernstein summarises Arendt's distinction as putting into "the public political sphere" only "those matters that can properly be debated; and about which we can form and test our opinions; matters that require judgement; and about which it is correct to say that we seek to persuade each other through public argumentation". We avoid the political by various suppositions. one important effect is that "we do not, for example, debate about matters where there are clear decision procedures for determining whether they are true or false, for example, mathematical truths or even empirical claims which can be settled by the appeal to facts." Richard J. Bernstein, "Rethinking the Social and the Political", in Philosophical profiles: Essays in a Pragmatic Mode, Polity Press/Basil Blackwell, Oxford, 1986. p.252. Accepting the distinction as usable does not mean that we accept Arendt's 'resolution' of that distinction.

41. Boaventura de Sousa Santos, "Law and Community", in The Politics of Informal Justice, Vol 1, The American Experience, Richard Abel (ed.), Academic Press, New York/London, 1982, p.264. Santos adopts a mixed Foucault plus Marxist approach in which political domination mirrors itself in cognitive domination and argues in post-modern fashion that the present crisis of the scientific paradigm destroys the overreach of this domination allowing other forms of 'knowledge' will point to 'liberation'.

42. In the work of Ewald, for instance, and for most criminological texts, this development is presented as a complete sudden entity, as an event - 'actual' social history is much more confusing, however, Beccaria does present a unique juncture, a text in which many narratives interrelate to produce a 'classic' text.

43. Ewald, "Justice, Equality, Judgement: On 'Social Justice'".

44. See Bernard Yack, The longing for Total Revolution: philosophic sources of Social Discontent from Rousseau to Marx and Nietzsche, (Princeton University Press, Princeton, 1986) for a development of this theme.

45. Hans Blumenberg, The Legitimacy of the Modern Age, Robert M. Wallace (trans.), MIT Press, Cambridge, 1985, p. 337.

46. A view which structures a whole field of criminal justice and in which law is a bulwark containing the unsociable nature of man; in presenting his 1976 proposals for Criminal Justice change Harold Pepinsky demonstrates the opposite view stating that his proposals "rest on a faith that people can be trusted to co-

operate in interpersonal affairs". Harold E. Pepinsky, Crime and Conflict, Martin Robertson, London, 1976, p. 131.

47. Beccaria's rationalization can be seen in such terms - it was to be an instrument, a mechanism, which would allow calculation pacifying the arbitrary and disruptive influences of social life, and which would give the social engineering required for progress. Beccaria's rationalization of penology was a steely affair. As Thorsten Sellin labels it, his replacement of capital punishment with penal servitude was a punishment worse than death, "a living death". [Thorsten Sellin, "Beccaria's Substitute for the Death Penalty", in S.F. Landau and L. Sebba (eds.), Criminology in Perspective, Lexington Books, Massachusetts, 1977.] Penal servitude, and the associated repeated public sighting of the prisoner, is a rational advance since "it is not the intensity of punishment that has the greatest effect on the human spirit, but its duration, for our sensibility is more easily, and more permanently, affected by slight but repeated impressions than by a powerful, but momentary, action." The death penalty can only create an impression which, for all its immediate force, men soon forget, but "in a free and peaceful government the impressions should be frequent rather than strong.... The death penalty becomes for the majority a spectacle and for others an object of compassion mixed with disdain: these two sentiments rather than the salutary fear which the laws pretend to inspire occupy the spirits of the spectators." Furthermore, this right to control is fundamental to orderly political structure and its continuance is a crucial social task. It is, of course, a political task also - but we are not led to see it as such. Instead the operation of the penal machine is depicted as a technology of the social - something to be discussed as a matter of efficiency not of politics.

Beccaria espouses his version of the penal spectacle as able to deter any potential justifications the populace may have in breaking a law they consider creates or reinforces an unjustified situation. The penal equation reinforces the economic and social structure under which the majority live, and which the offender views as "fatal to the majority". Remembering the materialist use of 'motive' Beccaria considers the rationality of thieves or assassins as those individuals "who find no motive weighty enough to keep them from violating the laws, except the gallows or the wheel", although they cannot give a clear account of their motives this "does not make them any the less operative". Thus it is that the offender dares to think politics and considers: "'What are these laws that I am supposed to respect, that place such a great distance between me and the rich man? He refuses me the penny I ask of him and, as an excuse, tells me to sweat at work he knows nothing about. Who made these laws? Rich and powerful men who have never deigned to visit the squalid huts of the poor, who have never had to share a crust of mouldy bread amid the innocent cries of hungry children and the tears of a wife. Let us break these bonds, fatal to the majority and only useful to a few indolent tyrants; let us attack the injustice at its source. I will return to my natural state of independence; I shall at least for a little time live free and happy with the fruits of my courage and industry. The day will

perhaps come for my sorrow and repentance, but it will be brief, and for a single day of suffering I shall have many years of liberty and of pleasures. As king over a few, I will correct the mistakes of fortune and will see these tyrants grow pale and tremble in the presence of one whom with an insulting flourish of pride they used to dismiss to a lower level than their horses and dogs'. Then religion presents itself to the mind of the abusive wretch and, promising him an easy repentance and an almost certain eternity of happiness, does much to diminish for him the horrors of the ultimate tragedy.

But he who foresees a great number of years, or even a whole lifetime to be spent in servitude and pain, in sight of his fellow citizens with whom he lives in freedom and friendship, slave of the laws which once afforded him protection, makes a useful comparison of all this with the uncertainty of the result of his crimes, and the brevity of the time in which he would enjoy their fruits. The perpetual example of those whom he actually sees the victims of their own carelessness makes a much stronger impression upon him than the spectacle of a punishment that hardens more than it corrects him."(B. pp. 49-50)

48. Although this can itself be open to the reflexive paradox, i.e. it is itself such a viewpoint, it differs in that it is a negative epistemological claim - the 'truth' is that no man can know totally the 'truth' but he can know that! It is the same epistemological structure as the argument for tolerance which specifies, because of lack of confidence in the 'truth' of any particular practice, multiple practices shall be allowed, so long as they do not impose themselves on the 'truth' of the master-practice, i.e. the 'truth' of the need for tolerance.

49. Cf. Ewald, prev. cit., pp 101-104. No one can accept being subject to the judgement of another - such is only arbitrary imposition, the activity of the war of all upon all. Any movement to generalise or universalise the act of judgement of one to another is but an act of defiance and conflict. Without natural ordering there can be no law of judgement, no law of lawgivers, no grounding of valuation for principles transcendent of the self.

50. For Hobbes in the above paragraphs see Leviathan, Penguin Edition, Part 1, particularly Chapter 13. Certain qualities lead man to form society, namely: "The passions that incline men to Peace, are Feare [sic] of Death; Desire of such things as are necessary to commodious living; and a hope by their industry to obtain them". (p.188)

51. In this regard see chapter three of Norman Jacobson, Pride and Solace: The Functions and Limits of Political Theory, Methuen, New York/London, 1986, entitled "Behold Leviathan!: the Systematic Solace of Thomas Hobbes".

52."Where there is no common Power, there is no Law: where there is no Law there is no Injustice." Leviathan, p.188.

53.Hence, the rule of law not the rule of nature, but as this 'naturally' comes about [cf., Hume earlier] this can be called, as Ewald does, 'modern natural law'. Such a body, law, takes on an identity of itself, 'Legal ideology', the objects of its truth claims cannot be linked via some correspondence theory to 'natural reality', but grow up in accordance with basic assumptions of developing legal doctrine as a self constituting epistemic body.

54.The principle which gives organization flows from empirical observation - No man will give other than what is the minimum to sustain co-existence. Hobbes sums his deductions of the laws of Nature into the maxim "do not do that to another, which thou wouldest not have done to thyself." Leviathan, p.214. There is a certainty of reciprocity although there is no substantive commitment to a content to social organisation. There is no substantive content necessary to the social, only the stylised form of reciprocity which gives it stable expectations. Man does not need any idea of the "good" society to constitute civil society out of the state of nature.

55.Beccaria here is specific: it is both because "these problems deserve to be analyzed with that geometric precision which the mist of sophisms, seductive eloquence...cannot withstand.. " and that in "defending... unconquerable truth..." we turn to "consult the human heart, and find there the basic principles of the true right of the sovereign to punish crimes." (B. p.214) Beccaria's narrative calls upon the motif of mirroring nature (natural process), for "it is not only the arts of taste and pleasure that have as their universal principle the faithful imitation of nature, but politics itself, at least that which is true and lasting..."(B. p.55)

56.Quoted in Ewald, prev. cit., p.104.

57.Leo Strauss in Natural Right and History, The University of Chicago Press, Chicago/London,1953, analyses at length this transition. For Strauss the dilemma was clear: "Reason is impotent because reason or humanity have no cosmic support: the universe is unintelligible, and nature 'dissociates' men. But the very fact that the universe is unintelligible permits reason to rest satisfied with its free constructs, to establish through its constructs an Archimedean basis of operations, and to anticipate an unlimited progress in its conquest of nature." p.201.

58.Hobbes states that the contract by which men leave the state of nature and form civil society is an agreement between individuals "as if every man should say to every man, 'I authorise and give up my right of governing myself'.

59. The importance of Beccaria's placement of his message in a scheme of progress lies partly in what it tells us about desire. The progress of the modern age is unattainable without christianity which went before it, but the progress of the modern cannot be achieved by a mere transposition of christian motifs (eschatology, and so forth) for whereas christian progress postulates the hand of the other-worldly (divine intervention, the occurrence of the grand event), the guarantee of progress of this modern era evolves from the power/knowledge equation and an adherence to an image of the structural visibility of truth continually organising the performance of activity. This idea of progress, in its reflexive understanding, recognises that the subjective desire of its will and practice resides in its own projection of history, a projection which was not possible at just any point of time but depended itself upon past progress (i.e. the fact of the the Enlightenment).

60. See Beccaria's "To the Reader" , pp. 3-7 of the Paolucci translation, being his response to the criticism of the first edition and where he distinguishes his thesis from the idea of Divine justice stating that he is concerned with "human, or rather political justice". This understanding may be expected to make judging part of the political process but remember for Beccaria judging is mere technical application, judges do not interpret; his is a positivist conception of law.

61. The reciprocity of Beccaria's formal rationalism is apparent in his concern to link punishments to a ranking concerning the deed. This is essentially a formalist conception, and one based upon a vision of the nature of the populace and an idealist conception of crime: "the measure of punishments is not the sensibility of the criminal, but the public injury... equality of punishments can only be extrinsic, since in reality the effect on each individual is diverse... And who does not know that external formalities take the place of reason for the credulous and admiring populace?" (B.p.70)

62. That is not to say that law does not retain the shape of reason - the law must be internally ordered by reason, since it is such reason and logical form which will ensure laws operation, its objectivity. Law is rational and formal, to be applied in the social, its policy aspects discussed and changed in the political. The role of the judge is but to reflect what the law is - "the interpretation of laws is an evil". (B.p.17) The inheritors of the criminal law can look back upon Beccaria, and the 'rights' approach which through its Kantian forms later develops into the 'due process' defence of the institutions of criminal justice, and thus blind themselves to what Beccaria achieved, an instrument designed for control, which legitimatises itself to mediate between the open power of the sovereign and the latent power of the subject.

63. For instance Donald Black outlines how much 'crime' is actually "quite the opposite. Far from being an intentional violation of a prohibition, much crime is moralistic and involves the pursuit of justice. It is a mode of conflict management, possibly a form of punishment, even capital punishment. Viewed

in relation to law, it is self-help. To the degree that it defines or responds to the conduct of someone else - the victim - as deviant, crime is social control." "Crime as Social Control", in Toward a General Theory of Social Control: Vol 2: Selected Problems, Donald Black, ed., Academic Press, INC. (London) LTD, London, 1984, p.1. The impact of state control over 'crime' thus robs 'traditional self help' of its meaning and makes problematic 'modern self help'; the ability of individuals or groups to respond in certain ways is taken away by the state. Modern legality is "governmental social control". Black leads to the conclusion that the reality of much crime, for instance inner city 'drug wars' and self help actions, is that "in modern society the state has only theoretically achieved a monopoly over the legitimate use of violence. In reality, violence flourishes (particularly in modern America), and most of it involves ordinary citizens who seemingly view their conduct as a perfectly legitimate exercise of social control." p.13.

64. For a Marxist perspective on this see Drew Humphries and David F. Greenburg, "Social Control and Social Formation", in Toward A General Theory of Social Control: Vol 2: Selected Problems, p.171-208.

65. In De l'esprit II, 5, See discussion in George H. Sabine, A History of Political Theory, 4th ed., Dryden Press, Hinsdale, Illinois, 1973, pp.519-20.

66. Talcott Parsons, The Structure of Social Action, in 2 Vols., The Free Press, New York, 1968.

67. Bentham, quoted in James Steintrager, Bentham, Political Thinkers Series No. 5, George Allen & Unwin, London, 1977, p.30.

68. Ibid., Quoted p.31.

69. M. Ignatieff, A Just Measure of Pain: The Penitentiary in the Industrial Revolution, Macmillan, London, 1978, p.68. Materialism aided even the religious reformers "by collapsing the mind-body distinction, it seemed to offer a scientific explanation for Howard's claim that men's moral behaviour could be altered by disciplining their bodies. Materialist psychology implied that a regime applied to the body by the external force of authority would first become a habit and then gradually be transformed into a moral preference. Through routinization and repetition, the regimes of discipline would be internalised as moral duties."

70. Quoted in D. Garland, "Politics and Policy in criminological discourse: a study in tendentious reasoning and rhetoric", International Journal of Sociology of Law, No.1, 1985, p.27.

71. The trustees of the Eastern penitentiary at Philadelphia were already in the 1850's and 60's linking the categories of the criminal law to the "scientifically" derived categories of Phrenology. See the table in Barns and Tweeters, Horizons of

Criminology, p. 160, for their vision of "passion", "vice" and "offence" within the scheme of nature.

72.A. Yakovlev, "Criminal Law - Individualization of Punishment or Equality Before the Law", Papers on Criminal Policy, HEUNI PUBLICATIONS SERIES, No. 7, Helsinki, 1986, p.55.

73.H.D.Lasswell, "What psychiatrists and political scientists can learn from each other", Psychiatry, 1938, p. 39.

74.It is thus no coincidence that Goring's book is called The English Convict. Published 1913, see discussion in Vold, Theoretical Criminology, p.92 f.

75.The constitution of the 'criminal' is located at the interface of the law, the 'social', and the process of clarity.

Suicide has, post Durkheim, been the motif for the investigation of crime. Durkheim obtains a transition. A transition from 'traditional natural' legal law - the law of God and Sovereign - to social law. As Foucault depicts it, the attack which suicide constituted under that legal law is an attack of will. Opposition to the will of God, opposition to the will of the sovereign. A play of power which seeks to raise the will of the subject above that of the sovereign. But with Durkheim that will is not now located as belonging to the subject, but is the temporal result of another set of laws which flow through him. It is to the sociologist, not the theologian or the philosopher, for whom these "real laws are discoverable". The subject is constrained by "real, living, active forces which, because of the way they determine the individual, prove their independence of him." Suicide: A Study in Sociology, Routledge & Kegan Paul, London, 1970. There is now the rescue of the term from legalist abstraction - a replacement by social types of suicide determined by their own configurations of 'social facts' (e.g., the 'egoistic').

The subject of this suicide is essentially passive - the bearer of the impact of the social law(s). His is not the rebellion of the personal desire, the personal boundaries of suicide are penetrated and made non-existent before the social forces which are external to and act upon the individual - social forces which are the "real laws" which "are discoverable" by the observation of the sociologist. Subsequent criticism of Durkheim mirrors those which positivist approaches to crime suffered generally.

First, the positivist self-criticism: the data Durkheim analyzed was official statistics from the 1840's to the 1870's and this information is subject to error. Errors of collection and reportage thus prejudice the analysis through data fault. Similarly much of subsequent criminological investigation can be seen as an attempt to explain the official crime statistics - if these are suspect then the whole analysis is also. The positivist response is to correct such errors and to provide real, actual data as 'true facts' upon which to join correlations of 'observable occurrences'.

Second, the phenomenological criticism of such statistics is that they never are capable of conversion into 'real facts' or

'empirical positivistics' at all. The original or basic datum involve a process of interpretation and symbolic construction of meaning which is unable to be analyzed by positivist methodology other than spuriously.

The interactionist approach to suicide can be seen in Atkinson's concentration upon the "process" of categorizing deaths as "suicide". The 'objectivity' of a 'real' rate of suicide which would provide the material for analysis is rejected. Instead coroners interact with the situations their courts interpret producing suicide rates as a result of the interaction of their "common sense" theories of suicide with the material presented to them. Coroners bring sets of narrative expectations, or patterns of cultural history, and, under which, if the material fits, a suicide will most likely be registered. If not further investigation or no suicide is found. [J.M. Atkinson, "Societal Reaction to Suicide", in S. Cohen (ed.), Images of Deviance, Penguin Books, Harmondsworth, 1971; and Discovering Suicide, MacMillan, London, 1978. The paradigm reflection in Criminological literature is Aron V. Cicourel, The Social Organization of Juvenile Justice, Heinemann, London, 1976. The categories of crime and criminal are not references to 'objective facts', or mirror images of objective reality but are constructions of meanings which come out of the interaction of certain situations. Importantly, the question becomes 'how do such meanings become generated? How is the categorization manufactured?'

76. Ferri is specific: "the doctrine and proposals of the new criminal school... hold that crime is to be studied in its natural and social causes, because a crime is always the effect of an anomaly or of a pathological condition, permanent or transitory, in the individual and in the society itself. And, on this account penal justice, instead of having a mission of measuring the 'moral fault' of the delinquent (a measure which is an unalterable impossibility), and of measuring a 'proportionate punishment' (a proportion which is impossible), penal justice can only be a tactical defence against the danger and the injury represented by crime; a kind of hygiene and clinic against the disease of criminality..." Criminal Sociology, American Edition 1917, reprinted Agathan Press, New York, 1967, p.xi (references annotated in text as (C.S. p...))

77. Ferri is specific in his conception of the non-interactive role of theory, thus "It is we who, by changing our manner of conceiving and explaining the world, believe that the world is going to ruin. Natural laws, however, remain what they have always been, and the world keeps the even tenor of its way regardless." This version of naturalist theory denies the pragmatic dialectic of social theorizing. The world keeps the even tenor of its way regardless of the explanations of philosophers and of scientists, we are to be passively instructed as to the way of the world - to the pragmatic imagination this is not so. Social theory and philosophy interact with and change the very 'reality' they set out to mirror. We are not passively instructed by the world, we interact.

78. Raffaele Garofalo locates the feeling of criminality in the concept of "natural crime" wherein crime is what offends the 'norm' of the moral sense of the community: "Moreover, the injury must wound the sentiments not in their superior and finer degrees, but in the average measure in which they are possessed by a community - a measure which is indispensable for the adaption of the individual to society. Give such a violation of either of the sentiments, and we have what may properly be called a natural crime." Criminology, p.44. The moral sense of the community is guaranteed by its form of natural law, since Humean style, Garofalo finds two "elementary altruistic sentiments of pity and probity". The image Gabrielle Tarde has of this thesis was of a "desperate effort to attach himself at some point in this unfathomable flood of phenomena and cast an anchor exactly in what is the most fluid and evasive thing in the world, that is to say, feeling." Penal Philosophy, p.72. Both quotes in The New Criminology, pp. 16-17.

79. As Daniel Bell put it: "today we feel that there are no inherent secrets in the universe... and this is one of the significant changes in the modern moral temper", ("Twelve Modes of prediction - a preliminary Sorting of Approaches in the Social Sciences", Daedalus, Summer 1964, p. 845.) which appears to return the moral temper in its faith in knowledge to those 'Platonic' theses which hold to the essential intelligibility of the universe, yet without the Greek emphasis upon combining truth, goodness and beauty.

80. It was inside these boundaries that "method" gained in importance magnifying the technical emphasis of action within and upon the observable entities of knowledges boundaries. The notion of the "defective delinquent" which positivism created was something that could be observed and the elevation of "social protection" as the central reason for punishment combined to raise both reformation, deterrence, and preventive measures of various kinds - the fashion may change, and as interest in "the science of the mind" replaced the "anthropological determinism" of Lombroso or the "sociological determinism" of Ferri, or the "biological determinism" of Garofalo, then some could say: "It is increasingly obvious that a majority of the persons whose lives are apparently abandoned to a career of crime are determined by a deviation from a normal mental condition. This fact can no longer be ignored either in our effort to correct offenders or to protect society". Law, state and society engaged in a field of discourse where, for example, assertions as to the social dangerousness of the offender were held to be an "objectively existing phenomenon", and we meet "traits" whereby one can judge the presence or absence of such phenomenon.

The dialectics of discourse were, for most of the twentieth century, predominately interdisciplinary. To those of the sociological school that claimed the determination of "environment" the proponents of "traits" could respond that "many boys and girls have worked themselves up against tremendous obstacles. This proves that persons with valuable personal traits will rarely yield to criminalistic tendencies." But positivism over-predicted crime when it assigned individuals into 'classes'

or 'typologies' which flowed deterministically within grand mono theories. Instead an individualist orientation favouring eclectic data appeared preferable.

Crime was thus the product of a persons tendencies and the situation of the moment interacting with his mental resistance. Criminology could offer to the policy maker a diagrammatical representation explaining crime and the necessary action that would solve it. Thus letting C stand for crime, T for tendencies, S for the situation, and R for resistance:

$$C = \frac{T \ \& \ S}{R}$$

"Penal Treatment" could change both the inputs of tendencies and of resistance. Deterrence would also back up resistance. Situational factors could be dealt with by suitable preventive measures. The underlying drive is individualist - the primary uses of the scheme were to give confidence to 'naturalistic' conceptions of man and the ability of 'expertise' to oversee the operation of this formula even as the scientific claims of any one discipline may be negated or cut across by those of another. Moreover the formula offered a rationalization for the past empiricism which had resulted in so many collections of "facts". For the formula offered a methodology to combine an array of information for the collection of which criminological eclecticism appeared the best guiding rationale for research. The widest multiple factor approaches could be legitimated under the desire for practical knowledge as providing some information for the formula.

81. See Hook, discussed in Matza, Delinquency and Drift, pp. 10-11.

82. See Lyotard, the conclusion to The Post-modern Condition, and Blumenberg, throughout The Legitimacy of the Modern Age, for the changing pattern of 'theoretical curiosity'.

83. The underlying theme of Nigel Walker's attempt in 1974

84. N. Maxwell, From Knowledge to Wisdom, p.149.

85. Jock Young, "Thinking Seriously about crime: some models of criminology", in Crime and Society: readings in history and theory, Mike Fitzgerald et al, (The Open University Press) Routledge & Kegan Paul, London, 1981,

86. Ibid., p. 307.

87. David Downes and Paul Rock, Understanding Deviance: a guide to the sociology of crime and rule breaking, Clarendon Press, Oxford, (2nd ed.) 1988.

88. Lakatos, "Falsification and the Methodology of Scientific Research Programs", in Lakatos and A. Musgrave (eds.) Criticism and the Growth of Knowledge, p. 133ff.

89.A.MacIntyre, Whose Justice? Which Rationality?, p.361.

90.Now, as Charles Taylor describes it quite a game goes on between social theory and the 'common sense' descriptions of the common life. The practices which make up society require certain self-descriptions on the part of the participants - these self-descriptions can be called constitutive. In a certain way social theory merely tries to make explicit what the participants of a social practice are doing, describing the activity central to the practice and articulating the norms central to it. Perhaps we can then describe the first set of understandings as 'pre-theoretical' but what then follows is that any subsequent set of understandings involving prior reflection upon practices is inescapably 'theoretical'. This is of course to simplify as any set of practices can be said to involve a set of 'theoretical understandings', but the original set of understandings can be called pre-theoretical in the sense that they do not rely upon a set of articulated theoretical positions for their legitimacy. There may not be any systematic formulation of the norms and the conception of man and society which underlies them. Social theory can be said to arise in our attempts to articulate what we are doing in the activities of life, formulate its 'practices', routines and central features, and the regularities and understandings these rely upon (the norms). But once that is attempted choices are faced, for the construction of theory rarely if at all consists of the simple reportage of self evident practices or the raising to an explicit formulation of what before was only latent. Instead the articulations of theory often appear as an opposing force to our common sense thought - theory does not expressly articulate common sense but challenges, replaces or extends such understandings. The answer to the question: 'what is really going on?' is thus to demonstrate a previously unthought of recounting of the activities. A recounting which to common sense may appear dangerous or simply mistaken. Alternatively, ways of perceiving what was previously taken for granted are provided which provide radically shocking ways of perceiving, offering, perhaps, the power to transform. This effect of theory cannot but place itself under the label of 'political' in effect if not in its self-consciousness. See "Social Theory as practice", in Philosophy and the Human Sciences: Philosophical Papers Vol 2.

91.See Positive Criminology, p.12.

92.Ironically, considering the terminology which he employs, the situation we depict here is presented by Ronald Dworkin in Law's Empire. Dworkin is referred to in our next chapter and this thesis is not the place here to fully deconstruct the rationalist rhetoric of Dworkin into pragmatism, however, the social theory of law he presents in Law's Empire, implicitly, only partially exists, it is as much a normative conception, a "noble dream" as a critic has called it, or as others have put it in opposition to empirical legal theory, an exercise in normative legal theory.

The cover to Law's Empire claims to provide "a masterful explanation of how the Anglo-American legal system works and on

what principles it is grounded." Yet Dworkin's thesis is full of phrases which identify his theory as "a conception" which "denies", "insists", "rejects", "suggests" and "instructs"; for example (at p.225): "the adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author - the community personified - expressing a coherent conception of justice and fairness." Law as integrity "insists that legal claims are interpretive judgments and therefore combine backward- and forward-looking elements; they interpret contemporary legal practice seen as an unfolding political narrative", again: "according to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice."

Dworkin's project offers an interpretative explanation with persuasive force, it seeks to establish an interpretation of practice which has normative impact asking the reader to both understand contemporary practice differently and to change future practice as a result. The theory will be true if it can achieve that. Its rhetoric is that this will achieve the rationality inherent and latent in Law; "it reflects a discrimination already latent in the ideal of integrity itself" (at p.243). Dworkin fits into the rationalist tradition where the full grasp of the meaning of Law's Empire in thought carries with it a grasp of its inner necessity, of an understanding of its meaning which conveys a total clarity, however, this guarantee is reinforced by the persuasion that it is simple better to treat law as integrity than alternative, what he calls conventionalist and 'pragmatist', accounts; better in terms of more liberal practices which result.

Thus (at p.243) we read: "Law as integrity asks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process, and it asks them to enforce these in the fresh cases that come before them, so that each person's situation is fair and just according to the same standards. That style of adjudication respects the ambition integrity assumes, the ambition to be a community of principle."

Further (at p.406): "Our root ambition of treating ourselves as a community of principle itself recommends a special role for justice. Citizens of such a community aim to be governed justly and fairly and with due process... So there is practical importance in isolating the question of what integrity both permits and requires seen from the standpoint of justice alone. For that question marks an agenda for the community as a whole, as prior to and shaping further questions about what institutional decisions would be necessary to achieve this."

Ultimately, however, (at p. 407) the theory is described largely as a story of law's growth whose "optimism may be misplaced. A sceptical story seems better to some critics of our law: they predict the triumph of entropy instead, of law losing its overall substantive coherence in the chaos produced by selfish and disparate concentrations of political power. Which attitude - pessimism or optimism - is wise and which foolish? That depends on energy and imagination as much as foresight, for

each attitude, if popular enough, contributes to its own vindication."

The impact of accepting this account of law and its practice may lead to a change of practice, a constructivist change inducing practice more easily covered by the description.

In Charles Taylor's definition the modern empiricist tradition "is a genuine attempt to go beyond the circle of our interpretations, to get beyond subjectivity. The attempt is to reconstruct knowledge in such a way that there is no need to make final appeal to readings or judgments which cannot be checked further..[to obtain] a unit of information which is not the deliverance of a judgement, which has by definition no element in it of reading or interpretation, which is a brute datum." He has no doubts that both rationalism and empiricism fail and that social theory is an endless series of interpretative structures (in "Interpretation and the sciences of man", Philosophical Papers, Vol II. See also "Self-interpreting Animals", in Vol I. In this respect Ruth Benedict has earlier destroyed recourse to a settled naturalist foundation for modern empiricism in deviancy studies; in "Anthropology and the abnormal" she argued the relativity of our conceptions and the life grounding for the normal and abnormal. For Benedict "normality is culturally defined", the structure of humanity is open-ended but in all societies choice is required. "No one society can possibly utilize in its mores the whole potential range of human behaviour." The categories and marcations which social theory investigate are socially created: "The concept of the normal is properly a variant of the concept of the good. It is that which society has approved." Moving against the crass empiricist reading of Humean functionality Benedict states: "The small proportion of the number of the deviants in any culture is not a function of the sure instinct with which that society has built itself upon the fundamental sanities, but of the universal fact that, happily, the majority of mankind quite readily take any shape that is presented to them." The result is that questions of social engineering become contingent: "Our picture of our own civilization is no longer in this generation in terms of a changeless and divinely set of categorical imperatives... we must face the fact that even our normality is man-made, and is of our own seeking." In the variability of time: "No society has yet achieved self-conscious and critical analysis of its own normalities and attempted rationally to deal with its own social process of creating new normalities within its next generation." Ruth Benedict, "Anthropology and the abnormal", The Journal of General Psychology, Vol. 10 (1934), pp.59-82.

93. In Juridification of Social Spheres, other references to this work are contained in the text annotated as (J. p...)

94. Ewald stressed the relationship between 'justice' and epistemology by linking the idea of justice to the concept of equality; equality defined in terms of the granting of equality of consideration. This recognition of fairness or of appropriateness must always exist as a judgment, and, since judgment itself requires prior vision to enable the entities to be judged to become

known to the judge, the emphasis can in this way be traced back upon the structuring or facilitating of this vision with the consequence that we are reminded that vision is allowed, and perhaps can only exist, as an internal aspect of an epistemological regime.

Ewald specifies that the term justice designates three different things: the first is to see justice as a virtue - a virtue to act according to the norms of judgment, norms, however, appropriate to the well ordered exercise of judgment. The virtue of justice can thus be equated to continually treating the beings of a category in the fashion that category requires. The exercise of this virtue, therefore, presupposes the existence of a common measure by which the apparently dissimilar can be compared and equated. This leads to the demand for the meta description - the language wherein is found "a principle that would allow the value of all values to be assessed". (J. p.95). Drawing upon Aristotle (the Politics) we understand that this meta or key principle for the rule of justice, on which one must agree in order for the polity to survive as an harmonious whole, is also the most problematic thing there is. It is the creation of a convention - an act of agreement upon a common rule of judgment that allows judgment about oneself and judgement about the others, to create via the process of reciprocity, into a judgment of the social whole. A process which suffuses throughout the social body an identity of objectivity.

95. After Virtue, further references contained in text annotated as (A.V. p...)

96. In criminology this central theme of managerial expertise with its stress upon "the aspiration to value neutrality and the claim to manipulative power", although stronger in America with the claims of corrections (i.e. rehabilitation) under the indeterminate sentence, is clearly visible in the training traditionally given to social workers and probation trainees. Central to that training was the necessity to adopt a "non-judgmental stance", but to respond to the object, i.e. the client, the offender, solely on the basis of the techniques inscribed during training (in their earlier forms a bowlderised Freudianism).

97. In this discussion 'social justice' is viewed as that state of social organization which is regarded as just because it is revealed by social theory to be the grand product of modernity's progress. The decline of social justice in the context of the positive state taking on the role of organising society, the rise of neo-liberalism, the position of Just Deserts, is linked to the functional utility of a libertarian order. Libertarianism is to some extent reliant upon social theory, in Hayek's writing, for example, the market is held out as being undeniably proved to be the most efficient mechanism of modernity. Moreover Hayek claims that the market can satisfy all of man's wants:

"The economic efforts of ... individuals as well as the services which the market order renders to them consist in an allocation of means for the competing ultimate purposes which are always non-economic. The market order reconciles the claims of different non-economic ends by the only known process that

benefits all - without, however, assuring that the more important comes before the less important, for the simple reason that there can exist in such a system no single ordering of needs. What it tends to bring about is merely a state of affairs in which no need is served at the cost of withdrawing a greater amount of means from the use of other needs than is necessary to satisfy it. The market is the only known method by which this can be achieved without an agreement on the relative importance of different ultimate ends..." [Law, Legislation and Liberty, Vol II, p.113]

The backup to the market is a set of universal rules, rules which are necessarily abstract, the observance of which is the virtue of justice (the allegiance to Hume is clear) - the spread of these rules constitutes the culmination of modernity:

"revolt against the abstractness of the rules we are required to obey in the great Society.. [is to demonstrate that] intellectually and morally we have not yet fully matured to the needs of the impersonal comprehensive order of mankind." [Ibid., p.149.]

Nor do these rules have as their foundation the expectation that sets of human emotions, sympathy, will ensure that social relations actually contain instincts of co-operation and beneficence, opposed to the assumptions of Hume, Hayek attacks ideals of socialism and social justice not only for their epistemological claims but because their ideals

"do not offer a new moral but merely appeal to instincts inherited from an earlier type of society. Similarly the people who are described as alienated or estranged from a society based on the market order are not the bearers of a new moral but the non-domesticated or un-civilized who never learnt the rules of conduct upon which the Open Society is based, but want to impose upon it their instinctive, 'natural' conceptions derived from tribal society." [Ibid., p.147.]

The market is thus the crowing achievement of modernity; but this is undercut by reflexivity.

First, the rule of law is not the impartial abstract mature order Hayek sees it since even if enforcement of the rules was able to be impartial and objective, and we shall see in the next chapter that this is not possible, the rules themselves lock everyone into an order not all have chosen and many do not want. In reality the rule of law makes sense as part of the narratives of progress and linked to desires, i.e. those sets of desires for liberty, equality and fraternity, which set in motion the force of political change in modernity. Thus the impartial, abstract, inhuman, rule of law depends upon very human, emotional concerns.

Second, to see the rule of law as a technical matter of reference to self-evident rules, where the application of rules is different from policy or interpretation is subject to all the criticism of legal positivism (see Dworkin, Law's Empire).

Third, to see the tension between our 'natural emotions' and 'the discipline of rules' imposed by the achievement of the Great Society as the source of the 'fragility of liberty' is to cleanse humanity of what others have seen as humanity's greatest attributes - we may still feel, however, that the poet, the playwright and the musician cannot be so easily discarded.

Forth, his project is ambivalent to local values. In true Humean style he demands political decentralization with local accountability, which would give rise to the expression of localised, non-universalised values and emotions. However, there is to be no carry over of these values into the larger sphere since "all attempts to model the Great Society on the image of the familiar small group, or to turn it into a community by directing the individuals toward common visible purposes, must produce a totalitarian society". [Law, Legislation and Liberty, Vol II, p.147.] What is, however, to prevent the occurrence of these small groups, and their allegiances from spreading their value structures if there is to be no recognition of the legitimacy and incorporation of value discussion in the larger sphere and thus no institutionalised methodology of demarcation?

Fifth, to prevent the appearance of this totalitarian society Hayek sees the disciplining of individuals into a common acceptance of the necessity of the rules and informed public opinion as to duties, but how is this to be achieved unless by a powerful state or set of media monopolies which control communication and influence public expectations? In other words a totalitarian society? To think that a free and pluralist political and educative order would automatically produce the degree of discipline that sets of universal and abstract rules require without local influences would appear to hold to some common metaphysic of the structure of human nature and desires which he claims not to hold.

To the pragmatic imagination the image of Hayek's Great Society founders without a foundation on assumptions as to humanity which earlier writers such as Hume and Smith shared but Hayek attempts to cleanse in creating a bloodless Great Society.

98. The question can be put to Ewald as 'from what epistemological regime is your statement concerning the structures of the previous launched?' There has been a tendency to launch critiques of the rationality of modernity from the weak position of "irrationalism". Sometimes this is confused with the tendency of certain writers, Foucault is an outstanding example, to engage in epistemological critique without any statement as to his own epistemological basis. However, as with the paradoxes of reflexivity, to deny truth is to bring into play some form of epistemology.

99. Peller, for instance writing about the collapse of modernity's confidence in epistemology adopts the de-constructive stance which soon reduces to plays of power:

"each move to fix meaning fails because no essential or necessary meaning adheres to either the expressions or the things they signify... The search for such meaning leads back to contingent social practices rather than to objective 'reality'. These social practices embody contingent choices concerning how to organise the thick texture of the world... What gets called knowledge is the effect of social power institutionalised in .. representational conventions". Gary Peller, "The Metaphysics of Law", 73 California Law Review, pp 1168-70.

100. Richard Rorty, Philosophy and the Mirror of Nature, Princeton, Princeton University Press, p.12.
101. In Politics of Informal Justice.
102. Just Gaming, p. 36.
103. Ibid., p.33.
104. See The History of Sexuality, Vol 1, for instance, although it does appear to be that the later volumes moved towards a position where 'the care of the self' could be achieved. This must form some sort of epistemological break for on the earlier position there was no self to care for except that 'entity' found at the intersection of the various disciplines that dominated it.
105. Just Gaming, p.42-3.
106. Ibid., p.43.
107. In this connection see the discussion by Anne Burrows "Lyotard and the Problem of Justice", forthcoming in Judging Lyotard, Andrew Benjamin and David Wood (eds.), to be published 1990, who draws the comparison between the 'liberal' system of Rawls (who believes the Just society necessarily involves consensus) and Lyotard's non-consensus image. I draw upon the unpublished manuscript.
108. The Post-modern Condition, p.xxv.
109. Ibid., p.66.
110. Ibid., p.95.
111. In The Post-modern condition, pp.71-82.
112. To some extent it can be argued that he is asking for the postmodern to prevail in a form which simply continues the 'Liberal' tradition of tolerance under another name. Thus following the J.S.Mill dicta that the just mode will prevail out of the process of tolerance, out of our refusal to intervene and choose what will prevail, because it is the 'naturally true'. See J.S.Mill, "On Liberty", in Six great Humanist Essays of John Stuart Mill, Dolphin Books, New York, 1961.
113. The Post-modern condition, p.82.
114. Foucault's work is an inspiration for this concern as in Garland's Punishment and Welfare where the issue of a controlling function for welfare is as important as the 'punishment' which can provide a practical example for 'philosophies of punishment'.
115. A powerful example of this is David E. Duffee, Explaining Criminal Justice: community theory and criminal justice reform, Oelgeschlager, Gunn & Hain, Cambridge, Massachusetts, 1980.

116.Nicola Lacey, State Punishment: political principles and community values, Routledge, London/New York, 1988, p.173.

Chapter Nine: Problems of intellectual order for Criminal Justice: notes on avoiding false objectivity.

I

In Explaining Criminal Justice David Duffee divided contemporary criminal justice into two approaches, the Moralistic and Welfare. In this distinction (which roughly corresponds to the usual Justice versus Welfare distinction used in Britain with particular reference to Juvenile Justice) the moralistic position is identified as defending the morals or cultural fabric of the society, whilst in the welfare position public organizations are primarily concerned with improving social welfare. As well as being expressions of themes dealt with in our last chapter both are battles of personnel - the welfare perspective necessitates a range of social work and interventionist agencies while the moralistic approach is linked to policing, prosecution, court agencies and penal establishments. The moralistic position conflates two themes, first the Humean legacy of the criminal law as a system of 'rules' and secondly that these rules reflect the moral understanding of the society. As Hyman Gross puts it:

"The rules of the criminal law let us know that certain of these things that members of a community know to be against prevailing moral views are also against the law. ...With rules [of the criminal law] we have a common means of guiding ourselves and of judging objectively the acts of others. Through the institutions of a legal system that includes a legislature representing the people, rules have the further virtue of representing not a single person's judgement but the intelligence, will, and moral sense of the community at large."¹

This picture of criminal justice gives

"prominence to rules of conduct whose violations the law makes punishable. Such rules are violated when a person acts contrary to the rule by engaging in conduct the rule prohibits or by failing to engage in conduct that the rule requires."²

These rules, although nominally the rules of a 'community', are the rules of the abstracted community - the nation. Indeed implicitly in Duffee's analysis both the moralistic and welfare

approaches are aspects of modernity's overcoming of 'community' in the task of organising 'society'. The welfare position, although mediated by knowledge, is an agency of social control which reflects activities of politically ordered society, and can be seen as a progressive growth in the functions of social control complementary to law since "the basis of the authority of law is immediately the power of organised society..... Ultimately the law rests upon the basis of its accord with the conditions of life in civilized society."³ Welfare takes as its concern a concept of overall social welfare where the practical actions of the system are action for the good of the society. This welfare approach is currently subject to a neo-Weberian critique which develops Weber's idea that bureaucratic administration entails that a few, and not necessarily an elected few, do the thinking and determine the socio-cultural forms that delineate the projects of modernity, while the rest of society is confined to a submissive conformity. The critique of treatment and intervention associated with the rise of Just Deserts can be seen as not only part of a return to doctrines associated with the perspective which underpinned the early modern nation-state with its stress upon sovereignty, individual freedom, responsibility and the rule of law, but also a reaction against certain of the institutional forms of organizational modernity; i.e. of the welfare state.

The tension Duffee portrays is mirrored in Unger's division of modern jurisprudence into two principles of justice; the principle of freedom of contract and the counter-principle of community. For Unger the two are dialectically connected, the first serves the money-making ethic of capitalism while the second heals or regulates the dehumanisation of life which the first leads to - late modernity lurches between the two. Unger's demand is for a responsive jurisprudence which reinstates the locality of humanity.⁴

Duffee sees criminology having brought criminal justice to a position where although research has not left us ignorant of

crime it has stripped us of any confidence that the operation of criminal justice is highly significant for anything that we may wish to achieve under the label of 'social improvement'. This understanding complicates the belief in the primary importance of 'criminal-justice-as-social-control' which both welfare and the moralist perspective gave themselves as a 'normative' self-conception. This normative emphasis on what should happen therefore confounds efforts at describing what in fact does happen. Behind this normative approach Duffee sees three overriding assumptions:

"(1) that there is a uniform conception of criminal justice applicable to any and every actual social setting; (2) that there is in fact a coherent criminal justice system in any particular social setting; and (3) that there is in fact a coherent, consensual version of American society and consequently a single version of social order that most, if not all, persons in the United States would accept, had they the opportunity."⁵

Central to the modernist perspectives of criminal justice is the state-wide unity of thought and action - a universal grounding which both the moralist and the welfare share and wherein decision making occurs on criteria which are the same throughout the area concerned. Decisions are thus an application of rules or, conversely, an application of the facts of judgement - decisions do not vary with locality. Against this the pragmatic element in the post-modernist critique of modernity concerns itself with the local dimension of thought and action. Foucault's argument for local discourses, Lyotard's local narratives and just gaming, Rorty's situated dialogues, Unger's responsive jurisprudence, share a pragmatic retort to the centralised, dominating and exclusive operation of modernity's structures. The extensionality and similarity which empiricism and rationalism designate as the bedrock of modernity's imaginative epistemological structuring pragmatism fractures into claims for disassociation and multifaced creativity.

Normative assumptions appear to guide the self-conception of criminal justice. Opposed to these so called empirical or 'sociological' studies of actual criminal justice functioning

stress, in equivalent fashion to the work on 'living law', that the criminal justice system is a network of agencies and groupings that on a local level seek to achieve their own goals, not some abstract 'will of the society/people' or 'the aim of the state'. Although the 'policy' of criminal justice may be determined by factors at the level of state politics and demands for social change at the level of the nation state, the grassroots operation of criminal justice is necessarily mediated by factors internal to the bureaucracies themselves and the social characteristics of the officials subject to local contextualisation.

This understanding is not simply to take the stance of, say, 'legal realism' against 'legal formalism', but to deny the commonality of grounding which either rationalism or empiricism normatively assume for understanding. Instead under the pragmatic imagination the forms of punishment found in societies come to be seen as creations; as social artifacts necessarily historical and contingent.⁶ As a social artifact the operation of criminal justice is multi-layered and multifaced, able to be expressed in terms of an overriding universalist function only at the cost of reducing complexity.

This complexity is felt inside the criminal justice system by the actors involved, felt as an enemy. The demarcation central to criminal justice decision making corresponds in large part to reasoning in binary oppositions rather than complexity and local determinism. Thus sets of alternatives such as crime/non-crime, guilty/not guilty, insane/normal predominate acting as if the particular was always a version of a universal. In sentencing, where more options are theoretically available, the tendency is to locate them in sets of oppositions such as discharge/punish, imprison/alternative, and the rhetoric of diversion presupposes a 'normal' in relation to which diversion is the 'other'. When this system of oppositions comes across either sets of beliefs which do not correspond, for example with the guilty/not guilty division, the difficulties of the Japanese in pleading at the

Tokyo war trials, or the situation of socio-pathology or psychopathology which is not classified as true insanity but is not 'normal', or an offender who does not fit the bill for prison or probation, then difficulty is experienced fitting the oppositional template onto life. Empirical research on decision making reveals the narrative methodology wherein the decision-maker simplifies, labels and locates the entities so labeled as characteristics of other situations which are reflected in the situation under consideration, labelling into roles or images which fit into narrative renditions of thought and action. In this way both the widespread, in the offering of the discursive terms in the narrative, and the local, in the living interpretive activity of giving meaning, are combined.⁷

One of the features of Just Deserts is that it consciously sets out to achieve a formal process of simplification and boundary drawing which will control decision making on the local level. Depending on the presence of certain features the sentencing outcome will be found in various set situations in terms both of imprisonment and the length of time to be spent. One reason for this has been the fear of discretion and the arbitrariness which it was felt the complexity of contrasting inputs into criminal justice from law and the social sciences under local considerations was achieving. Concern with the notion of fairness and objectivity run through work which is related to this theme. Thus in his survey of decisions in the penal process Keith Bottomley highlighted the difficulties in applying the slogan "equal justice under the law" as a point of reference which could presently enable us to contrast our empirical reality with an agreed ideal.⁸ He pointed out that this slogan was of limited use if different conceptions of the overall goals of the criminal justice system were in common usage. For if

"sentences reflect different goals they cannot easily be compared with another according to some supposed overriding criterion of 'equality'; it is more a question of the injustice of sentences being passed with different objectives in mind than sentences being unequal according to the same criterion, and to that extent unjust."⁹

The contrary presumption is that there is ascertainable some essential reason for the performance of punishment, and thus some essential goal for the social organization of punishment, by comparison with which any others are subsidiary. In other words, some one, dominant thing that is being done when punishment is performed. This notion runs counter to the idea of pluralism and highlights the notion at the back of rationalising punishment/penalty - which is that if we are to be able to judge the fairness or quality of a sentence then we require some settled criterion of equal treatment to begin with - and that the criterion of fairness in sentencing will become visible in our efforts to locate the central purpose of punishment. This is the traditional purpose for studying the philosophy of punishment. It still lurked beneath the sociological notion of 'penalty' which Young and Garland used, as it was with Rusche and Kirchheimer where it was thought that if the essential purpose of punishment could be exposed then its essential non-fairness would be exposed also (i.e. negative critique). According to this view, locating the central purpose of punishment leads to notions which give the criterion for allocation of punishment/sanction/treatment/deserts, or, alternatively, through the negative force of critically exposing the dialectical transposition of the 'unfair'. When the central notion of punishment was a mixed social defence and rehabilitative purpose, for instance, one institutional implication led to indeterminate sentences and the power of parole. The replacement of such a sentencing system and its ideas of indeterminacy with one of Just Deserts is in turn indicated by changing prior notions about the central purpose of punishment. The defence of 'rehabilitation' in the face of Just Deserts easily lapses back into such essentialist thinking.¹⁰ In contrast, Wittgenstein put a pragmatic perspective thus:

"'Why do we punish criminals? Is it from a desire for revenge? Is it in order to prevent a repetition of the crime?' And so on. The truth is there is no one reason. There is the institution of punishing criminals. Different people support this for different reasons, and for different reasons in different cases and at different times....And so punishments are carried out."¹¹

It is important to note how widespread the reductive picture has been, however, with scholars as diverse as Durkheim and Pashukanis offering "sociologies of punishment" bound by its framework.¹²

Similarly Nietzsche attacked crass normativism as preventing sophisticated analysis.¹³ The mistake commonly made in approaching the subject of punishment was to

"seek out some 'purpose' in punishment, for example, revenge or deterrence, then place this purpose at the beginning as the cause of the origin of punishment.

... the cause of the origin of a thing and its eventual utility, its actual employment and place in a system of purposes, lie worlds apart; whatever exists...is again and again reinterpreted to new ends, taken over, transformed, and redirected...

...one must distinguish, that in it which is relatively enduring, the custom, the act, the 'drama', a certain sequence of procedures; [from] that in it which is fluid, the meaning, the purpose, the expectation associated with the performance of such procedures...the concept possesses in fact not one meaning but a whole synthesis of meanings; [moreover] the previous history of punishment in general, the history of its employment for the most various purposes, finally crystallizes into a kind of unity that is hard to disentangle, hard to analyze and, as must be emphasised especially, totally indefinable."

In parenthesis Nietzsche adds:

"today it is impossible to say for certain why people are really punished: all concepts in which an entire process is semiotically concentrated elude definition; only that which has no history is definable."

He concludes that "the meaning" of punishment is "uncertain, supplemental and accidental" and that "the one procedure can be employed, interpreted, adapted to ends that differ fundamentally." One target is the rather comfortable translation of functionalism whereby social custom is seen as natural process. A mistake which occurs when people assume that "the eye is made for seeing, the hand for grasping", and go on to assert that "punishment" is simply a natural "invention for the purpose of punishing". Freed from reductive functionalism both the type, and amount of "punishment" are shown to be varying social creations, not a naturally occurring given.

Yet our common ways of referring to criminal justice and penalty leads us to think of a highly rational and goal directed "Criminal Justice System" as being the natural and rational thing that we are to strive for and this is expressly so when the analysis finds that criminal justice is currently a "non-system".¹⁴ Apart from the deviant 'abolitionist' perspective the terminology of present progressive discourse is full of implications of expertise, cohesiveness, and rational operationality. One result analytically is to see the practicality of criminal justice as purely the prerogative of the state and thus deny the variability of language games which may also be at play in creating the concrete "punishment" which an offender experiences. Punishment is thus considered as something abstract and independent of local human concerns, agency or processing. This latter characteristic is replicated in the second move to reduce the power of the criminal justice system to that range of 'determinants' which are assumed to lie behind the state, i.e. 'political economy'.¹⁵ Both appear to doom Criminal Justice to the status where inputs for change from individuals or weak groups are ineffective. But again there are grounds for seeing 'the criminal justice system' as more open to intervention than is suggested.

Comparison of the stated criteria of system analysis to the operation of criminal justice reveals that criminal justice can only be called a system by a loose use of this terminology and many commentators prefer to use the term "process".¹⁶ Whether we are dealing with a "system" or not would be somewhat of an academic point if it were not for the battle of semantics which lie beneath this issue. Namely, the impossibility of the traditional 'progressive' motif of rationality and systematization achieving a coherent series of "goals" and ranking of these other than in a system by contrast to the sets of opposing values implicit in the 'abolitionism' of those such as Christie or Hulsman.¹⁷ Such system thinking encourages functionalism, it also fits well with rather utilitarian theories of punishment such as social defence and reductionism, but it also has been seen by

analysts to run counter to certain of the 'rights' approaches in legal theory and related modes of procedure. As apparent, for example, in Howard Packer's two models of criminal justice.¹⁸ But again to conceive of criminal justice in terms of these two models is to adopt an essentialising of punishment. Michael King adds Medical, Power, Bureaucratic and Status Passage, as other "models" we can use in conceptualising "The Framework of Criminal Justice".¹⁹ Is there a common referential for this system? The question is especially crucial for if there is to be agreement and translatability of discourse for solution, for action, must there not be some form of agreement and common understanding of the position each one inhabits?²⁰ But what sort of consensus is asked for in this language of 'the criminal justice system'? The traditional image attached to the modern theme of the democratic control of those modalities of social control lies in the notion of consensus - the legitimated authority of modernity achieved via cognition and a co-orientation to some form of meta-code (legal-rational forms of authority). Yet the consensus which Duffee finds in Criminal Justice is only to a vague notion of 'social order' or 'protection of society' which conceals a variety of suppositions as to what form of order is required. As Stanley Cohen describes it inside the criminal justice system these world views co-exist in complexes of interaction, conflict and mutual indifference, partly as symbolic modes by which "the professionals" exercise "deposits of power... inside the system".²¹ The paradox for the post-modern, however, who would welcome this 'de-construction' is that without some notion of systematic contextuality the symbolisms and semantics which legitimate the present institutional arrangements need not be confronted with, or contradict, each other. Giddens's post-consensus babel does not mean Rorty's 'conversation of mankind'! At least two paths could develop. One is a 'pragmatism without foundations' which would link participation to a methodology rather than agreement on some objective categories of a meta-language; the other is the imposition of some form of meta-code - some agreement upon a common form of definition to be imposed to achieve and control a common universe of discourse. The second

line encourages the rhetoric of reflexive control over the participants and instruments of criminal justice and so Just Deserts, as an example, appears to achieve a mechanism of control without needing to argue the reflexivity of what sort of society is justly defended.

II

The cure of Sentencing disparity by Just Deserts is a subordination of plural discourse to central power.

One explanation for sentencing disparities is the conflicting pulls of differing conceptions of the aims and goals of criminal justice. These may be felt differently as between different judges and in the same judge on different occasions. Increasing the range of available dispositions, for long seen as a key element in producing a "progressive system", without working out a coherent and integrated philosophy underlying decisions, may only further enlarge disparities. Is this consequence to be feared? Or can a coherence which allows a degree of disparity be acceptable?²²

The tradition of conceptualising the role of the judge has relied, in the main, upon universalising the conception and position of this 'semi-autonomous state functionary'. Work on disparities has been done with the presumption of the consensus model of the criminal law at the same time as lowering the effect of the diverse aims of criminal justice administration. The first presumption appears that similarity in outcomes of dispositions should occur naturally, as though the Humean legacy of an empiricist natural law carried over to 'natural sanctioning'. This is a move which H. Mannheim realised was crass and sought "significant factors" which would allow a justifiable universality. Conversely, Hood sought "considerations" that would account for differences. Mannheim's failure to identify consistency led to the explanation of disparities becoming the non-occurrence of objectivity, concluding that "the subjective

or intuitive assessment of individual cases does in the main prevail."²³ The consensus model finds itself qualified by "the human element in justice" to steal Everson's title.

"Justice is a very personal thing reflecting the temperament, the personality, the education, environment and personal traits of the magistrate.....to a [great] extent justice resolves itself into the personality of the judge."

As Bottomley points out, to many writers

"the introduction of concepts such as these into the analysis of the problem implies a retreat from systematic and objective investigation into the realms of subjectivity and irrationality; they seem to equate 'personality factors' with pure arbitrariness, inevitably resulting in injustice."²⁴

Gaudet's comment is to the point:

"if this personality of the judge element is present to a marked degree, we may assume that there are inequalities and even injustices in the administration of the criminal law."²⁵

Bottomley's review of the literature leads him to side with the conclusions of Hogarth's study and hold that the most important influences upon sentencing are the penal philosophies and attitudes of individual judges, attitudes which act as a framework through which the other social and procedural constraints are filtered in a way broadly consistent with the magistrates' existing attitudes and objectives in sentencing. Bottomley presents a picture wherein sentencers selectively interpret and respond to their effective environments in sentencing and thus exhibit a large degree of self-consistency with the corollary being an equal or greater degree of inconsistency between different sentencers. Bottomley concludes:

"Such inconsistency must by definition, always contain an element of 'injustice' for convicted offenders appearing before different judges, but the degree to which particular sentences may also be considered 'unjustified' on their own terms, can only be assessed after a close examination of the validity not only of the individual sentencer's own penal objectives but also of the social and situational constraints to which the final sentencing decision is a response."²⁶

The paragraph is remarkable for the pragmatic epistemological foundation it seeks to have accepted as the basis of a redefined

"objectivity". As Donald Black put it:

"In the traditional conception, law is fundamentally an affair of rules. The explanation of a legal decision normally lies with one or more rules by which the established facts are assessed. By contrast, the sociological model directs our focus to the social structure of a case - to who is involved in it - and this explains how it is handled. The rules provide the language of law, but the social structure of the case provides the grammar by which this language is expressed."²⁷

Basic to the pragmatic imagination is the contention that decisions and arguments are the arguments and decisions of men - the decisions, therefore of the criminal justice 'system', although functional, are not the decisions of the 'system' nor can they be reduced to coherent bodies of rules or principles, but they are of the individuals, contextually situated, who in the policy of criminal justice, perform the tasks of staffing and mediating between the abstraction of the state and the varying individuality of the subject.

Yet a great deal in what has been taken as the progress of criminal justice goes directly counter to this notion. Much of the development of decision making in Criminal Justice has been understood in terms of a 'rationalising of the moral aspect of life' in an overcoming of passion and the 'human element' in the name of reason seen as the objective application of rules and knowledge.

The rationalization of 'justice', which the narratives of progressive epistemological development called for, expressly disrupted certain features in the notion of 'judgement'.²⁸ It was not simply that sentencing was called to undergo a revolution to a new 'model' (Classicism, Positivism, Just Deserts) but that the very acceptance of a concept of rational, 'professional', judging by any individual in modernity, and in particular the modern phenomena of the judge passing sentence within choice but with the use of reason and under the constraints of the new "knowledges" (as, for example, in the current American notion of 'selective incapacitation' which requires knowledges of

dangerousness), rests on the presupposition that judgments in the formal sense of the outcome or product of the activities of deciding, arguing, justifying, and giving reasons, can be considered separately from those activities themselves. That is, from 'judging', 'deciding', 'arguments', in what can be described as an alternative, and at the risk of over-simplification, 'human' sense. The success of the type of rational arguments to be engaged in is achieved in the distancing of the arguer from the argument - the argument is to take on the form of an algorithm. This is essential to distinguish knowledge from mere subjective belief or opinion - legitimate and rational action from arbitrariness. The discipline of the epistemologically secure 'reconstructions' of the expert stands contrasted to the free flowing poetic licence of the rhetorician.²⁹

On the one side stands the purity of the 'objective' epistemological warrant, on the other, the arbitrary, impassioned movement of what may loosely be called humanism. The two sides appear disjointed and the distinction drawn in chapter one between the 'context of discovery' and the 'justification of belief' reinforces this. Epistemology, and thus the question of the legitimacy of thought, was assigned the task of the 'justification of belief' while psychology was given the task of explaining how men came to hold the diversity of true and false beliefs that they did. Correct thought, a matter of 'justified true belief', is thus the province of epistemological purification stating why a belief is certain and justified and this process accounts for the belief in terms of the reasons or grounds which can logically reconstruct it, while psychology has an applied status accounting at most for methods of assent and denial.

In the pragmatic imagination, as we have seen, social human behaviour is placed at the foundation of judgement - questions of justification become 'beyond' epistemology in the empiricist and rationalist sense, and become a question of the constraints that shape our actions and allow the active sequence of social

interaction and the expression of modes of life. The relationship between truth and human conviction and action are thus not that of the traditional distinction - they are reflexive and not a process of contrast in binary opposition. But this does not mean that reason is without a role, for the understanding that some beliefs are entrenched into our life forms and others are not, is not an arbitrary matter. We should not lose sight of what we have stressed continually, that the entrenchment of a position (and thus the acceptance of that position as a foundational basis of judgement and action) can be a matter of reasoned decision which does not need the foundational guarantee of its absolute truth or falsity.³⁰

III

James presented the dicta of pragmatism as 'you can't weed out the human element' and sociological understanding shows that the legitimation of action in modern Criminal Justice is not a pure rationality but rests in a combination of pre-modern claims to authority in the Humean sense, claims to 'objective' truth statements in the criminological domain (the facts of judgement), the interactional mediation of moral rhetoric and the variable social structuring of the cases. Rational organization is always situated, and, as Richard Sennett points out for example, although the direct appeal to patriarchal authority is not made, many of the structures of modern authority are still vaguely aligned with one or other patriarchal model. In Juvenile Justice, for example, one strong image is 'paternalism', which seemingly appropriates the image of paternity yet constitutes a power relation that has few of the real elements of a family.³¹ The ancien regime's symbolism of sovereign authority implanted in the robes and formal language of the law courts still continues in attenuated form - law and religion still stand central in their concern with manifesting themselves by the symbolic, at the same time as they themselves attempt to provide symbolic reference points for the modern state.³² Similarly, the neo-conservative

demand, phrased in terms of a social anthropological consciousness, states that symbols linking governmental action to a realm of certain values are as necessary today as in 'primitive' pre-enlightenment conditions. Sennett specifies the impossibility of a truly or wholly rational structure of authority, since for him the barriers of marcation between the 'irrational' and the epistemological secured rational appear frequently of little effect. Thus in social life the distinction between the emotional and the rational is not firm. He holds that a political order cannot base itself solely upon one or the other.³³ For his part Habermas, in dealing with the rationality of the discourses of modernity, gives rhetoric a bridging function between the specific "expert" cultural domains in modernity and the life world where rhetoric serves to

"feed the contents of expert culture, in which knowledge is accumulated under one aspect of validity at a time, into an everyday practice in which all linguistic functions and aspects of validity are intermeshed to form one syndrome."³⁴

If criminal justice is about 'authority' then the operation of criminal justice requires alliances with the common life. The survival of the legal framework over the positivistic, incorporating as it does its set of 'moral fictions' and philosophical suppositions (as opposed to the scientific fictions of the sciences) aligned with those life-ideas which from the time of Kant onwards have articulated the "moral consciousness" of society as including the idea of a rational "moral reactive attitude"; an attitude which is opposed to many of the foundational claims of the "positive", and one which has resisted all attempts to subdue and replace it. The ability of legal notions to resist the alternative 'naturalistic' conceptions of social science can be seen in H.L.A. Hart and A. Honore's Causation in the Law which contrasted legal and scientific conceptions of causation.³⁵ For the authors, law's use of the term was and, moreover, normatively should be taken from the common sense perceptions of the populace; the correct test for legal outcomes was their correspondence to the presuppositions and attributions of responsibility in the common life. Similarly the truth in sentencing which the rhetoric of Just Deserts offers

is a correlation to the reactive attitudes of the common life, as, that is, in the American example of deciding sentencing lengths by public referendum the collection of preferences indicated in polls on the issue (See also the recent return to favour of the Death penalty in the U.S.).

IV

The moral reactive attitude and objectivity.

In *Freedom and Resentment*³⁶ P.F. Strawson legitimates the reactive attitude in our experiencing "what it is actually like to be involved in ordinary interpersonal relationships ranging from the most intimate to the most casual". Reactive attitudes are central constitutive features of those relationships which draw upon such emotions as resentment, gratitude, forgiveness, rage or simply disappointment; emotions and relationships which give rise to attitudes which stand in contrast to those he terms "objective".

To Strawson attaining a total "objectivity", would necessitate a transformation to social attitudes fundamentally at odds with the social reality we experience and relate to as humans engaged in daily social interaction. In what could be discussions aimed specifically at those like Barbara Wootton³⁷ or Eysenck, Strawson asks whether the acceptance of the principle of determinism, i.e. the acceptance of a particular 'truth' portrayed by social theory (i.e. theoretical reason) as the grounding of criminological judgement, could lead to the decay or repudiation of participant reactive attitudes. He considers this "practically inconceivable", as "the human commitment to participation in ordinary interpersonal relationships is too thoroughgoing and deeply rooted for... a general theoretical conviction [to] so change our world..." Strawson contends that "a sustained objectivity of interpersonal attitudes and the human isolation which that would entail, does not seem to be something of which human beings would be capable, even if some general truth were a

theoretical ground for it". Reactive attitudes are essentially "participant attitudes", and removal from general social participation is only occasioned in cases of outstanding abnormality or immaturity, or when used as a resource and aid to policy, or when it provides a refuge from the strains of involvement, or simply out of intellectual curiosity. He rephrases the tension between the participant attitude and the objective attitude, although he also admits it is to somewhat distort both notions, as between "our humanity and our intelligence".³⁸ For Strawson, the claims of the theoretician to bring objective knowledge necessitating such substantive change fails to adequately grasp

"the fact of our natural human commitment to ordinary interpersonal attitudes...

..this commitment is part of the general framework of human life, not something that can come up for review as particular cases can come up for review within this general framework."³⁹

Strawson rephrases the question in terms of a choice between continuing to regard the individual who has offended as a member of our general moral community, but one who has offended against its demands, or regarding him as somehow different and outside this community. If we consider him as part of the moral community, then, he implicitly claims, we must see the practice of punishment as of a piece with the whole range of attitudes constituting that community, including the self reactive attitude.

In contrast, Barbara Wootton openly espoused the path of 'objectivity' in order to realign the practice of sentencing so that its social practice was to rest upon calculated, objective consequences. "The frequency with which reconviction follows a sentence for a given offence is a fact", which could serve as "an objective criterion" to develop "the prevalent punitive system of sentencing into one the success of which is judged by its skill in preventing recidivism".⁴⁰ The crucial element in this progress is the provision of "better information": both as to the outcome of the courts decisions and in the translation of this information into "statistical analysis" providing objective

particulars of a "higher prognostic value" than "subjective judgments of persons...in close touch with the subject of the investigation."⁴¹ Criminology and penology are self sustaining discursive instruments of the social and the question of punishment Wootton presents does not contain any moral or social ambiguity. Support will be granted to actual dispositions, or not, on the basis of factual, 'hard', particulars. The consequences are clearly recognised:

"decisions as to the treatment of offenders should become an administrative, instead of a judicial, matter....
...custodial sentences should be indeterminate...rigid divisions of institutions into the penal and the medical should be obliterated...
...regard should be paid to questions of guilt and responsibility only in so far as they are related to this aim".

It is the denial of any concept of the penal equation, and the sentencing function, other than as a particular unambiguous specie of scientific reasoning; morality as a specie of discourse is extraneous.

The overall position relies upon a specific notion of the role of objectivity - it clearly draws a distinction whereby the forms of psychological judgments that Strawson notes in the reactive attitudes stand outside science and logic. It grants a belief that science and logic are on one side, and on the other psychological factors masquerading in the terminology of the moral which are continually to be fought against in the name of a rational system, and are to be removed in the creation of that system. Woolly, "humanist" thinking, of whatever form, retributionist or the opposite, is not to be indulged in. This position is on a par with the infusion of related styles of "objective attitude" throughout general explanatory schemes offered by empiricism: for, "if causal theories explain why a criminal acts as he does, they also explain why he must act as he does".⁴² The foundations of discourse are confident, and, furthermore, this explanation promises to enable the holder the power to play with the strings that control the "must" by the creation of a scientific crime reducing 'treatment' system.^{43/44}

Wootton clearly indicates that her drive to attain "objectivity" requires an instrumental machine-like approach stressing 'objective particulars' which minimises subjective discursive interaction. It is ideally a treatment machine where "the concept of legal guilt" is "dissolved", replaced by a system where the "significance of a conviction [is] reinterpreted merely as evidence that a prohibited act has been committed, questions of motivation being relevant only in so far as they bear upon the probability of such acts being repeated."⁴⁵

Jurisprudential concern is transformed: for "the forward-looking aims of social protection might... have absolutely no connection with punishment", thus "there is little cause to be disturbed by the multiplication of offenses of strict liability",⁴⁶ as these are mostly aimed at the task of reducing social harm, which is the same whatever the mental state of the actor.

Wootton's own version whilst expressly stated as not requiring an "acceptance of a deterministic view of human behaviour" is ambiguous. For on the one hand she wishes to state that "it is not possible to get inside another man's skin", yet that denial is made for the purpose of benefiting the contention that we simply "by systematic observation of experience" come to know what treatment is most effective with offenders, and that it is un-necessary to the operationality of this knowledge to ask whether the reason of man is subject to free-will or determinism.

One of the Just Deserts arguments against the "scientific" approach is that its instrumentality would justify sentences which may amount to restrictions far out of proportion in severity to the seriousness of a committed offence; i.e. that it loses any thread of connection of the actuality of punishment to the activities which brought about the punishment/treatment/measure/etc.

In fact this charge could be conceivably ignored, for if the scientific and "objective" game is internally consistent it has achieved the verbalization of a language game in which this as-

sersion is incommensurable, and has no place within the framework of the game, belonging instead to an outmoded and separate game. There is no grounding for this complaint as there is no question of the retributive demand for proportionality in ranking severity of sentence to past offence. There can consistently be no limits upon efficiency, and Wootton recognises that "if an anti-social person can be changed by medical treatment into a well-conducted citizen, it is only common sense that he should be so treated."⁴⁷ On this there can logically be no constraints except utilitarian efficiency, however, Wootton emphasizes the existence of "moral limits" to the permissible types of treatment, and although she does not go into the question of how these could be formulated, or what they would look like she relies upon these moral factors to guide the range and imposition of treatment.⁴⁸ This, however, from the point of view of a Strawson style argument, means that Wootton is being either inconsistent, or simply speaking nonsense. Since, as Strawson emphasised it, the basis of the "objective" approach is the suspension of the notion of belonging to a moral community. To reintroduce "moral" arguments into the performance of tasks legitimated upon the premise of the inapplicability of the "moral" is to have ones cake and eat it to. As Wootton explicitly declared, the practice of each game is different; the empiricist, scientific game, and the rationalist, punishment as a game of the moralist, are incommensurable.⁴⁹

Modern offenses of "no responsibility" have been called no-morality offenses. Historically, modern moves to avoid jurisprudential subjectivism (i.e. the avoidance of needing to investigate the question of mens rea, for instance strict liability offenses), which provide a transition towards a technical objectivism, are clearly linked to utilitarianism.⁵⁰ The use of the criminal law as opposed to administrative control, in areas such as traffic, consumer protection, environmental concern, can be argued to lead to certain traditional features being relegated (such as the requirement of consciousness and mens rea). The arguments that such strict liability offenses were necessary to provide knowable potential costs to companies

planning development, and thus increasing cost and efficiency analysis, places the criminal law as a "market consideration" in the Kantian sense. Such crimes do not become "crimes" in the Kantian deontological sense but assume the characteristics of 'regulatory violations'. Reaction to such activities is something which can be thrown open to administrative techniques with all the tactics of prosecutorial discretion, a range of penalties after the finding of occurrence and the emphasis upon out-of-court settlement rather than formal measures; the Kantian objection is that such methodologies cause one to punish the blameless and ignore moral condemnation when, conversely, it is due. The moral condemnation which the Kantian sees as essential and which focus upon a communicative process of demonstrating the normative aspects of the individual/community interface is transformed into a technical doctrine where the individual takes on the characteristics of an object to be controlled on the basis of scientific findings derived from the study of the external features of the object.⁵¹ In the resulting theoretical perceptions the individual tends to become a mere epiphenomenon, and the formula for society is that of an objectively organised society directed by state functionaries, with deontological morality subservient to administrative science. The legitimation of such Law and its enforcement is not confined to the delineation of abstract spheres of conceptual reasoning but such 'regulatory law' legitimates itself by the social process it achieves by regulation.

The strict purity of Kantian rationalist reasoning can be seen in contrast to a modern writer, Walter Berns, who has implicitly attempted to reconcile a notion of the *sensus communis* and moral reactive attitudes in a defence of retributionist activity within an empiricist imagination.

Although Berns does not talk in terms of the *sensus communis* he uses a notion of "the moral community" and society is constituted as a moral community by the common experience of the moral reactive attitude. Within the commonality of this moral

community certain acts appear as unjust and give rise to anger; this moral reactive attitude is the defining characteristic of the community. Specifically: "if men are not angry when someone else is robbed, raped or murdered, the implication is that no moral community exists, because those men do not care for anyone other than themselves."⁵² In the moral community dominant beliefs as to the injustice of certain acts arouses anger at their occurrence; that anger is a justified reaction to those acts and this justification carries over to punishment. "Punishment arises out of the demand for justice, and justice is demanded by angry, morally indignant men; its purpose is to satisfy the moral indignation that, it is assumed, accompanies it."⁵³ Berns would confine us entirely within a narrow empiricism, for "justice" is equated to the satisfaction of an empirical desire, one which Kant would call a lower desire - there is no transcendency possible, no prescription other than the purpose of satisfying moral indignation, i.e. the natural sentiment of anger. The Kantian position on the other hand necessarily relates the question of justice to the "higher desires"; the non-sentient, and in such a case justice may well be demanded by angry men but justice does not relate to their anger but to their use of reason.

Why too must the reactive attitudes be reduced to one facility, that of anger? The Christian response, which may just as well be feasible also relies upon a notion of a *sensus communis* - that of feeling a cosmic unity with God, but its response may well be different from anger; the Jewish response, taking as it does the completion of a promise as its criterion of justice, is also different.

Berns' position that anger can be seen as reasonable, and that to act out of anger is not a primitive throwback or irrational self-indulgence, defends the rationality of the Strawson style attack upon the objective attitude, and stands counter to the Kantian ideology that reason takes morality as its own and lines up against the emotions. Berns sets out to demolish the notion

that punishment linked to anger is nothing other than a barbaric retaliation against the criminal which denies the criminals dignity. However, 'dignity' inhabits a variety of language games and Berns by no means succeeds in placing reference to anger as the legitimate reference for the games of punishment.⁵⁴ Berns is with Strawson in stressing that anger is properly directed only at agents considered to be responsible and thereby possessed of the "dignity" of responsibility.⁵⁵

Strawson's aim at 'the intelligence' on behalf of 'our humanity' sides with the pragmatic concern to put the human element as the centre of explanatory focus and action, and thus both the image of chains of determinism which enable the 'expert' to decide in the model of the diagnostic tribunal, and the pre-arranged categorizations of the rationalised mandatory tariff system which enable the neo-classical moralist to judge both stand condemned. But it may be a characteristic of modern life that the actuality of "what it is like to be involved in ordinary interpersonal relationships" is that the "commitment to participation" and "communication" are actually features which central trends of modern life goes against; features we can label as those of 'distance'. A central theme of scholars as far apart as Hume, Smith, Durkheim, Weber, and Marx is the effect of the growing division of labour and the necessary mediation of the social world upon the human experience of life in that world. That the individual's life in that world is mediated by the activities of others is obvious enough, what is not so obvious is that there is no escape from this mediation, since even the individual's understanding of himself is mediated by, and largely the product of, the images others have provided him and the necessary structuring of his attempt at understanding in language.⁵⁶ There does, at least at first, seem to be something strange or wrong about the pragmatists notion that no one has unmediated direct experience of his actions or of the structure of his thoughts (moral principles and so forth). It conjures up the puppet model or the image of a robot and we feel that we are clearly not either - but this is to confuse domination with mediation,

passivity with dialectics, mindlessness with social responsibility. 'Social responsibility', for as with the other terms none makes sense without the social. In the pragmatic imagination it is impossible to escape the social; outside of the social the non-social mind or language does not exist. 'Individual responsibility' is a 'social creation'.⁵⁷ Without constant communication, without the constant interaction with the other (including the intrasubjective 'other'), the individual lives in a moral vacuum. The abstract recognition of the existence of 'good' or 'evil' is of little consequence, what counts is the ability to appropriate such concepts into the actions of ourselves and others. The failure to do this is the creation of extreme social distance and the creation of acts which the individual refuses to appropriate. But under the theory of a Skinner,⁵⁸ for instance, the individual cannot appropriate his action, similarly to all forms of formula decision making, the responsibility is there held to be the formula's.⁵⁹

Accepting, however, that language and the constructions of language act as a medium connects the products of language, theories, philosophies, ideologies to human activity. All act as a medium and are themselves mediating forces. Reflection, expression, criticism, of the self and of the others in that social environment whether individually, in group, or institutionally, would be inconceivable otherwise. Mediation is required by the expansion in modernity of social consciousness out of the premodern spacial characteristics of the local and the simplicity of limited division of labour - the style of criminal justice which Christie espouses in Limits to Pain does not need a developed 'philosophy of punishment' since its reactionary attitudes are mediated by the experience of close interpersonal contact and intimate knowledge of the 'other'.⁶⁰ In the pre-modern spectacles of medieval christendom or the ancien regime a form of participation was granted to both the ruler and the ruled. Psychic distance was kept at a minimum - the public nature of the execution gives to each the experience of being a witness of the other. In the case of dealing with what is considered

'evil', all can say if was 'we' that rid the social body of that evil. In the case of the political offender, the visibility of the spectacle helps all to recognise and to respect his part in the order of things. His execution has a positive function reinforcing order by the visual display of the power to punish. In the developed modern state, however, punishment and the operation of the criminal law is carried out by the complex division of labour termed the criminal justice system, where the handling of the offender and the imposition of pain is hidden for the most part. The operation of the modern Criminal Justice system is the operation of a series of interactional sites in police stations, courtrooms, prisons behind walls, staffed by professionals, existing at an ambiguous distance within and yet not of the social body - officially aiming at the control of the social. The removal of the visibility which characterised the premodern with the witnessing of each act by substantial members of the populace (who would describe the event in graphic detail to those not there), eliminates participation and makes the role of penalty in the expression and continuity of the social bond harder (as well as depriving the public of a direct avenue of response). The act will still be social - but legitimacy may be suspect, penalty may no longer have such a direct and obvious fit with the social body, and come to play a more indirect role in reinforcing the social fabric. Conversely, however, the role of criminal justice ideology, i.e. philosophies of punishment, theories of criminology, theories of law and society, can be seen not only as instrumental creations of thought but instruments which grant vicarious participation in modern social processes. That is they serve as medium which effect the legitimacy of acts done in the name of 'us' and which are conducted under the rhetoric of the 'we'. Utilitarian theories roughly put, state that the act of punishment is done to maximise the social benefit of the majority, to give the greater social benefit, punishment is an 'evil' operating as an instrument on behalf of all the society - therefore vicariously it is carried out by officials for you and thus you and the offender who in sharing it understands that his suffering is the means to that end.

Deontological theories of punishment give to the official the task of seeing that the proper deserts for wrongdoing (evil) are visited upon him. Therefore as the child molester sits in the prison his suffering, albeit witnessed only by his fellows (neither Beccaria nor Bentham had their wishes put fully into practice on this point), is offered as satisfaction to virtue and populace; understood and communicated by the understanding that his disappearance is proper 'deserts', and, that he, the offender, understands and recognises the 'mediated' stare of the public. However, it is not put quite so clearly. Utilitarian theories are expressed as the tools of the rational organization of that abstract entity 'society', deontological theories attempt to reconcile the patently different, and rights based theories lose themselves in the abstraction of the 'regime of rights'. The offender becomes the entity to be talked to, to be convicted, to be imprisoned, to be paroled, to have things done to him of which he is the recipient, and which go on largely irrespective of his participation or of any others. The instrumental function of language takes over, the mediative and expressional downplayed, possibly resulting in alienation.⁶¹

In the imaginative structuring of early modernity mediation was not seen as a problem. Both rationalism in its Kantian form, and empiricism in its Humean, specified constraints which would in the 'natural' course of events regulate the application of the power to punish. For the Kantian it is never right to use another person as a means, and for the Humean the inter-human capacity of sympathy would ensure a degree of reciprocity and humaneness in dealing with fellow human beings. The late modern public space is, however, a thoroughly mediated space. Mediation by theory, philosophy, and the institutional positioning of the individuals who exercise decision making capacity. Such mediation necessarily results in the creation of psychic distance between individuals who may already be the subjects of a large degree of social distancing.⁶²

In the historical analysis of Spierenburg the 'disappearance of

public executions' is linked 'to verifiable expressions of anxiety or repugnance' where "the death and suffering of fellow human beings were increasingly experienced as painful, just because other people were increasingly perceived as fellow human beings."⁶³ In the developing modern society with the increasingly professed allegiance to the democratic ideal and the lowering of social suffering such visual suffering could not take place, it was a political liability. How then, if the literature which brings out the hidden pain of modern imprisonment is at all accurate, can the pain of the modern prisoner be legitimate and measured as desert? The 'unproductive' pain of a series of hidden processes full of unquantifiable variables?⁶⁴ The pain is still productive because the populace still have to understand that punishment exists and that the power to punish is present, but the sensitivity, the acknowledgement that the criminal is actually a fellow human being, a central controlling factor over change, is blunted by the 'objectivity' of modern discourse, that is to say through the 'distancing' of modernity. However, it is as well to remember that this distancing is an achievement of modernity, an achievement which itself allows other achievements in social life to develop. The reactive attitudes of community life may well be structured along lines, for example those of race and of status, which the distancing of modernity overcomes in the name of social progress. The social structuring of real, human, communal judgement defends what we may call its 'inner territory', an inner territory consisting of others like the communal self, and defends this from the intrusion of others who do not share the features of that self. The weakness of the 'return to community' models is their lack of appreciation of that real 'progress', of the types of interactive social relationships which modernity allows to a social life freed from the constraints of communal pressure - conversely the postmodern move in the pragmatic deconstruction of that distance, the move to 'humanise' language, is a move to bridge such social distance. Its terms, however, are not the return to premodern denials of mediation, but a postmodern conception of the reflexive conception of the richness of linguistic mediation and

construction of social life. As Wittgenstein put it: "We are struggling with language. We are engaged in a struggle with language."⁶⁵ In such a process we may do well to be wary of false 'objectivity'.

V

'Objectivity' and the Sentencer.

In the previous chapter we attempted to show that reflexively all the central concepts of justice are open to varying interpretations. Justice and humaneness take historically different meanings and similarly with fairness. Fairness wears at least two faces. The first concerns the relationship between the individual (citizen, offender, victim) and the society/community. Rules of equality, subordination, duties or rights are historically situated and contextually laden within varying temporal configurations (epistemes). How society is to deal with its citizens and lawbreakers is in general terms indicated therein. The second concerns the specific treatment, allocation and distribution of resources within any particular configuration of relationships. This second consideration is an internal ascription process having to do with the operation of those criteria and proceedings which the general relationship chooses to adopt as its internal mechanism of performance. This sense of fairness appears thus as an internal question within any one episteme of Justice.

The pragmatist must appear as relativist as between systems of general relationships, since he holds that the claims of an individual to declare the fair and the unfair can be countered by a grand scepticism as to the his universal foundationism, a relativising of his foundational touchstone. Specifically, the pragmatist is sceptical of there being either an external empirically identifiable reality (such as absolute truths of human nature and the human condition which contains empirical substance) which can be used as the reference demonstrating the

fair and the unfair. However, he is equally sceptical of any set of universal, reconciling principles whereby justice, fairness, politics and being flow into one; into the absolute. The pragmatist cannot, however, be a relativist internal to his living conceptual scheme or paradigm set; his epistemic abstinence or scepticism founds itself upon the living language games of his society and the macro-understanding of pragmatism itself. Internally, coherence and logic constantly reinforce a concern with the relationality of the internal factors constituting the points of the conceptual vision. Further, the pragmatist denies staticity, thus he may well wish to trade, renounce, disregard or develop one or more of the concepts or principles which comprise his paradigms and this must cause a necessary reorganization to retain coherence in the relations internal to his vision, among, for example, the concepts of justice, fairness, and equal consideration. Individual pragmatists may demonstrate different degrees of personal entrenchment or flexibility vis a vis elements of their scheme. The pragmatist is not a nihilist. Nihilism is as much the opponent of the pragmatist as it is the rationalist or the empiricist, but nihilism has less to grab onto in its struggle to drown reason since the pragmatist did not ever rejoice in the notion of the settled final scheme. The pragmatist always took his scheme to be a laical statement (in the sense of the language game) arising in a particular spacial-temporal moment, as well as an item in ongoing (and engaging) historical narratives - part of the process of historical journeying in the multiple unfolding language games of existence.

Since the pragmatist is devoid of the ease of reference to settled foundations the pragmatist has continual pressure placed upon his choices and the integrity of his vision. The temptation is to renounce pragmatism in a capitulation and forgetfulness of external relativism and accept the 'theory' as true. When called upon to act under the guidance of theory to accept the concepts of those theories as faithful representations of reality (as the crude empiricist seeks for him to do with the appearance of the

world), or to the presented sets of rules as self-explanatory and completely posited. That is to conceive of the law as the written statement of an uninterpretable reference, or to be strictly bound to the implications of such theory as determining the only fruitful mode of dealing with the world. This would result in him adopting a forward goal pursuing projection with the entities of the world thus revealed, which the efficiency bound, utilitarian empiricist would wish him to do, or accept the rationalists' intuitive, dreamlike, propositions as bearers of true reality, i.e. to the 'true' law as the absolute moral determinant (as opposed to choice) of justice. All such alternatives would doom his pragmatism and renounce his integrity.

For the pragmatist, acceptance of theory and philosophy is to take a grounding and tools arising out of the suppositions and modes of life, rather than some complete 'truth' of such theory. The absence of self-directing knowledge necessarily determines that such theory and philosophy is 'moral' in the proper sense of 'the moral sciences'. The pragmatist cannot renounce the centrality of human judgement for the security which social theory appears to promise, for to him Wittgenstein's statement that 'knowledge is in the end based on acknowledgement' ensures the placement of humans at the centre of judgement, and it is thus up to humans themselves to continually acknowledge and to be constrained by the boundaries and complexities of their world views. To the pragmatist if the choice of judgement is taken from the person and given to the theory then there can be no claim to be a reasonable person. The pragmatist cannot renounce the burden he carries of the ideals of his scheme for the empiricists 'objectivity', or non-human currency, that reflective social theory promises. For the pragmatist the tradition of his paradigm, and his attitudes to reason, his introduction into and furtherance of the narratives of the historical world demands respect as the heritage of reason.

Seeing intellectual models of socio-political obligation and distribution in these terms, i.e. at any one time as a system

concerned with the activities of distribution, allocation, and restriction of people within what a commentator may see as a growing tradition but which may only be one of a multiplicity of possible traditions, directly structures modes of judging. It is easy to see how a reflexive pragmatic position for judging (i.e. internal to the formal social control mechanisms of these traditions) is radically incompatible with either a wholly backward looking, conventionalist empiricism which ties the concern of decision making only to the announcement and performance of the actual words expressed in statute or precedent devoid of tradition; or the radical utilitarian version with its practical mandate to place the power to punish at the service of empirical meta-theories as to the monolithic design of society and the normalcy of the unit.

A commitment to fairness and objectivity is thus a commitment to forms of human practice and interhuman development. When guidance for immediate action is sought within the demands of the present criminal justice system being conscious of the historically changing paradigm formulations of general fairness, of the general relationship between individual and society, reflects in his approach to the question of defending, or stipulating, the degree to which aspects of an internal method of distribution should be upheld. Moreover, he recognises that this is crucially a question of living interpretation - the pragmatist does not have the solace of the externally provided empirical or rationalist solution - his solutions cannot be provided from outside of man's activities but are an act of living interpretation between present purpose, past tradition, and living mode of life.

By contrast, the empiricist judge in a simple act of reflection (i.e. non-interpretatively) claims to find his solution in the statutes and legal decisions of the past. He is like Hume in his defence of conventions, albeit, he may not share his stoic faith; his solace is found in his functional performance of objectivity. Alternatively, the forward looking empiricist who is bound by the

dictates of his social theory must accept the consequentialist predictions which his social theory gives, and, mindful of his goals instrumentally choose and apply. In comparison, the rationalist holds himself bound by clarity of principle to decide, by allocation to absolute categories. It is the pragmatist, by contrast who has the rough passage for he raises the act of judgement into an act of affirmation of modes of social life and in this he cannot deny his self-consciousness, his reflexivity, and thus the pragmatist must keep interpreting the tradition of his conceptual scheme, which of course, already holds itself out, seductively, as the 'correct' scheme - the overcome of the other(s). But reflexively the pragmatist 'knows' that this very claim is undone, and, hence, he must interpret the very material which the alternative positions of the empiricist or the rationalist, hold out as post-interpretative. What this further entails is that at any time the application of internal fairness must be part of, and continuous with, the wider interpretation of the general relationship - there cannot be a paradigmatical breach and it is the role of immanent critique to locate any such incompatibility. That is to say, that the details of substantive fairness do stand in a continuous relation of interpretation to the episteme's interpreted principles of general fairness. But because this relationship is not absolute, nor grounded in an ahistorical, 'naturally' given universal 'objective' foundationism, that interpretation is always a living process involving the integrity of the judge (and all fonctionnaires are judges in the performance of their tasks).

VII

We have noted that a prominent concern in criminal justice studies has been the issue of sentencing disparities; the working presumption evidenced in the literature was that disparity indicated a case of injustice - the blame was placed squarely upon the 'human factor' creeping into the judicial mind. As described in the criminological literature the epistemology of

the judicial sentencer lines up with the division between empiricism and pragmatism as the following quotations of Hume and William James demonstrate.⁶⁶

Hume held that "after every circumstance, every relation is known, the understanding has no room to operate, nor any object on which it could employ itself." Objectivity is thus something that can wield an impersonal control over beliefs and action. James' reply is simple: "You can't weed out the human contribution." He asks us to give up any notion of the mind of man as a responsive to entirely external procedures of evidence and justification.

James holds that a persons belief system grows and changes by a process of accommodating fresh observations within a body of existing opinion and in this "consistency between previous truth and novel fact is always the most imperious claimant".⁶⁷ New facts may serve to drag aspects of the persons belief system to a different formation, but the belief system may also prevent the recognition of novel facts. Piecemeal change is the norm, and this is governed by highly "subjective" considerations. The judge which fits this picture is very much the judge revealed in the conclusion of Hogarth whose "Sentencing is a human process" found

"that the attitudes, definitions of constraints, and sentencing behaviour of magistrates are organised in congruence with one another. A punitive sentencing policy is associated both with punitive attitudes and with a belief that the law and the social situation demands a punitive response from the magistrate. A lenient sentencing policy is associated both with lenient attitudes and beliefs that the situation calls for a more lenient policy... Certain reality aspects of the social environment do penetrate the consciousness of a judge resulting in a modification of his behaviour on the bench."⁶⁸

The judge of the empiricist, on the other hand, appears as an ideal type and is the subject of a universal extensionality. He belongs to no particular location but is the incumbent of a universal but internally empty "role". He is a receiver and interpreter of the social consensus and the 'truth' of presented law or theory; he has observed, apprehended, made sense of or

directly intuited a continuum of experiencing. The individual is presented as a passive receptor of data and the relations between objects. The picture is that of a sensory, or sensory-cum-intellectual confrontation with the objective world as it reveals its reality structure.

The pragmatists' judge is an agent acting in the world and guided by belief, motive, desires and need, and the foundation of the epistemology of his ideas and positions will stem from his activities and practices.⁶⁹ The emphasis is upon accepting that reasoning, observing, judging, and the quality of being objective are products of people's activities. Under the pen of the pragmatist the epistemological perspective changes from the image of the subjective observer facing an objective external world to a conception of consciously active agents acting rationally against a background of acquired belief. The ethico-jurisprudential problem for this "humanist" conception is the necessity of constructing an arrangement where people are at the focus of the epistemology of criminal justice without sacrificing what is accepted as the virtues of objectivity, reasoning and the assigning of truth values by rational methods. To even consider this as a possibility, however, seems to run counter to the view that the subject related elements accruing from the "human contribution" undercut interpersonal neutral testing and permit the observer to project his own beliefs onto the world thus reintroducing the factors of arbitrariness and opinion the project of the enlightenment fought against. It appears to ignore the issue of rational control over the conclusions that people may reach and open further the field of criminal justice to chaos and division. A mature empiricism, on the other hand, takes us along the path of believing that a developed subject matter open to uniform testing can be achieved only if the road to objectivity coincides with the road to impersonality, and that a truly objective operation can only be achieved by progressively eliminating subject-related factors from the process of verification. In other words to screen out those personal factors of background, biography, values, attitude, ability, decision and

judgement that are distinctive of "oneself". This version of "objectivity" seeks to remove such factors in the double demand for a generality of considerations and the process of neutral observation. Here the constitution of the 'social' is to be self defining. The requirement of this generality is, however, a form of essentialism, and the assumption of neutral observation effectually removes from the ongoing concern the legitimacy of the internal expressional of the judge, who is seen as a neutral functionary with only a role playing methodology instead of individual responsibility for decision.⁷⁰

By contrast the pragmatist openly takes up the humanist mantle and denies the possibility of humans becoming operators of a decision making apparatus in which responsibility is taken out of their hands. The pragmatist denies that the 'social' exists other than as a result of the work of individuals and groups in history. The 'social' does not work upon itself other than by the work of humans, and it is the pragmatists cry that only restoration of the creative human factor, and the requirement of human responsibility can generate epistemological success to the understanding of that social. Some, as James did, can take as their general opponent the resulting analytic-synthetic dichotomy of empiricist structure wherein each direction of discourse has its own mode of validation; dual mechanisms wherein humans but look on as spectators. The "democratic" theory of James is opposed to any such dichotomy in the interests of a uniform account of testing, and the rejection of the notion that the key to epistemological success lies in increasing impersonal judgement. With the empiricists' idea of objectivity two crucial assumptions are important for success - the maintenance of interpersonal commensurability of perceptions, meanings and beliefs, and the elimination of whatever might break down this commensurability. Commensurability is aided by the establishment of general criteria of identification to be shared across the board, which justify the ascription of predicates and serve to measure the verdicts of different individuals. Cohesion is achieved by attempts to eliminate divisive subjective elements

from the decision making process. The path is to maximise unity and minimise fragmentation.⁷¹

In his analysis Newell sees a second role for objectivity which enables objective judgments to be contrasted with prejudiced, biased or dogmatic judgments where objectivity is associated with impartiality, detachment, disinterestedness and a willingness to submit to standards of evidence. It becomes a quality of persons through their actions. The objective judgement becomes so not because of the character of the external entities but because of the practices of the person judging. This understanding of objectivity turns the central focus of objectivity away from suppositions concerning the external world onto the practices and attitudes of man. Objectivity becomes a human conception in the radical sense that the objective person is a result of his exercise of a disposition to act within the constraints of a wider social practice. Just as, for example, integrity is associated with certain observable patterns of human behaviour, so does objectivity become identified by the practice of respecting certain norms (among which are standards of evidence and lines of argument regulating ways of resolving disputes). Objectivity becomes a practice, something we can take a moral stance about and praise a person for maintaining. Objectivity is something that the person can do something about - he may choose to be objective or not in the same way he chooses to be honest or not, and thus it becomes talked about as a virtue. Treating objectivity as a virtue similar to integrity breaks the force of the ontological argument as the dominant player in the game of social objectivity. It is no longer of primary concern to objectivity. The primacy of ontology depended upon the existence of impersonal entities existing independent of subject-related properties as opposed to the second role where it is dependent upon the performance of human actions and is linked to choices and decisions. But in effect 'objectivity' is redundant in the first role for it serves to add nothing; ontology does it all. If something is actually out there it is so, and the ascription of objectivity to a judgement adds nothing but is actually excess

baggage. To explain things "as they really are" by calling them objective does nothing without a prior grasp of the difference between "real things" and representations, and, if we have that, then we already have a sense of the distinction and there is no need to use the notion of objectivity to supply it. To simply correlate the objective with the nature of the external world leaves objectivity with no job of its own, since we broadly identifying 'objective particulars' with the 'facts'. However, the idea that objectivity depends 'on the facts outside' makes the mistake of assimilating practices to particulars.

This pragmatic role for objectivity is not concerned with the ascription to external particulars beyond reach. It invites us to conceive of objectivity as a part of human activity and not as a property transcending activity and thus opens it up for participation. The focus, therefore, shifts from the problem of identifying what lies beyond us to become the problem of identifying the human actions which ensure objectiveness. It brings objectivity back onto a human scale. However, this very accessibility causes conflict by threatening the subjective-objective distinction as it is officially understood. If objectivity is something like a visible disposition, then to be objective, or fail to be, is to conduct oneself in certain ways; the distinction between the objective and the non-objective would be drawn solely within the arena of action. But this will clash with the traditional idea that what is subjective is in the mind, and what is objective is 'outside' it. The distinction would simply be irrelevant.

Under the direction of this argument we are encouraged to drop the concern with outer ontology and concentrate upon our methodologies instead. If objectivity is actually the essential feature then it must be accessible - and thus one may talk of the objectivity of a practice but not of the objectivity of the particulars of the world beyond that practice.

The criminal becomes constituted in that practice, in the

objectivity of the methodology enshrined and the outcome of those practices.⁷² The price of objectivity then becomes the demand for a proper method, not the actuality of some external "objective particulars", but in the practice of the process itself. A public practice, constituted upon a public methodology, and one open to the scrutiny of the possibility of independent and impartial criteria. Yet this seems to reconstitute the problem of the misuse of objectivity again, this time in the expectations of the "independent" and impartial.

The pragmatic retort is to again redefine the "independent" and impartial, this time in terms of agreement in participation. It can be no other, for the ambitions of the external "objectivity" which even MacIntyre looks back upon in his ambition to reconstitute morality (in After Virtue) still "harps" upon the Aristotelian desire to see the beauty of form. Wherein the objectivity of values is linked to their validation by external items, existing "independent" of the products of the mind. But this is circular unless they can universally be picked out and identified by observation, and thus be a form of naturalism, or they are decided a priori, in which case we have no grounds except for assumption for declaring their existence. This is only to fall into the mistake of holding that the more a practice becomes "impersonal" the more it is "objective" - the trick of a successful reconciliation will be to achieve an objectivity which incorporates those things distinctive of individuals, and one which builds upon the opposite assumption to the modern claim that a judgement denies its discussability, rationality and justiciability in admitting that it is the judgement of a person and, communicatively, of a group.

Just Deserts restates the language of 'fairness' and 'justice' at the time of the onset of the 'post-modern' in the rhetoric of calling upon a progressive narrative of returning to the 'tradition' of the Enlightenment. What we are offered is the "Struggle for Justice", "Towards a Just and Effective Sentencing System", "Fair and Certain Punishment", "Doing Justice: The

Choice of Punishments". We are told that we have taken the wrong turning and forsaken the doing of justice for the illusion that the 'truth' of justice was upon us (Social Justice); the remedy, we are told, is to constitute a new formal structure of objective particulars, clearly visible and universally applicable across the relevant frame (the state). Just Deserts is to be a new tool of government for the sovereign institution of the state, the repository of legitimate authority and power, overseeing citizens who stand aware of the price of infraction and are constitutionally clothed in rights of protection against both the actions of others and the arbitrary power to punish.

There is a motif which sits as the obverse to this spectra of an impersonal ordering mechanism and it is referred to by those who seek to use the motif of the polis - the motif that justice is implicated in the symbiotic and dialectical relationship of individual to the community and cannot be abstracted from it. For modernity, however, 'community' has been an overburdened concept. In marxism, although Marx recognised that existing forms of social communities, as in India, were sites of irrational discrimination, the idea of the socialist community performs the utopian role of the counter image to liberalism, the promise of a 'solution' to mankind's alienated condition. In jurisprudence, community emphasises the primacy of the social over the individual, the tension is between the concentration of liberalism upon the freedom of individual rights and community's emphasis upon collective welfare. In criminology, the individualist presuppositions of Kantian liberalism are apparently vacuous in light of the reality of communal social science - i.e. the impossibility of moral desert in a heteronomous world where crime is socially patterned and conditioned. The dream of community is the dream of the overcoming of liberalism, the end of the state and the end of punishment. Conversely the achievement of community is seen as the only time when punishment would be justified.⁷³ However, some critical commentators of liberalism have recognised that the ambivalence of modernity to community, the tension between

furthering individual rights with the corresponding ability of the individual to pursue individual projects and the possible communal consequences of doing so, is not a tension between liberalism and the 'other', i.e. community, but a tension within central projects of modernity which involve liberalism. Tim O'Hagan, for instance, has argued that instead of there being a necessary incompatibility between community and the idea of sovereign individuals as citizens of the state many writers have actually seen them as interconnected.⁷⁴ In Unger's analysis the principle of individualist freedom of contract and that of community dialectically feed off each other.⁷⁵ Out of Unger comes a less optimistic pragmatic notion of community. Community no longer is an end state to be achieved - community cannot be a solution to social life. Instead community is an intellectual sphere capable of energising language games interconnected in its name which must be actively and consciously created as a sphere continually vulnerable to colonization by the morality and mechanisms of the marketplace. The pay off in justice is the concern with locality, a concern with practical rationality within a semantic space, a community that is not the abstraction "community" but is the reality of "X community" - the 'particular' community.

This image of community denies the possibility of overcoming tensions. For its community is 'mystery' and not 'problem'. It must be continually fought for, created and defended, not inherited and preserved. Neither can it be achieved through the embrace with the void, with the image of the sudden transformation, since to the pragmatist that is but a solace of the mind. Community must build on what is potential in the present, creating via paralogies on the active. What then are possible modalities of this reasoning?

One possible route in criminal justice judging lies in the combination of the normative conceptual positions and empirical sociology, between normative legal theory and empirical legal theory.⁷⁶ Within normative legal theory the models that Dworkin

uses in Law's Empire reflect the concerns of our discussion. Dworkin builds on his earlier position in A Matter of Principle,⁷⁷ where he saw the role of the U.S. Supreme Court as a forum of principle allowing a continuing public moral debate within a particular socio-legal moral tradition. MacIntyre by contrast expressly argued that the Supreme Court has

"the role of a peacemaking or trucekeeping body by negotiating its way through an impasse of conflict, not by invoking our shared moral first principles. For our society as a whole has none."⁷⁸

In Law's Empire Dworkin places the judge as the most important personage in Law's Empire (rather than the legislature) and saw law as an expressive form of the will of the community (as will made into legal language). The legal community is the inheritor and safeguard of this expressive process protecting the just society. The shared value system of the judges enables them to advance the key rights and privileges which are central to the particular community's tradition and minimise those which are not. Dworkin puts up three models of judging, conventionalism, pragmatism, and integrity. The conventionalist simply applies, non reflexively, the law which is seen as unproblematic and successfully pictured in statute and precedent. When he comes across cases not actually covered by the past law he is radically free to make new law. The pragmatist is a radical consequentialist who feels free to ignore what the conventionalist sees as the 'law' and he judges solely on the basis of a utilitarian calculus of the community interest, maximising future welfare and social benefits and so forth. Dworkin's pragmatist is thus a development of the empiricist imagination while his hero, Integrity, actually derives from a rationalist version of pragmatism. Law as Integrity consists of

"trying to find, in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community."⁷⁹

Law as Integrity sees contemporary legal practice "as an unfolding political narrative" and the judge takes his self-image as the latest participant in that community's 'chain

novel'. Underling the undoubted pragmatic epistemology of law as integrity however, is rationalist metaphysics. For Dworkin, law is a structure of reason, and this is so ultimately because the will of man and community is fully rational, that is to say its present imperfections are correctable in the latent perfection of law's image as the imperfect presentation of the pure law which is possible (which is the expression of the rational structure of the cosmos). Dworkin cannot acknowledge pragmatic contingency since ultimately 'consensus' is his goal, a consensus which resides completed in the future since "present law gropes towards pure law."⁸⁰

What we can take from Dworkin is that all judgments of legality are necessarily defences and investigations into the entire socio-political structure of the society. The institutions of law are not sealed spheres of technical application of objective rules, instead the objectivity of law's institutions lies in the methodology by which it is faithful to a best reading of that society's socio-political principles.⁸¹

The arguments of Dworkin and MacIntyre are limited to normative conceptual analysis - why must the images of a MacIntyre or a Dworkin be expressed in terms of seeking the court as a forum of 'principle' only? To Black such approaches show the hegemony of legal formalism and in Sociological Justice Black starts from the simple notion that "legal doctrine cannot adequately predict or explain how cases are handled."⁸² For Black "the social structure of the case" is crucial. That is, the social characteristics of who has a complaint against whom? Who handles it? Who else is involved? Who are the various supporters, witnesses etc.? What is the social standing of the participants? What are their social skills, ability to communicate, appearance in court etc? These are factors of empirical predictive power. Every case is thus a complex structure of social positions and relationships which determines the legal variation from one formally similar, technically identical case to another. The conception of legal formalism, that law is fundamentally an affair of rules, is

replaced by the social structure of the case and this explains how the language games of criminal justice locate and give actual meaning to the various words of official discourse and sets of rules (from Police and Criminal Procedure Acts, to Criminal Codes, to Penal statutes). Legal Sociology "documents the significance of social diversity and specifies its impact on the handling of cases. Moreover... it demonstrates the social relativity of law."⁸³ These understandings imply to the formalist "a gross violation of the rule of law", it provides the empirical counterposition to normative legal conceptualisation:

Legal sociology therefore invites modern jurisprudence to face reality: Cases are not decided by rules alone...

A new sociological jurisprudence would critically examine each of the social factors associated with the handling of cases: the several kinds of social status, the involvement of organizations (including the state), the degree of relational distance between the parties, the availability of alternatives, and the like. Which of these, if any, should be legally endorsed? Which, if any, should be counteracted?"⁸⁴

Thus "sociology changes our conception of judgement itself... it raises relational consciousness, and consciousness of everything social". Thus the objectivity of judging in normative legal theory needs to be complemented with the objectivity of empirical legal theory.

However, neither is the articulated form of the present organization of the trial process and sentencing. Present opportunities for any in depth articulation are mainly confined to appeal review, a process which is conducted on pleadings and judicial reflection and the very structure of the way criminal law is understood is abstracted methodological individualism. The opportunities for the trial to be a communicative mechanism and a continual reflection upon social relations, sociological knowledge and moral positioning within socio-political discourse appear limited. What sort of knowledge of the criminal would be allowed? The knowledge of traditional criminology has been a function of the sites and practices which were given to it by the criminal law and its administration.⁸⁵ Indeed much of the focus of knowledge production in criminology has been concerned with

the activity of control and the subject-object distancing which 'objectivity' is presumed to require. Our reading of social theory in Chapter Eight has touched upon this and it is as well to note that it is different from the objections which David Matza gave to the "correctional" attitude he saw underpinning criminological knowledge production. Matza asked for the "appreciative" attitude to be developed, an attitude which would produce a different form of knowledge and a different stance for the user of that knowledge towards the activities being discussed.⁸⁶ We have previously stressed that the duality of modern disciplinary knowledge is such that it can function as an instrument of control, or subjugation of the individual, while acting as an instrument of participation. Could not the individual also use the resource of the disciplinary languages to articulate his position and his point of view without being caught in the power of the determining of the 'self' beyond the participation of the active self?⁸⁷ Such dialogicity may run counter to the reductivist theme of contemporary trials and sentencing since the dominant attitude towards the criminal trial is instrumental, it is to see it as a part of 'problem' aimed towards crime control and crime reduction: "that the guilty should be detected, convicted and duly sentenced".⁸⁸ In Trials and Punishments Duff sets out an alternative, openly moralistic position concerned with the normative aspect of the Kantian/Hegelian emphasis on autonomy and respect. This makes the trial a moral confrontation:

"a communicative process of argument and justification which seeks the participation and assent of the defendant, and which addresses him as a rational responsible agent."⁸⁹

Duff is at pains to point out he is putting forward an 'ideal' and that actual criminal trials are far from having this character, further: "the extent to which they lack it shows the extent to which our existing legal practices are radically imperfect."⁹⁰ Penalty has the purpose of confronting the offender:

"It serves in part to make our endeavour more effective, forcing the criminal's attention onto the implications of his crime; he cannot ignore it as easily as he can ignore or

forget a conviction or a purely symbolic punishment. But it should serve too - if it is successful - as a penance which the criminal comes to will for himself; the pain or suffering which begins as a coercive attempt to attract and direct the unrepentant criminal's attention should become the penitential pain which the repentant criminal accepts for himself."⁹¹

Enlarging upon Duff, in such a communication process, disciplinary discourses of the self and sociology can have an expressive part to play - however, as we have stressed the dominance of the model of 'problem' and its presuppositions places manipulative potential at the heart of what is proper 'modern' knowledge. The introduction of professional, therapeutic expertise and knowledge represents for MacIntyre "the obliteration of the distinction between manipulative and nonmanipulative social relations.. in the sphere of personal life".⁹² For Foucault, western mankind has become a confessing animal. Thus Duff's penitence in penology can be seen as the latest move in the procedures of individualisation which link together the desire for the truthful rendering of one's being into speech directed to one's parent, one's teachers, one's doctor, one's lover - a rendering which creates one's social individuality.⁹³ But from this process there is no escape, for our subjective lives are the products of the language games we play, and our intimate feelings, desires and relationships are the objects of new forms of knowledge, the object-subjects of new forms of power.⁹⁴

Thus we could have another ideal, that of the criminal trial as a communicative process utilising both the discourse of social science and of the moral presuppositions of law aimed at the maximization of the possibilities of articulation by the defendant using social sciences which have given up the metaphysical guarantee of total determinism. Paraphrasing Duff, the extent to which the trials of the present lack this, shows the extent to which both our existing legal practices and use of the 'human sciences' are radically imperfect. Which does not mean that a search for some way in which criminal justice could contribute to an increase of normative-cognitive self-

understandings and information on offending, individuals, the law and society need be fruitless.

However, to jump ahead of our story a little, the differentiation of the social which characterises late modernity is also a differentiation in discourse. The rise of the pragmatic imagination and the testing of knowledge spheres by internal coherence and a lowering of the demands for commensurability means that we are presented with a confusing melange of 'knowledges', assertions, and 'opinions' which survive alongside the monopolistic tendencies of blocks such as criminal law doctrine and social science disciplines. For, having changed 'truth' from an 'absolute' to a 'conditional', we arrive at the non-occurrence of revolutions - the destruction of a block becomes more difficult and blocks become 'autopoietic'. The claims which positive criminology made concerning the disappearance of criminal law (i.e. claims for the superiority of social science as a 'system' which can understand law's weaknesses and correct its previous haphazard modes of dealing with social life) reflect Popper's argument against the old notion of truth in relation to system legitimacy: "Newton's theory is a system. If we falsify it, we falsify the whole system".⁹⁵ But as MacIntyre put it in his 'pragmatic' conclusion to Whose Justice? Which Rationality? the pragmatic imagination of modernity turns such 'systems of absolute truth' into traditions which operate according to relatively self-sustaining processes.⁹⁶

Yet interference from the outside is required for 'progress'; in Luhmann's analysis which we look at in the next chapter, the attempt at communication and the uncertainty over ontology raises tensions and creates a reflexivity practical action dialectic. The advent of reflexivity by actors situated in discourses and attempts at self appraisal occasions change and constitutive social development.⁹⁷

There is a complex set of constraints on this process,

constraints which hamper attempts at communication in criminal justice and, among them is the question of the institutional structure of producing knowledge inside the centres of discourse, and the question of the degree of reflexivity or non-reflexivity of these centres. That is their essential self-understanding or non-pragmatism which makes them think of domination and colonization rather than negotiation.⁹⁸ In this respect, David Nelken has recently addressed the position of criminal law's ability to escape from talking to the social sciences in any real form, first concentrating upon the tactics of teaching and scholarship,⁹⁹ and then the question of "the truth about law's truth".¹⁰⁰ For Nelken there is no simple commensurability of a real differentiation between law and social science. Continually "different elements of positivism and post-positivism or modernism or post-modernism, variations between explanatory and interpretive strategies or between a stress on cognitive adequacy or normative correctness all figure as argumentative moves and counter-moves within theoretical and practical controversies between law and science."¹⁰¹

In Nelken's conclusion is implicit that the advent of the pragmatic imagination, which he identifies as 'post-positivism', means that we are able to transcend the enclosed awareness of the epistemic believing subject. We are

"not to treat law and science as monoliths...We need not take the self-conceptions of law and science as a justification for political choices towards the proceduralisation of law."¹⁰²

The advent of Just Deserts can be seen, therefore, in these terms: a political choice concerning proceduralisation of conflict between law and social scientific notions of offending and responsibility. The implications of the communicative approach Duff outlines are, however, diametrically opposed to the strict framework of Just Deserts where in its 'normal' form, as in American sentencing guidelines, much of the energy of the trial will, by implication, be directed at factual and labelling battles as to which 'Box' the event fits into (for example, disputes as to whether the housebreaking took place before dark or after). Just Deserts opposes pragmatic reflexivity by embracing the motif of the stable mechanism and the fully

developed organizational form where fairness pertains to the operation of the algorithm and is the internal ordering of stress and energy to components in their respective positions according to whatever engineering application is being sought. Thus offenders must be treated according to the criteria of distribution which is being used - it does not matter what the substantive outcome may be, that is open to another decision, what is important is the following of the principle that is in application.

With 'democratic' versions of Just Deserts the communal and the mechanic ideas are fused into one by the concept that the community (democratically) decides upon the algorithm - the grand political statement of Just Deserts. Not as with Hobbes by one grand act, but by the continual (re)adjustment of politics (referendum and elected officials). But the question of fairness is located in the treatment of the offender within the existing penalty structure. The question of the composition of the penalty structure is thus always an issue *ex parte* - it is no longer regarded as 'essentially' fixed, but now admitted as fixed by acts of politics, but these are acts which are separate from the action of this new 'social' tariff. That application is an objectivity which resides in the 'facts' of the penalty discretion and guidelines. The fairness of the objectivity of the 'fair' recognition (that is of the proper cognition) is the objectivity of the fair treatment - the objective retributive concept legitimated only by the tautological dance of modernity's distanced 'objectivity'.

Moreover, the internal coherence of the extrapolation from the algorithm will depend upon the selective ranking of the variety of the 'aims of the process'. The aims are to be ranked themselves according to a meta-algorithm. Thus the sentencer(s) cannot pursue a variety of goals in a 'subjective' manner but is now provided with an external framework by which to correctly structure his preferences. Again the meaning of this 'correction' of subjective narrative of criteria of meta-fairness is to be

procedural and amounts to the empiricism of setting up an external body constituting criteria know(able) in advance (temporal realism). Above all we have reversed the substantive questioning of the 'factual' approach of empiricism and escaped reflexive pragmatism - for our narrative of Just Deserts is concerned with an equal treatment within a/the penalty system and is not concerned with the nature of the penalty system itself. Unfortunately, this is at least twofold, for not only is the sentencing process to be constrained in the amount of questioning and divergence it can undertake but the process of constructing the mechanism becomes concentrated only on the 'objective particulars' which the organising body, the Sentencing Commission or the like, is told are relevant. Thereby the central pivot of Criminal Justice turns away from partaking in any wider concerns of social theory and openly denies the need to be concerned with the messy facts of the world outside the de-contextualised operation of 'criminal justice'. In the central place of power marcation bites again denying reflexivity, denying the need to synthesis beyond the dominance of the 'knowledge led' model of 'problem' which refuses to locate crime and its administration into the moral, social, political and economic contexts which give it its grammar.

VIII

Excursus on the arrival of Just Deserts.

Instead of incorporating social science into questions of guilt and of sentencing, Just Deserts appears to turn away from the participatory element for perspectives which can be seen as a consequence of the tradition of the Enlightenment.

Partly this can be seen as a response to over confident claims by positivism under the model of 'problem'. The accepted formula for attaining knowledge did not give control of the social and the redefinition of punishment as a civilised element of rational society stripped the understanding of punishment of any justification other than functional rationality. Instead a public concern with social order, termed 'law and order', has arisen which has taken crime and punishment away from being seen as a question for "experts".¹⁰³ The semi-acknowledged consensus, which existed in Britain at least, among the major political parties

which saw criminal justice as increasingly a province of "expertise" has been undone. Now law and order has become a political issue, and one in which the "public" is involved and an appeal to common feelings as to desert is engaged in to legitimate this change.¹⁰⁴

The issue of the "truth" of sentencing and penal practice is openly held to be at stake and new formal structures arise to counteract the doubts within criminal justice. To use the terminology of Lyotard, we appear to move from any self acknowledged episteme to that situation where in Just Gaming we are said to be

"in dialectics, and we are never in the episteme.... [Our intellectualism] is not a reason that states Being. It is a reason that is an understanding... In every instance one must evaluate relations: of force, of values, of quantities, and of qualities, but to evaluate them there are no criteria, nothing but opinions".¹⁰⁵

Against the idea that this leads on to a time of loss of power for central authority (the critical dream of 'de-construction') and a resurgence of pragmatic responsibility on local levels, Norbert Elias stated in his classic work:

"the hour of the strong central authority within a highly differentiated society strikes when the ambivalence of interests of the most important functional groups grows so large, and power is distributed so evenly between them, that there can be neither a decisive compromise nor a decisive conflict between them."¹⁰⁶

At such a time the excuse of administrators may well be that they are hampered in their efforts by unnecessary restrictions on the exercise of their functions, and that the fight against crime requires greater powers for the elements involved. The limited role of the criminal justice system and sentencing process for the control of crime is an understanding of reflexivity. Keeping the image of the 'all functional' role for criminal justice, entails that when the 'problem' worsens the range of powers and interventionist tactics available to state functionnaires should be increased. To see this form of authoritarianism as a response to post-modern times is not an image only of the 'left'.¹⁰⁷

The collapse of confidence in expertise, we have broadly placed in terms of a social history of the epistemological warrant for social affairs, and in the confines of penological discourse this movement also, at least in part, relates to and enables a rise in interest in certain philosophical arguments concerned with the 'remoralising' of criminal justice, specifically identifiable in the United States in a report published by the American Society of Friends in 1971.¹⁰⁸ Much of this was repeated in the book which Andrew von Hirsch based upon the work of a committee of scholars reporting on incarceration published in 1976.¹⁰⁹ Out of these deliberations came the label of Just Deserts which claimed to present a "justice model for crime and punishment" having specific recourse to notions of equality and reciprocity.¹¹⁰

The challenge to the idea of the clinical approach to dealing with offenders began much earlier in the work of research analysts. As early as the 1950's doubt was thrown upon the idea that the more effective the "treatment" of the offender, the less was the likelihood of recidivism.¹¹¹ A summary of research into recidivism may be given thus: There is no evidence that any identifiable disposition is superior to any other in terms of its impact upon the subsequent criminal activity of the person dealt with.¹¹² As the authors of Justice for Children put it:

"Major reviews of research into the effectiveness of penal measures both in the USA and UK provide no ground for optimism. It is not at all clear that doing something is better than doing nothing, or that doing one thing is better than doing nothing, or that doing one thing is better than doing another. It is also now clear that intervention can harm as well as help, and that the actions of even the well-meaning do as much harm as good."¹¹³

These findings open new grounds for functional differentiation within the rationality of punishment - new forms of 'selective incapacitation' for example. Some approaches tend to a crass pragmatism; for example what can be termed a pragmatic approach and free exchange of penal measures treating all as interchangeable on a simple "whatever works" principle (holding, however, to the instrumental 'crime reduction' perspective solely). The boundaries of the institution blur and the techniques of the institution - intensive control over time and spacial location - can be transferred into the community (via supervisory tracking, electronic tagging for example). An alternative desire in both the economic and 'humanitarian' quarters is to pose the praxial question as - 'how little is it possible to do to offenders and still retain respect for the law on the part of non-offenders?'¹¹⁴ In the absence of determinable criteria to gauge progress there are arguments to regard punishment as a scarce and costly resource, an equivalent principle to economic accountability has been developed - the principle of parsimony - penology becomes economics.¹¹⁵

Some professionals, however, analyzing the co-option of 'back to justice' by law and order writers reaffirm rehabilitation as being the only defensible ideology for criminal justice.¹¹⁶ However, as Stanley Cohen points out in discussing a prominent American argument:

"Not content to revive rehabilitation as a value in itself or as an ideology to use in the struggle against conservatism, Cullen and Gilbert have to make the very same essentialist claims against 'punishment' and about the 'real' purposes of the criminal justice system which started the last round of reforms moving."¹¹⁷

Not all such moves are the claims of criminologists; in the institutions, fear is voiced by grass-roots personnel at the difficulty of life post-rehabilitation. The necessity to keep up what is seen as a humanistic core to the Enlightenment tradition of progress in criminology is asserted - to keep the humanism without the rigidity of the hold of theory. This humanitarian

approach also perceives that it may well be a good thing that human individuals are highly resistant to being changed. If some people could change offenders into good citizens, it would be just as easy for other persons to change good citizens into offenders... or whatever socio-political animal they wished.¹¹⁸ Alternatively theorists also claim that human resistance to change may well be functional for society; innovation and diversity result. Moral claims also intervene in that if it were possible by technical means to dramatically change human behaviour it appears that this would require methods so intrusive to the integrity of the offender's 'human' personality that they should be rejected on moral grounds.¹¹⁹

According to some other lines of the Just Deserts or return to justice critique of correctionalism and welfare, the offender has a 'right' to the appropriate punishment: this is a "right" that appears to take much of its strength out of comparison to the alternative modes of dealing with him. The emphasis of this "right" is that he should not be treated according to anybody's opinion as to what he needs in order to lead a crime-free life but only in a system which takes seriously the possession of rights by individuals in society and the fact that in offending he has breached this regime.¹²⁰ The Committee on Incarceration stated:

"The conventional wisdom has been that the sentence should be fashioned so as to rehabilitate the offender and isolate him if he is dangerous. To accomplish this, the sentencer was given the widest discretion to suit the disposition of the particular offender. We reject these notions as unworkable and unjust...and conclude that the severity of the sentence should depend upon what he did rather than on what the sentencer expects he will do if treated in a certain fashion".

The simplistic and common-sense notion of "what he did" is modified slightly in other places to accommodate the idea of culpability. Von Hirsch stating that "'seriousness' depends both on the harm done (or risked) by the act and on the degree of the actor's culpability" (on p.69), but the idea of culpability, and the seriousness of the crime, do not receive much critical attention in this work and are presumed to be those of the traditional confines of the notions of the criminal law (i.e. 'intentionality'), not social theory.¹²¹

The Just Deserts concept is now hotly debated. On the one hand, criticism comes from those who wish to believe that case work and therapy really work. There is an unease on the part of those who think that if humanitarian dispositions cannot be seen to "pay off" in reduced recidivism, there will be a return to draconian punishments. Advocates of Just Deserts argue that it is the treatment approach which could result in draconian dispositions because it is indeterminate; in this area they ask for control of power by legal procedure and predictability. Others argue that Just Deserts does not face up to questions of social justice and the social factors surrounding the offender and the offence, but "abstracts" this from society. Some persons also want to find a

middle ground between punishment and rehabilitation, to combine a little of each of the main philosophies currently in vogue, and to stress the offender's culpability and make the sentence commensurable to the odium of his criminal act, and yet, under the influence of parsimony and deinstitutionalisation, to use imprisonment "most efficiently" as a scarce resource aimed at those whom we recognise as "dangerous", or as bearing a strong propensity to develop into "career criminals". Some argue for the necessity to look forward at the same time as criminal justice looks back at the crime committed, stating that rehabilitation is the attempt to look forward while retribution is the backwards glance.¹²² This is problematic. Put another way, the retributive basis for a decision and the correctional/rehabilitative basis are polar opposites; they are from vastly different language games.¹²³

What is apparent is a collapse, in criminological quarters at least, in reductionism as the rationale of sentencing. That is to say, the belief that the control effect of criminal justice through sentencing policy was the determinant factor in the level of crime in society. The labelling school actually asserts that official sanctioning creates more crime and some argue that a more sensible policy is "radical non-intervention".¹²⁴ Even within the purely technical or 'problem' approach to punishment much of current research and thinking is as follows:-

(i) we cannot justify punishment of individuals solely in terms of any likelihood of reduced crime or recidivism;

(ii) scientific inquiry cannot indicate the 'right' amount of punishment for any crime, but this lack can suggest that we should not spend too much on punishments which do not work;

(iii) we have two problems rather than one; we have the problem of :-

(a) what to do with persons found guilty of crimes?

(b) what to do about crime itself?

That is to say, we can no longer simplify the problem of crime to the problem of the offender.¹²⁵

In criminal justice the lack of attention to this distinction between persons and acts, between methodological individualism and methodological holism, means that when administrative attention is turned to crime frequently it becomes the 'criminal' who is seen as the problem rather than social conditions (for example, the Johnson Administration started what was called a War on Crime, but quickly it became a war on criminals. Which is simply not the same thing. The Nixon Administration sought to wage a war upon the problem of drugs, but soon reduced this to the problem of drug pushers and traffickers - the social problem of drugs gets ignored).

This chapter began identifying the assumptions of control and social order underlying the two distinctive approaches characterising criminal justice arguing that reductionism was a consideration shared by both classicism and positivism. In methodological individualism, the classical reduction through deterrence; in positivism a reduction through lowered recidivism by individualised treatment; in methodological holism a reduction

of crime into a determinate of social structure. What this means, however, is that the 'justice' of criminal justice is a balance between social purpose, individual application, intellectual episteme and objectivity. In this way, inhabitants in the models of justice of modernity therefore see, as a crucial matter of epistemological foundationalism, that the rationality of decisions concerning the dispensation of justice is a question of methodology and a matter of selection of variables and information which is deemed correct for participation. Yet what is information: if a 'just' decision is 'one which is justified in the circumstances' then it follows that the 'justice' of a decision depends upon the relevant episteme which structures and guides the relevant historical 'sense', the methodology of collecting such information, the regime of fairness which lays down the appropriate presentation and rules of 'reading' information (i.e., general evidence), the resulting ranking of importance of such information, all of which may exist of a local - general tension.

Yet including the idea of uncertainty or local determinism is problematic to the normative assumptions of modernity. The statement whether a particular act is "right or wrong" is usually expected to give a certain answer; not one which says that it is probably right, but that it has a chance of being morally wrong or that it is only capable of being called "right" or "wrong" given our changeable social circumstances. Moreover, whatever the moral difficulties of dispensing justice, where we cannot claim complete assurance of accuracy in the availability of information, we are not justified in 'assuming' the data is always accurate or provides a picture of 'reality'.¹²⁶ The categories of sentencing guidelines are man made selections - relativism is their bedrock. Judges, and others, who make decisions in criminal justice, must accept that, regardless of the criteria they accept, their decisions will not be guaranteed by extra human standards, and that the 'justice' of their sets is a matter of social creation and possible choice.

Thus Just Deserts appears apt when it claims that to avoid this there should be a public structure which specifies relevant information and the methodology by which factors are deemed relevant to decision making. It is not only from an instrumentalist perspective concerned with developing an 'efficient system' that there appear to be good reasons why "Policy" should determine what items are to be considered, and as to whether these should be few in number or not. Since some form of inner relevance of the system must be in effect. Items which it is policy not to consider would then not be collected. As an example, if we decide that prior arrests (including, for example, cautions for juveniles) should not be considered but, regard should be paid only to convictions, then information on prior arrests should not be provided to the decision-maker concerned. The range and selection of information is linked to the policy considerations of punishment rationale and should be logically consistent for that structure.¹²⁷ Thus it logically follows that if a fully developed 'rational' system for sentencing is created it requires decisions as to the information

which constitutes the relevant factors and, for example, if we decide the crime is the same whether the victim or offender is old or young, it should not be possible for any decision-maker to arbitrarily decide otherwise - the alternative also holds, but "alternatively". That is the meaning of 'policy'. What that then leads us to ask is what sort of structure should it be which specifies the methodology of information collection and presentation - also what price discretion? And how open or closed should such a structure or methodology be? Must we in turning away from the over ambitious claimants of 'truth' in the modern state and succeed in recreating only another 'machine' which denies the desires which Ferri and other claimants for social theory in their varying ways expressed? A turning away from the tyranny of theory and the path of 'problem' only to be free from 'problem' at the expense of denying individuals entrapment in socio-political problems.¹²⁸

NOTES.

1. Hyman Gross, A Theory of Criminal Justice, Oxford University Press, New York, 1979, p.8-9.

2. Ibid., p.48.

3. Roscoe Pound, Criminal Justice in America, Dacapo Paperback, Brown University, 1957 [1930], p.3-4.

4. Roberto Unger, Passion: an essay on personality, Basic Books, New York, 1984.

5. Explaining Criminal Justice, p.xv.

6. I mean this phrase in a similar sense to the imagery of the social body which Roberto Unger develops in Social Theory: Its Situation and Its Task, Cambridge University Press, Cambridge, 1987.

7. See for instance Keith Hawkins, "The Interpretation of Evil in Criminal Settings", in Law and Deviance, H.Ross (ed.), Sage, London, 1981.

8. A. Keith Bottomley, Decisions in the Penal Process, Law in Society Series, Martin Robertson, London, 1973.

9. Ibid., p.131.

10. See for example F.Cullen and K.Gilbert, Rehabilitation Reaffirmed, Anderson, Cincinnati, 1982.

11.L.Wittgenstein, Lectures & Conversations on Aesthetics, Psychology & Religious Belief, Cyril Barrett (ed.), Basil Blackwell, Oxford, 1966, p.50.

12.Cf. E.B. Pashukanis, Law and Marxism: A General Theory, E. Einhorn Trans., Ink Links, London, 1978, whose own monotheism is a reduction of legal form to commodity form.

13.Following quotes from On The Genealogy of Morals, pp. 76-79. Walter Kaufman and R. Hollingdale Trans., Vintage Books, New York, 1969.

14.See James Campbell et al, Law and Order Reconsidered, Bantam Books, New York, 1970, when the implication is that a systems approach is necessary to overcome the identified lack of unification.

15.Included here is the majority of marxist analysis on punishment as well as work such as A. Scull's which locates the fiscal crises of the state as the determinant cause of change in Decarceration: Community Treatment and the Deviant: A Radical View, Prentice-Hall, New Jersey, 1977.

16.For the English situation see A. Ashworth, The English Criminal Process: a Review of Empirical Research, Occasional Paper No. 11, Centre for Criminological Research University of Oxford. 1984. In common with many studies this shows the variation in activities, "tensions and conflicts inherent in the criminal process", the desire to achieve a closely knit fully 'rationalised system' is apparent in 'official circles'. Leon Brittan the Home Secretary in 1984: "on taking office I decided that we needed a strategy which would enable us to pursue our priorities in a deliberate and coherent way. Such a strategy is now in place.... Our principal preoccupation is, and I believe ought to be the criminal justice system which incidently I wish to see treated in all that we do as a system." Quoted in Joe Sim, "Working for the Clampdown", in Law, Order and the Authoritarian State, Phil Scraton (ed.), Open University Press, 1987.

17.See on Hulsman, "Critical Criminology and the Concept of Crime" in H. Bianchi, R.Van Swaaningen (eds) Abolitionism, towards a non-repressive approach to crime, Free University Press, 1986.

18.Herbert Packer's two models of criminal justice, a "crime control" and a "due process" approach, placed the crime control model as fitting best with system thinking, and under it "extrajudicial processes should be preferred to judicial processes, informal operations to formal ones.... Routine, stereotyped procedures are essential if large numbers are being handled. The model that will operate successfully...must be an administrative, almost a managerial model." By contrast the due process model stresses legal safeguards in the handling of those caught up with criminal justice operations. It is against informality, and runs counter to the managerial ethos and the claims to specialized expertise that the supporters of social

science have sought to incorporate into the operation of criminal justice. But from another perspective, it is not so much against managerial decisions and or aimed at the control of crime, but seeks to achieve a different basis for decision making. One where 'constitutional' enactments and the multitude of related rules are to be observed and these define the relevant standing of the participants to each other. Where individuals are not defined in social theory but in the established conventions and statements (for instance, rights) of the community. The onus is upon those entitled to hold power, for example, police, prosecutors, judges, and penal officers to be constrained within this model and bound to exercise power judiciously and fairly; but this can be read as required for the crime control function to maintain its legitimacy. Thus Packer's contention that equality under the law is of primary concern, individualization of treatment and reduction of crime secondary is an ideal type. But see earlier comments on classicism and the fact that legality is about control not counter-control (Packer himself admits crime control is the description of operationality).

19. Michael King, The Framework of Criminal Justice, Croom Helm, London, 1981.

20. Again it appears as a hidden curriculum of 'interdisciplinary' studies to convert all human activities, all modes of intellectual study, to one thing; to a package of commensurability. But how is it at all possible to assume that this one thing could cover everything that is considered as essential? Again this surfaces in many places - it is an implicit notion in Santos. Recognising that the Enlightenment causes a split in Human study - the disciplines - the movement is to escape this split by a recombination.

21. To borrow some chapter titles of Stanley Cohen's Visions of Social Control.

22. The reality of disparities is well attested in the literature and appears more prevalent in decisions the less removed they are from being a relatively minor technical application of the lower ends of the tariff. [Roger Hood's study is illustrative, with little variation occurring in offences regarded as minor or technical infringements, but greater variation occurring in offences like drunken driving or driving whilst disqualified. Hood felt that the closer the offence was to "the accepted definition of crime", ie., what he called 'traditional crime', as opposed to regulatory kinds of offence, the greater the disparity in sentencing. Discussed in Bottomley, prev. cit. p.138.]

Another important aspect of disparities has been seen as the extent to which their existence lends support to either the "consensus theory" or the "conflict theory" of criminal law. Consensus theory takes its modern expression from Durkheim and his contention that the criminal law is an expression of the collective conscience of society. Here "the nature of collective sentiments accounts for punishment....the power of reaction which is given over to government functionaries is only an

emanation of that which has been diffuse in society...there is a social cohesion whose cause lies in a certain conformity of all particular consciences to a common type which is none other than the psychic type of society."(pp.104-5) This image of the judicial functionary being necessarily coextensive with the collective consciousness is embedded in the dominant traditions of jurisprudence.[Friedmann held:"The state of the criminal law continues to be - as it should - a decisive reflection of the social consciousness of a society. What kind of conduct an organized community considers, at a given point in time, sufficiently condemnable to impose official sanctions...is a barometer of the moral and social thinking of a community." Law in a Changing Society, 1964.

The criminal laws and the sentencing carried out in their name "speak to members of the community, in other words, on the community's behalf, with all the power and prestige of the community behind them".(Henry Hart)

For the English Lord Devlin the task of the law is to strongly enforce shared morality, the *sensus communis*, of society. Without enforcement society would disintegrate; by fiat of pen and in a movement similar to Berns, a society without a strong shared morality cannot be a society. Devlin, The Enforcement of Morals, Oxford University Press, Oxford, 1965. H.L.A. Hart's reply involved the epistemological critique and offered Devlin "the alternative of supplementing his contentions with evidence, or accepting that his statements... were not empirical statements at all but were disguised typologies or necessary truths.." University of Chicago Law Review, Vol 34, 3.]

Moving beyond the rather sterile dichotomy of this opposition the existence of sentencing disparities may act as a reflection wherein the confused nature of sentencing aims is actually a reflection of the confused and incoherent nature of our society's "moral and social thinking", that is to say it reflects its location in the ethics, theologies and power plays of the ordinary life only too well and its local consistencies provide evidence of what we may call, following Lyotard, the 'local determinism' of language games.

23.Mannheim et al, "Magisterial Policy in the London Juvenile Courts", British Journal of Delinquency, Vol 7 (1957), p. 136.

24.Decisions in the Penal Process, p.143.

25.Quoted in Ibid., p.143.

26.Ibid., p.170.

27.Donald Black, Sociological Justice, Oxford University Press, New York/Oxford, 1989, p.19

28.Jacobson reminds us of the terms that the bargain Hobbes drove were: we surrender to the Sovereign our power of opposing and he will protect us and brood for us the vicissitudes of existence, but at a price. "His price is that we henceforth agree to discuss the human condition in his terms, rather than ours; that we

discuss it in terms of reason and science, rather than of the passions - what Hobbes calls superstition, myth, and theology. To the sovereign we yield our judgement. To the scientist we surrender our understanding." Pride and Solace, p.61.

29. Foucault's definition of modernity in relation to rhetoric is illustrative. Thus: "The space of language today is not defined by Rhetoric but by the Library; by the ranging to infinity of fragmentary languages substituting for the double chain of rhetoric the simple, continuous, monotonous line of language left to its own devices..". Language, Counter-Memory, Practice, p.67.

30. See "Certainty and Human Action: Wittgenstein", being Chapter Four of Newell's Objectivity, Empiricism and Truth, for a fuller statement of the above paragraph and the drawing of this out in the case of Wittgenstein.

31. See, for instance, the criticisms in Nicholas Krittrie's The Right to be Different.

The whole movement for a 'rights orientation' in Juvenile Justice draws upon a critique of paternalism and the administrative tribunal (and hence anti-legalist) ethos of Juvenile Courts/Child Welfare Tribunals, see, for example, M.D.A. Freeman, The Rights and Wrongs of Children, Francis Pinter Publishers, London/Dover N.H., 1983. Paternalism does still have some supporters; Herbert Morris has recently proposed a philosophy of punishment based upon paternalism, as was a strong strand of H.L.A. Hart's thinking. See Hilary Allen, Justice Unbalanced, for a critical and deconstructivist analysis of 'male consideration for the female offender'.

32. See the use Weber makes of Traditional, Charismatic and Rational features of authority in the modern state in Economy and Society. W.F. Murphy in Elements of Judicial Strategy, Chicago University Press, Chicago, 1964, at pp. 12-13, specifies that the traditional and the charismatic complement the supposed legal-rationality of organizational legality. See in general for the ideological and symbolic features of the Judge, R.B.M. Cotterrell, The Sociology of Law: an introduction, pp. 241-253.

33. Richard Sennett, Authority, Knopf, New York, 1980, Ch.1.

34. Habermas, The philosophical Discourse of Modernity, p.209. For Habermas rhetoric is "subordinated to the discipline of a distinct form of argumentation", a disciplining which holds philosophy to the task of solving life's problems [implicitly 'correctly'] (rather than the playful destruction of the 'literary' texts of other 'experts' in that shared culture for instance), thus moral rhetoric provides argument to or from beliefs about what is right or wrong, just or unjust, good or evil; it serves a role as energising the constituting process of the social world.

35. H.L.A. Hart and A. Honore, Causation in the Law, Oxford University Press, Oxford, 1959 (2nd Ed. 1985).

36. P.F. Strawson, Freedom and Resentment, Methuen, London, 1974.

37. Especially the approach Wootton outlines in Crime and The Criminal Law, Hamlyn Lecture Series, Stevens & Sons, London, 1963.

38. The literature which asserted the adequacy of determinism in the modern period to stipulate judgement under the dictates of the facts of social theory is vast and the picture was drawn in the last chapter. For a picture of the force of its rhetoric in practice the defenses of Clarence Darrow in maintaining the incompatibility of moral responsibility and determinism are apt. His general position was that "Man is in no sense the maker of himself and has no power than any machine to escape the law of cause and effect. He does what he must. Therefore, there is no such thing as moral responsibility in the sense in which the expression is ordinarily used". Clarence Darrow, Crime: Its Cause and Treatment, Thomas Y. Crowell Co., New York, 1922, pp. 274-275. His defence of Leopold and Leod argued that hereditary and environmental factors had prevented them from developing normal emotional reactions, and so they should be pitied for their crime, not blamed.

39. All quotes from Freedom and Resentment, pp.1-34, this quote is from p.13..

40. Wootton, Crime and The Criminal Law, pp.102-3.

41. Ibid., pp.103-4.

42. J.Q. Wilson, Thinking About Crime, Vintage Books, New York, 1977, p.58.

43. Treatment in this context includes specific 'deterrence'. Wootton realises the dilemma with general deterrence which may pull against the decision a specific deterrent or treatment measure might indicate. See also the brief discussion in Walker, Sentencing: Theory and Practice, pp. 74-84.

44. The desire for a rational, scientific system along the Wootton lines is apparent not only in strictly "positivist" texts but also in some legalist texts such as that of Rupert Cross. Cross describes the present system as "based on a number of different impressionistic ranges of sentences for the different offenses based on a notion of gravity which turns out, on analysis, to be popular morality with a strong admixture of expediency: anything less scientific would be difficult to imagine". By comparison "the scientific control of crime" by a system of prison sentences "would entail the use of empirically verified generalizations .. however, there is at present no such thing as the scientific control of crime through the imposition of prison sentences of varying lengths because there are no empirically verified generalization such as those which have just been mentioned". Rupert Cross, The English Sentencing System, 3rd ed., Butterworths, London, 1981, p. 199.

45. Ibid., p.56.

46. Ibid., p.51.

47. B. Wootton, Social Science and Social Pathology, Routledge and Kegan Paul, London, 1959, p.252.

48. In Crime and the Criminal Law Wootton uses a limiting principle as "to take the minimum action which offers an adequate prospect of preventing future offenses". (p 95) She admits that "imprecision lurks in the word 'minimum' and that this word also implies a moral judgement", which she gives as "that freedom to live one's life after the fashion of one's choice is of value in itself". Thus "even in the case of offenders any restriction of this freedom must always be weighed against the possible social damage which might result from further offenses". This is a "qualification".

49. See the discussion in Michael Moore, Law and psychiatry: rethinking the relationship, pp. 233-43. His analysis of taxonomies of punishment demonstrates how a mixed theory of punishment actually reduces to a sophisticated retributionism with a bow to utilitarianism as the cost of organised society. In his thought experiments the mixed theory only appears to qualify utilitarianism when it is obvious that no punishment is justified, when however, it appears that punishment is justified on moral reactive grounds but no socially purposeful net social gain is the outcome the two aspects of the mixed theory appear in direct contradiction.

50. Leonard Leigh in Strict and Vicarious Liability, Sweet and Maxwell, London, 1987, argues that if proof of intention were needed for prosecution in the cases Strict Liability requirements were to cover the law would be simply unenforceable. The argument is consequentialist and is firmly in line with the acceptance of those features which are best suited to the 'rational organization' of the criminal justice system as a social control mechanism.

51. There are of course utilitarian arguments against Strict Liability. Namely that the evidence actually demonstrates in any case that the imposition of Strict Liability did not result in people being more careful and so forth.

52. Walter Berns, Capital Punishment, Basic Books, London, 1979, p.155.

53. Ibid., p.174.

54. Berns does a service by arguing through this notion but it is an implicit reason for punishment of a range of scholars who share an empiricist imagination. Leo Katz, in the midst of a work upon the jurisprudence of the criminal law written in a style somewhat removed from the clashes of life, simply states that criminal action is that action whose harm "arouses our emotions". Thus we punish the successful offender more than he who only made an attempt as "only he provokes anger. His punishment serves to still that anger." He further grounds distinctions upon the

question "why are we less angry with... than with...?" But such a rationale for punishment is never fully drawn out. Leo Katz, Bad Acts and Guilty Minds: Conundrums of the Criminal Law, University of Chicago Press, Chicago/London, 1987, p. 216.

55. Strawson gives an individualistic reading to the reactive attitudes. They do not cover accidental situations, or rather, the reactive attitude is substantially different in such situations. Accidental situations provide occasions where we continue to view the person as one for whom reactive attitudes are appropriate but wherein the injury caused by the act is part of an inappropriate situation for resentment to be focused. It is not the actual harm in material terms that is being the subject of our reactive attitudes but the ascription of these acts as the result of some form of willed activity, individualistically willed activity. Berns own project appeared to reduce the range of reactive attitudes to one dominant form but this is not necessary - even empirically, as Hume and Smith told us, pity and compassion do occur, moreover Kant did not simply deny the occurrence of any kind of emotionality with moral action. But for Kant if moral action was actually emotionality, than morality was reducible to natural causes and effects, i.e. to the epistemologically empirical science of 'natural' morality, rather than a rational science.

56. See John Lachs, Responsibility and the Individual in Modern Society, Harvester Press, 1981.

57. As Nietzsche put it in the Genealogy of Morals the notion central to modern political theory and contractual obligations, the notion of the autonomous individual was a result of social forces, see previous quote our Chapter Two. He goes on to say: "To breed an animal with the right to make promises - is this not the paradoxical task nature has set itself in the case of man? Is this not the real problem regarding man?" On The Genealogy of Morals, Essay II, sect 2.

Moreover, this entire edifice of social evolution comes about as a result of man's desires, of man's willing courses of development, but the philosophy neglects this in his anti-pragmatic abstractions. Nietzsche puts the pragmatic perspective in Beyond Good and Evil: "In all willing it is absolutely a question of commanding and obeying, on the basis... of a social structure composed of many 'souls'. hence a philosopher should claim the right to include willing within the sphere of morals - morals being understood as the doctrine of the relations of supremacy under which the phenomenon of 'life' comes to be." (W.Kaufmann trans., Random House, New York, 1966, at 19.)

58. B.F. Skinner "Humanism and Behaviorism": "What we feel when we have feelings and what we observe through introspection are nothing more than a rather miscellaneous set of collateral products or by-products of the environmental conditions to which behaviour is related.... Do I mean to say that Plato never discovered the mind? Or that Aquinas, Descartes, Locke and Kant were preoccupied with incidental, irrelevant by products of human behaviors? Yes I do. And I put the matter strongly because if we

are going to solve the problems that face the world today, this concern for mental life must no longer divert our attention from the environmental conditions of which it is a function." In A.J. Ayer (ed.) The Humanist Outlook, London, 1968, p. 101.

59. The response of neo-Aristotelians is to talk of actions having their own ends - to term them 'activities'. Activities are self-contained and satisfying with a co-penetration of means and ends.

60. See Limits to Pain, and also Beyond loneliness and institutions: communes for extraordinary people, Norwegian University Press, Oslo, 1989.

61. For an interesting portrayal of this see Nils Christie, "Crime Control as Drama", Journal of Law and Society, Vol. 13, No.1 (1986).

62. By social distancing I refer to differences in class, culture and gender intra-ethnic group, differences intensified when ethnic differences are present.

63. Spierenburg, The Spectacle of Suffering, p.185.

64. For some idea of the variability of the experiencing of imprisonment in England see Jail Journeys: The English Prison Experience 1918-1990, P. Priestly, Routledge, London, 1989.

65. Wittgenstein, Culture and Value, Basil Blackwell, Oxford, p. 40e.

66. My quotations are drawn from the introductory quotes in Chapter 1 of R.W. Newell's Objectivity, Empiricism and Truth, Routledge & Kegan Paul, London/New York, 1986. I draw extensively upon this work throughout the remainder of this chapter: I place it as a work within the pragmatic imagination. Another work in this area from which I have benefited and which also seeks to destroy the polar opposites of subjectivity - objectivity is Max Deutscher, Subjecting and Objecting: An Essay in Objectivity, Basil Blackwell, Oxford, 1983.

67. This a central notion in the analysis of Morse Peckham in Beyond The Tragic Vision.

68. Quoted in Bottomely, Decisions in the Penal Process, p.63.

69. The strong environmentalist appreciation of this holds that what a judge will do is almost entirely determined by his personal history and social position. See, for example, J.Griffith, The Politics of the Judiciary, Fontana, (3rd ed.) 1985.

70. This version of objectivity stresses the cognitive transparency of the subject matter of the act of judging (the theories of criminology, the offender, law): but with the cognitive transparency of that object questioned (dissolved), neutral observation has no essence which is not conceptually

embedded to identify, subject related features become constitutive within the process, and the language game embraces expressive and interpretative features.

71. Importantly the pragmatic perspective turns around the focus of questioning, for having asserted the impossibility of claiming that some things are simply true for men whether they realize them or not, the questioning shifts to the reasons for any belief being held. Emphasis shifts from the question "Is such and such a proposition correct or not?" to the question "Why should a person become convinced of such and such a thing?" The reason for the first is the traditional concern with elucidating the nature of the "justified" in the ascription of knowledge as "justified true belief" and the creation of further objective standards for the gauging of this; but in the pragmatic position, the search for the justified grounds for the holding of beliefs ends in the practices and actions of the holders. In this way opening up the opportunity to argue that there is no reasoning without reasoners, and that reasoners are people acting under the constraints of their current stock of opinions. A situation which the objectivist, in his attempted imposition of knowledge claims, will attempt to drag apart this mode of acting, but which is also one where in response the pragmatist can safely place on the agenda arguments about the style, quality and ethics of these practices on an equal footing to the arguments that we are to be led by "knowledge".

72. See our earlier discussion of Suicide.

73. See, for example, Lacey in State Punishment, Political Principles and Community Values.

74. T. O'Hagan, The end of law?, Basil Blackwell, Oxford, 1984.

75. See, Passion: an essay on personality.

76. The terms come from Roger Cotterrell, The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy, Butterworths, London/Edinburgh, 1989.

77. Dworkin, A Matter of Principle, Harvard University Press, Cambridge, Mass., 1985. See in particular Chapter 2. "The Forum of Principle".

78. After Virtue, p.253.

79. See Law's Empire, Chapter Seven, "Integrity in Law".

80. Law's Empire, p.407.

81. Others implicitly state the same thing. Nicola Lacey in State Punishment, Political Principles and Community Values, certainly argues that any discussion of the philosophy of punishment is necessarily a discussion of the 'parent' socio-political philosophies. In Lacey's community justification for punishment it is implicit that the justified protection of the community

against 'subversion' is expressly a protection of the socio-political structures of that society. When the universalistic pretensions of modernity's discourse is subjected to pragmatic understanding social defence is the defence, and affirmation, of particular arrangements and relations of subordination or equality.

82. Sociological Justice, p.6.

83. Ibid., p.94.

84. Ibid., p.101.

85. See our earlier discussions, the work of Foucault and Garland's Welfare and Punishment.

86. In Becoming Deviant David Matza drew a contrast between 'correction' and 'appreciation' as differing stances to deviant phenomenon. The correctional attitude comes about when we investigate "enterprises that violate cherished and widely shared standards of conduct and morality" and we slip our activities of investigation into a meta-narrative where the worth of our results lies in the enhanced ability of society to rid itself of the enterprises being studied. "The goal of ridding ourselves of the deviant phenomenon, however utopian, stands in sharp contrast to an appreciative perspective and may be referred to as correctional." (p.15) The correctional perspective experiences a 'lose of phenomenon' by "reducing it to that which it is not". The overriding concern with causation or 'etiology' "systematically interferes with the capacity to empathize and thus comprehend the subject of inquiry. Only through appreciation can the texture of social patterns and the nuances of human engagement with those patterns be understood and analyzed". The appreciative attitude is on the other hand a subjective view; it demands a commitment to render the phenomenon with fidelity and without violating its integrity.

"It delivers the analyst into the arms of the subject who renders the phenomenon, and commits him, though not without regrets or qualifications, to the subject's definition of the situation. This does not mean that the analyst always concurs with the subject's definition of the situation; rather that his aim is to comprehend and to illuminate the subject's view and to interpret the world as it appears to him". (p.25)

The weakness in this position is that it is not possible to escape to an innocent set of the 'subject's own definitions'; the language of interiority comes from the outside. The act of self description and of self analysis of one's situation is necessarily conducted in the language of the 'other'. What is possible is playing with alternative sets of language games, of not obeying the dictate to speak only in the language of the scientist but to be open to the potentiality of alternative forms of language games to inform and move us as 'criminology'.

87. Sykes and Matza in their "Techniques of neutralization: a theory of delinquency", show how a distorted version of this occurs when individuals outflank assertions of personal guilt or wrongdoing by turning explanatory hypothesis into justifications which serve to demonstrate their personal normalcy.

88. A.J. Ashworth, "Concepts of Criminal Justice", Quoted In R.A. Duff, Trials and Punishments, Cambridge University Press, Cambridge, 1986.

89. Trials and Punishments, p.143.

90. Ibid., p. 143.

91. Ibid., p.p. 260-1.

92. After Virtue, p.30.

93. Michel Foucault, The History of Sexuality. Vol. 1: An Introduction, Allen Lane, London, 1979.

94. See Nikolas Rose, Governing the soul: The shaping of the private self, Routledge, London/New York, 1990.

95. "Replies to my Critics", in Schilpp, (ed.) The Philosophy of Karl Popper, Open Court, La Salle, 1974, p.982.

96. "In systematizing and ordering the truths they take themselves to have discovered, the adherents of a tradition may well assign a primary place in the structures of their theorizing to certain truths and treat them as first metaphysical or practical principles. But such principles will have to vindicate themselves in the historical process of dialectical justification. It is by reference to such first principles that subordinate truths will be justified within a particular body of theory, and it is by reference to such first principles that in... theories of practical reasoning both particular practical judgments and actions themselves will be justified..... Traditions fail the Cartesian test of beginning from unassailable evident truths; not only do they begin from contingent positivity, but each begins from a point different from that of the others. Traditions also fail the Hegelian test of showing that their goal is some final rational state which they share with all other movements of thought." [Whose Justice? Which Rationality?, pp.360-1.]

97. In MacIntyre's analysis since the core elements of a tradition establish themselves over time and survive 'epistemological crises' in a movement from 'warranted assertability' to a truth function. To have passed through an epistemological crisis enables the adherents of a tradition to rewrite the history of that tradition in a way that provides not only a way of identifying the continuities in virtue of which that tradition has survived but also to identify more accurately the structure of justification which underpins whatever claims to truth are made within it. The survival of criminal law from the attack of positivism thus should be a time of reassessment of what it

exactly it is within both its doctrine and its fit with social ordering which appears to underpin the role of the criminal law in modernity. In other words reflexive understanding of the present needs to become pragmatized - a precondition, pace MacIntyre, for dialogue and translatability between traditions, or, as we would scale these down, developed sets of conceptual schemes or Lyotardian 'centres'.

98. Roger Cotterrell in an article pre-dating the publication of Whose Justice? Which Rationality? stated that it would require an crisis for legal understanding to attempt to 'contextualise itself'. He held that legal discourse was extremely efficient at protecting itself from "interference from external knowledge fields." "Law and Sociology", 13 Journal of Law and Society, 1986, pp. 9-29.

99. David Nelken, "Criminal Law and Criminal Justice: Some Notes on Their Irrelation", in I.H. Dennis (ed.) Criminal Law and Justice, Sweet & Maxwell, London, 1987.

100. David Nelkin, "The Truth about Law's Truth", Working Papers No.7, Faculty of Laws, University College London, 1989.

101. Ibid., p.90.

102. Ibid., pp.90-1.

103. Cf. (among others) David Downes, "Law and Order: The theft of an Issue", Fabian Society, London, 1983.; P.Norton (ed.) Law and Order in British Politics; S.Jones and M.Levi, "Law and Order and the Causes of Crime: Some Police and Public Perspectives", Howard Journal of Criminal Justice, Feb 1987, pp 1-14; M.Kettle, "The Drift to Law and Order", in S.Hall and M.Jacques (eds.) The Politics of Thatcherism, Lawrence & Wishart, London, 1983; R.Reiner, "Fuzzy Thoughts: the police and law and order politics", Sociological Review, 28, 1980; For a New Zealand comparison, J.Pratt, "Law and Order Politics in New Zealand 1986: A Comparison with the United Kingdom 1974-79", International Journal of the Sociology of Law", 1988, 16, pp 103-126.

104. As it was subtly put in the 1990 White Paper Crime, Justice and Protecting The Public:

"No Government should try to influence the decisions of the court in individual cases. The independence of the judiciary is rightly regarded as a cornerstone of our liberties. But sentencing principles and sentencing practice are matters of legitimate concern to Government, and parliament provides the funds necessary to give effect to the court's decisions." (p.5) Further it is stated that "if the punishment is just, and in proportion to the seriousness of the offence, then the victim, the victim's family and friends, and the public will be satisfied that the law has been upheld and there will be no desire for further retaliation or private revenge." (p.5)

105. Just Gaming, p.27.

106. State Formation and Civilization, p.171

107. This fear is common, for example, to Ralf Dahrendorf, Law and Order; Bob Roshier, Controlling Crime: The Classical Perspective in Criminology; Phil Scraton et, al. Law, Order and the Authoritarian State.

108. American Friends Service Committee, Struggle for Justice, Hill and Wang, New York, 1972 (originally published 1971).

109. Andrew Von Hirsch (Report of the Committee for the Study of Incarceration), Doing Justice, Hill and Wang, New York, 1976.

110. Also The Twentieth Century Task Force on Criminal Sentencing, Fair and Certain Punishment, New York, 1976; P. O'Donnell, M.J.Churgin and D.E.Curtis, Towards a Just and Effective Sentencing System, 1977; Crime and Punishment in New York: An Inquiry into Sentencing and the Criminal Justice System, 1979. In related frame, David Fogel, We are the Living Proof: the Justice Model of Corrections, Anderson, Cincinnati, 1975. A British text on the loss of rehabilitative faith already referred to is A.E. Bottoms and R.H.Preston (eds.), The Coming Penal Crisis.

111. In modern criminological circles the following (among others) support this claim: D.Cressey, "The Nature and Effectiveness of Correctional Techniques", Law and Contemporary Problems, 23, 1958; D.Cressey and K.Schuessler, "Personality Characteristics of Criminals", American Journal of Sociology, 1950; R.Cabot, "Treatment in Social casework and the need for a criterion of tests of its success or failure", Proceedings of the National Conference on Social Work, 1931; B.Coulter and E. Korpi, "Rehabilitation Programs in American Prisons and Correctional Institutions", Journal of Criminal Law, Criminology and Police Science, 1954. The most widely read rhetoric flourish of the 70's was R.Martinson's "What Works? - Questions and answers about prison reform", The Public Interest, no. 35, Spring 1974, p.22. Martinson's lesser read qualification of his "nothing works" position begins in R. Martinson, Rehabilitation, Recidivism and Research, National Council on Crime and Delinquency, New Jersey, 1976, and "New Findings, New Views: A Note of Caution regarding Sentencing Reform", 7 Hofstra Law Review, No. 2, p.243. See also Stephen Brody, The Effectiveness of Sentencing, HMSO, London, 1976.

112. See the summary of Nigel Walker in his Sentencing: Theory, Law and Practice, Butterworths, London, 1985, especially chapter six, "The Efficacy of Corrections", pp. 74-93.

113. Justice for Children, p.48.

114. Of course the opposite is also true, and some arguments for Just Deserts were for a return to swift and sure punishment, hence there is little guidance either way. Doubt is not just post-consensus: "The bleak fact is that just as the monstrous punishments of the eighteenth century failed to curtail crime,

so the more humane handling of the twentieth century has equally failed to do so." L.McKorkle and R.Korn, "Resocialisation within Walls", Annals of the American Academy of Political and Social Science, 1954, p.95. What appears to happen is that a move to fixed sentences on economic and humanistic grounds becomes transformed after the system gains support into moves for longer sentences. See Barbara Hudson, Justice through Punishment, and for an earlier American view D.Greenberg and D.Humphries "The Co-option of Fixed Sentencing Reform", Crime and Delinquency, Vol 26, pp 206-25.

115.Sect. 2.21 of the 1990 White paper: "To help the courts in sentencing decisions, the Government also proposes that the legislation should place a new duty on the secretary of state to inform the courts annually of the costs of implementing penalties and to publish information about the costs of the criminal justice system for the attention of those who take the decisions in the system...

The courts as well as other services, should know the costs of the decisions they take. Financial considerations can never be the deciding factor in sentencing. Even so, the courts should take some account of the costs of implementing their decisions when they sentence, especially when they have a choice of suitable penalties." (p.10)

116.Again F.Cullen and K.Gilbert, Rehabilitation Reaffirmed, Anderson, Cincinnati, 1982.

117.Visions of Social Control, p.250.

118.Hence the frequent allusions to George Orwell and Clockwork Orange in certain recent texts.

119.See, for example, the criticism by Jessica Mitford, The American Prison Business, Allen & Unwin, London, 1974.

120.Nils Christie sums the movement up as Beccaria rides again. See his comments in Limits to Pain, prev. cit. Barbara Hudson agrees adding that it is a return "to a Kantian view of morality and the moral need for punishment" (as opposed to the image of Freud) with a return to a Hobbesian view of the State. Barbara Hudson, Justice Through Punishment: A Critique of the 'Justice' Model of Corrections. Macmillan, London, 1987.

Although Just Deserts claims the 'moral high ground' R.A.Duff's reading of Kantian philosophy (in Trials and Punishments), which this text agrees with in the main, is dramatically different from the Just Deserts outcome however, which leads to the suspicion that expediency and the desire for an uncomplicated machine, which is Christie's analysis, is stronger than the moral position.

121.The Society of Friends' document, noted previously, makes the point. In protesting the "correctional approach" they say, "The whole person is not the concern of the law". They say, in other words, that it is morally right that decisions as to the disposal of offenders should be made on the basis of limited information.

122. Andrew Von Hirsch makes use of this distinction in his analysis of the difference in perspective these opposing tendencies engage in his Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of criminals, Rutgers University Press, New Brunswick, N.J., 1985. (U.K. ed., Manchester University Press, Manchester, 1986.)

123. An early formulation of this argument is that of Sheldon Amos who stated that one could not discuss the theory of punishment in isolation as it belonged "as much to Ethics and Politics as it does to jurisprudence". Its primary end was to enforce universal obedience to the criminal law and not the reformation of the criminal, which was a secondary end stating that "the two cannot even be put on the scales over against one another. They are incommensurable qualities." Sheldon Amos, A systematic View of the Science of Jurisprudence, 1872 and The Science of Law, 1874. Quoted in Leo Radzinowicz and Roger Hood, A History of English Criminal Law and its Administration from 1750: Vol 5, The Emergence of Penal Policy, Stevens and Sons, London, 1986, at p.16.

124. See writing following Lemert's distinction of primary and secondary deviance. Human Deviance, Social Problems and Social Control, Prentice Hall, New York, 1967, particularly E. Schur, radical Non-intervention, Prentice Hall, Englewood Cliffs, NJ, 1973.

125. This summary of the debate draws upon Leslie Wilkins, particularly his paper "Rationality and Morality in the Criminal Justice Process", in Effective, Rational and Humane Criminal Justice, HEUNI Publications series No 3, Helsinki, Finland, 1984, pp. 96-106, and Consumerist Criminology, Heineman, London, 1986.

126. One reason for Just Deserts is to outflank the need for a 'true' expertise as in the case of diagnosing "dangerousness". The Just Deserts advocates claim the errors of predictive statements are avoided because they do not make any forward judgments - only relating their decisions to the past. In particular they point to the 'false positives' which arise when predictive, or prognostically, based decisions are made.

A false positive occurs when a prognosis is made that the individual will "fail" (e.g. recidivate etc), but, in fact, he does not. A false negative occurs when the prognosis indicates success, but the individual, in fact, fails.

127. For example, each of the recently proposed American 'strategies' structures the range of relevant information differently. Just Deserts plays primarily with a conception of the seriousness of the crime, but in practice adds to this information as to prior convictions. [See the appendix on the "Minnesota sentencing guidelines and commentary" to Sentencing Reform: Guidance or Guidelines?, Ken Pease and Martin Wasik (eds.), Manchester University Press, Manchester, 1987, at pp 183-205.]

Strict deterrence (general) rationale has no interest in the offender's prior record but should consider information as to the

operationality of deterrent sentences in managing the social: normally it does not. Incapacitation, particularly in its "selective" variants attempts to combine the rhetoric of deinstitutionalisation, economic calculation as to the best use of resources, and 'diagnostic' prediction as to subsequent offending risk for individuals. Thus the expert has a crucial technical role of providing a selection process giving relevant information giving "the classification for risk... and the concomitant development of criteria on the basis of which a process of de-institutionization - or at least a substantial population reduction - can be implemented." This "classification system should seek to identify those offenders who commit serious predatory crimes and violence, in order to separate them from offenders who do not represent any serious risk to the public". [E.E. Flynn, "Classification for Risk and Supervision: A Preliminary Conceptualization", in J. Freeman (ed.), Prisons Past and Future, London, Heinemann, 1978, pp 134-5.]

128. For the pragmatic imagination what is an 'efficient system' is a matter of the range of presuppositions and foundational claims the users of that system adopt. To seek efficiency in the direction of Just Deserts makes sense in the light of a particular configuration of such suppositions, however, they are just that - others could be added, and efficiency aligned more to other sorts of considerations, as, for example, Duff outlines, i.e. participation in the process by the 'offender', communication, and a reflection on the circumstances, both moral and sociological, of both his predicament and that of the social body.

Chapter Ten: Conceiving of the context of criminological pragmatism.

I

We have identified the traditionally dominant movement of criminological self-consciousness as the period of 'progressive humanism'. This saw criminology and penology as a journey of enlightenment where emotion and irrationality gave way to rationality and the scientific approach to criminal justice uncovering knowledge which guided social practice towards a more humane and efficient epoch. Most texts until the late 1960's give this but prominent examples are the texts of Barnes and Teeters, Sutherland, and the first edition of Vold. Criminological change is explained by progress in knowledge and social consciousness - the point of criminology is 'the scientific study of crime'; penology is society humanising its penalty structures by applying the resulting understandings and knowledges. Implicit in these approaches is also a social theory - a social theory which assumes a deep structural foundation to social change which is progressive and within which the criminal justice system is a functional entity. Society is moving through stages, there are law-like generalisations to be uncovered - generalisations of the truth of human nature and social organisation, criminology applies this to one area. The progress of human societies represents the progress of a natural order, the supremacy of the west, the proof of western social evolution.

A second development, roughly called critical or radical, is found partially in the later editions of Vold's Theoretical Criminology, Radzinowicz in his Ideology and Crime and, more explicitly, in the works which, like the New Criminology, adopt an historical awareness for criminology and criminal justice which is derived from marxism. There is a division between the Radzinowicz style account and that which is marxist influenced. The former keeps the humanist accent but strengthens it with an allowance that the production of criminological discourse comes not only from the predominantly secular context of naturalism but

must be understood in the context of a developing state and society under liberalism.¹ The latter is partially anti-humanist in that it relegates humanism to a determined position and locates 'humanitarian progress' as a functional element within a vaguely positioned general social theory. While texts such as The New Criminology, the work of Pearson² or Platt would agree with Poggi³ in placing an emphasis on class struggle as the driving force of early liberalism the liberal state is seen as constructed to favour and sustain through the acts of rule the class domination of a developing bourgeoisie over the society as a whole. Marx's dictum that legal ideology was a "veritable garden of Eden of the bourgeois rights of man" implies that it was for class purposes that the institutional rules of state organization were ultimately directed and their contrast with the structures of the previous society must be understood in this light.⁴ The abstract rights of individuals, for instance, facilitated the process wherein labour power is sold for wages through individual employment contracts. Moreover the equality of all individuals before the law made sense as a constitutional principle because, as a matter of course, the legal protection of private property which directed the order-keeping, law-enforcement and repressive activities of the police and courts favoured the interests of the propertied groups. Thus is introduced the phenomena of politics. This politics is not, however, a freely productive politics. Politics here is mankind acting within the structural games of deeper forces and human conflict is the medium of other deeper and more important 'material' forces. Politics is only a reflection of nature. From one perspective the liberal view naturalises the institutions of society, seeing the institutions as reflections of the very nature of free and democratic modern societies. Although he may recognise these institutions as formed through the compromises of conflicting perspectives, as with tolerance itself, the resultant state of affairs easily becomes defended as the structure of a free society. The organisational formations of these so-called western-liberal-democratic societies are seen as representing and reflecting the most socially progressive modes

of human life and coexistence, their dominance evidence of the triumphant march of modernity's apex. Evidence of the power of a totality founded, it appeared, on a coherent set of activating principles and corresponding to a distinct stage in the material and moral history of mankind. From the marxist perspective these same institutional and organisational formations are subsumed under a general type of social organisation that represents a particular and demarcated stage of world history.

A third period of interpretation has grown up in the wake of the work of Foucault and emphasizes the social control functionality of criminal justice (examples are texts such as Garland and Young, The Power to Punish; S. Cohen, Visions of Social Control; Cohen and Scull; Social Control and the State, Lowman et al, Transcarration: essays in the sociology of social control). Strangely, although this work is expressly hyper-critical in its tone, it appears to take the normative assumptions of criminal justice texts at their face, to assume, that is, that the spoken normative desires of criminal justice reformers and administrators, for example to order society, to render society governable, to locate criminal justice and punishment as a solely instrumental function engaged in the magnification of productive forces, actually empirically describe criminal justice and punishment as the vehicles of instrumental plans that are functioning. They thus tend to suffer from an overstatement of social control rationality, of a new monolithic paradigm for punishment.

It appears that having deconstructed the 'wigg' view of criminal justice history the temptation within criminological revisionism is to fall back into a new form of essentialising - to forget Nietzsche and the demand for multiple perspectives in favour of reading Nietzsche's imitator Foucault as not only offering, at least on a crude neo-Hegelian reading, the image of a theory of 'power' as the spirit of this revised history, but actually producing it as the new 'supra-text'. Admittedly this statement stylises somewhat and an increasing reflexivity is apparent in

the later works of this area.⁵ There is, alternatively, a lot to be gained in a reconstitution of much of the themes offered in both Wiggism and marxism, i.e. that criminal justice and punishment encompasses a range of factors, desires, emotional states, conflicts and power games. To give a pessimistic reading to social control in modernity is to ignore the extent to which the institutions of modern, so called 'liberal-democratic' societies are an attempt to 'do justice' to human desires, fears, hopes and aspirations. The Popperian understanding of modernity, that modern western societies are the most free, most equal, most opportunist in history has some force as Marx well understood. This latter period of revision does, however, implicitly capture a tension partly expressed in the whole mind-body dichotomy - the fact that man's longing, man's dreaming, man's desires never seem to be able to be matched by the products of his labour and the functioning of his body. Whatever the context the mind reserves the ability to transcend and the desiring, to hoping, the striving, the effort for 'better' social arrangements never seems to gain a full satisfaction. The experiencing of the created formations, the life of modernity, is a mixture of pride, reflection, dissatisfaction and movement. In this third set of writings the deconstruction of moving behind the narrative of progress and the distress of uncovering fables is a tension in criminology between telling narratives which point to loyalty to society, loyalty which can point to the extremes of an authority structure where criminology teaches an acceptance of an authoritarian model of society, and a transformative idea. A transformative idea where criminology is part of constructing the new and thus must depart from the authority of the present.

II

Each approach stresses different elements, different themes of the self-description of modernity. Around the axis of construction, control, nature, lies a melange of concepts and perspectives. Each in turn tells some story, grants some

illumination, stylises some relationship of humanity to society to nature - creates some formation of perceived reality via the objectification of concepts.

Battles of perspectives are fought, for example, over reductionism,⁶ which also become battles over the participation of actors and their effectuality.⁷ Can social thought actually change the world, what are the tactics of intellectuals and how much of constructionism is actually preservation?⁸ All are questions of praxis. All movements, all disruptions of the routine of societies operation, however, create effects. The vastness of the range of effects and contingent variables entails that the scope of the effects is unpredictable. For example in the abstract universalism of early modernity a concomitant happening is that all activities not directly implicated in the state are best left to obey their own markets, their own internal dynamics. The dominance of state power then exists alongside a range of semi-autonomous spheres and an increasingly articulate 'public sphere' of intellectual and artistic discourses which is actually a mixture of sub-spheres. Modernism consists of differentiated spheres of influence and expertise, spheres, however, which overlap, interact and co-influence in terms, not of a stratification and hierarchy, but, of perceived functionality. The search for the 'determinate entity', the specific motor force of modern society, is thus doomed since the 'laws' of change and movement must exist as a result of causal interactions of what, in the final analysis, are probabilistically random exchanges.⁹ The product of such searches is only the temporality of a symbolically generalised motif.

In depicting the contingency of social order as the present finding of pragmatic social theory, the dilemma of macro-sociological conceptions of the social context of change is raised. How is it possible to both conceive of social change and the contextuality of practice without closing off the varieties of transformative desire into units which are submissive to the requirements of a deep structural theory of society and social

change? How is it possible, in other words, to rescue the dream of philosophy, that man can normatively arrange the world, from the rigours of sociology, that things are connected to the operation of the natural world and are required to be a functional fit? Whilst, at the same time, avoiding the trap of philosophy, i.e. rationalism. The perspective that there is a normative deep structure of reason which lies behind the chaotic empirical appearances and structures which can be known by sociology. Or of sociology, i.e. a deep empiricist faith that only those things which are a functional fit to the naturalist foundation determined by general laws and inflexible constraints are possible? Reflexive pragmatism offers hints of a modality for answering this.

III

Reflexive pragmatism argues that a post-modernist social theory, one that aims at being truly explanatory, has a closer connection to, and greater room for, man's normative arguments than the foundationalist preconceptions of rationalism or empiricism allow.

Reflexive pragmatism asserts the social order is made and is not a development of some scheme of naturalist progression. It rejects the empiricist idea that there is a natural scheme of coordination and association for the entities of the social world and that the structure of that scheme is inherent in the experience of the common life, in the operation of the 'normal' social order. It denies also that society moves to its ideal, or highest, form under a transcendent imposition of a grand template of pure coherence. The empiricist idea is rejected in favour of a radical contingency in social formations, the rationalist is seen to appeal to an immanent moral rationality in history whose destiny is the fate of the human spirit, an uplifting ideal whose reality is normative rather than believable. To hold either position is to believe forms of neo-creationism.

Instead the pragmatist takes seriously the dicta that 'God is dead', and with her death all forms of conceptualization beyond those systems of articulation that man can create are illusionary. If social reality is not 'God's problem' neither is it man's - social reality is 'mystery' not 'problem'. The meaning to 'reality' can never be reflectively told, it can only be expressively created. No meta-correction of articulation, or final statement, is possible - only historical interplay. The correction of meaning lies in the reflexive questioning of social context and structure - the ongoing demand 'was this really what we wanted?' and the pragmatist suspects that the answer will always be 'no'. The pragmatist asserts that the questioning and the answer are necessarily part of the structure of development, a process which can escape the trap of freezing construction into naturalism only through the realization that all activity is contextually bound.

The paradox of structure, of contextualism, is that it can never be finally transposed, overcome, or transcended but that it always is in the state of being so. Man's transcendence of context, of structure, begins in the first moment of questioning the naturalism of that context - of questioning whether the experiencing of the context adequates the normative interpretation of its existence. Thus pragmatism, the non-naturalist but human status of foundations and thus the reality of the social world as artifact, and a reflexivity, which operates within the pragmatism of reality, that is in the imaginative context that the understanding of social context, the system of representation and relationship which opens up the possibilities for dreaming a transformation, is a context rather than a natural order, combine as a mechanism of social change. Under reflexive pragmatism explanation and social change are insuperable.

To reflexive pragmatism both empiricism and rationalism deny the conditionality of social worlds when they claim to do any more than offer us morsels, altarge of human striving.

Reflexive pragmatism presents a sociology of language games and their change. For their inhibitors language games, the settled routine of social existence, represent time-spacial locations wherein social relationships appear fixed, and, through this fixity and closeness, take on an aura of naturalness, of being the normal order of things. The in-built tendency is, therein, to see the present as the natural, as the logical and necessary codification of the form of existence. The reflexive awareness of a pragmatic epistemology undercuts this. It gives instead an awareness that the foundations are artifice and neither a structure of reason illuminated in one or other of the possible sets of human existence, or a stage of naturalist progression in the evolutionary sequences of the natural order. The disclosure of the relativity of foundations, and their human origin, highlights the contingent, malleable and perilous nature of social formations. The fixed therefore, begins to be understood as the fixed only because of the strength of its context.

The settled, the life of language games, is thus the product of, and dependant upon, formative contexts. What is the regular today, the norm, the accepted, may truly have been a paralogy yesterday, and the contingency of its future, its labelling as progressive or deleterious, is not escaped by the phraseology 'being ahead of its time'. Which, as in Durkheim's structurally progressive conception of positive deviancy, merely indicates a neo-creationist metaphysic of history lurking behind this theory. Instead reflexive pragmatism asserts the routine of today was both constructed and largely unplanned, both created and undesigned. Its totality, and the interaction of its differentiation, defies prediction.¹⁰

The formative context revealed here, a pragmatic development of Durkheim's later idealist functionalist without foundational-structure commitments, is neither a choice in a world revealing structures of reason, or a stage in a predetermined sequential evolution, but a temporal configuration resultant from probabilistic chance exchanges. The social world has the

characteristics that it has today is not predetermined and would have been impossible to predict. Moreover, the daily entities of the human world, for example human and legal rights, although perhaps functional expressions of dominant self-conceptions of modern humanity, are 'accidents' of history because even the basic physical structure of modern humanity is 'accidental'. [The use of accidental here denotes that present humanity and social structure is a result of chance, the features which define modern humanity can be seen as unessential qualities or properties.¹¹ Unessential in the sense that there is no essence to humanity, no inherent structure which is objectively the basic forms of mind and behaviour, no arrangement of social organization which is incorrigibly definite, no statement of human purpose which is non-revisable. There are also not 'accidental' in the sense that the retention of contingency, its transformation into routine requires the proactive use and embedment of paralogies.¹² After all, in terms of the language of time we use to describe the universe the amount of time which separates 'us' from the 'ancient greeks' is only a minute unit.] Although, as with the interiority of conceptual schemes, the routine interiority of a formative context exhibits a functional linkage, the openness of possible formative contexts means that the number of possible social systems and evolutionary paths is open-ended.

Thus there is no master-plan to social evolution, no template to be uncovered. This is both cause for optimism and melancholy. Freeing, uplifting, in that there is always the possibility of future social reality being 'better' than the optimism and pessimism of today's imagination. Melancholic in that there is no guarantee that the 'achievements' of today are secure since they are neither the products of the true empirical flow of natural order and progress or the reflection of the structure of reason. Their reality as human 'pragma' is also their weakness - their only guarantee is human objectivity, that is human involvement.

The understanding that the routine games of today were deviant

moves of yesterday upsets the comfortable marcations of the common life. Politics becomes, not just state affairs but the foundational basis of what is now accepted as the common life. The state civil society divide is revealed as problematic. We need only touch on the penal aspects of this understanding. Punishment in modernity is a phenomena conceptually bound to the state - to the relationship of state to populace. Forms of punishment are thus implicated in forms of state organization. On the one hand we can recognise this as expressed in the marxist meta-narrative where the marxist post-modern, i.e. the communist society, was to be both a stateless society and a society without punishment. On the other hand contemporary 'liberal' writers who cannot imagine the disappearance of the state, such as Rawls or Van de Haag, also cannot imagine the disappearance of punishment and formal criminal justice. For Rawls the threat of punishment and the presence of the criminal justice system is necessary to guarantee the social contract which men enter into in the constitution of the just society. Rawls is with Hobbes in that he assumes a characteristic of human nature that men will always seek more than their share of social resources.¹³ For Van den Haag criminal justice and punishment protects the distributive system which is perhaps 'unjust' but the best there is.¹⁴ But in this situation the character of punishment and criminal justice must necessarily be implicated in the distributive system in operation and the ideologies of the relationship of individual to state. This may sound banal but it also means that its operations, that is the formations of penalty, are compatible with these relations - not only this but also that the formations of penalty are implicated in the socialising of power forms within the society.¹⁵ Law's implication with power is as a medium. Thus the close connection of law with the two dominant definitions of power. One stresses coercion or command and is expressed in Austin's conception of legality, the ability to get someone to do something against their will, the other sees power as a capacity created by social agreement, and the instrumentality of law as the structuring of this agreement. Yet this agreement may be seen as a form of ideology (marxism),

power/knowledge/rationality complexes (Foucault), or subject to the hegemony of monopolist tendencies. In the first stylisation of power stand off positions can result which rob social dynamics of directive energy, while with the second if agreement can successfully place ideological, political and economic power as non-contradictory, perhaps sharing the narrative of moving in the same direction (progress), it is likely that social energy can be increased. Agreement need not be narrowly construed as the pluralist formations of liberal modernity witness. What is also witnessed in liberal modernity is a form of agreement, narratively inspired, that the application of political, and economic power and thus the formations which reinforce such political and economic power, i.e. the use of force both militarily and internally to the nation state via the criminal justice system, is progressive. That is an agreement between forms of ideological power, expressed in the narratives of progress via secularity, industrialism, urbanization, social engineering and so forth, political power and economic power. The internal socio-political battles of modern western society, battles over rights and distributive policies, many of which originate locally and have wider repercussions, follow Kant's prescription on the organization of unsocial sociability of man which converts the antagonism of civil society into the ethical state via the adherence to the idea of lawful society. Put another way, the legal framework of modernity enables the institutionalization of the class struggle but this may depend on the one hand on an agreed narrative positioning of progress, on the idea of modernity itself, and the normative overcoming of tradition and arbitrary community by law and universality. On the idea that this institutionalization is to achieve something.¹⁶ Nowhere is this illusion more apparent than in neo-liberals such as Hayek and the new model of society as the free market guaranteed by the rule of law and the strict reciprocity of crime-punishment for what this model disregards is that the institutions of modernity are in place as part of the narratives of progress and achievement. Narratives which have linked desires for equality and liberty (including in 'critical' thought

emancipation) to collective modalities and public goods. The withdrawal from the social projects of modernity in the name of an individualism responsive only to the rule of law, conflates freedom solely to privacy. It denies that the privacy of the individual is linked to and is a product of the structuring of the social. It claims that to conceive individual man as necessarily the product of politics, and thus as a recipient of the burdens of political promise, a carrier of socio-political obligations, is to unjustly burden private individuals with public obligations. This position neglects, therefore, the 'fact' that modern individuality is a socially produced public creation.

In looking back at the tradition of the classical polis Hannah Arendt put an opposing view:

"Without a politically guaranteed public realm, freedom lacks the worldly space to make its appearance. To be sure it may still dwell in men's hearts as desire or hope or yearning; but the human heart, as we all know, is a very dark place, and whatever goes on in its obscurity can hardly be called a demonstrable fact. Freedom as a demonstrable fact and politics coincide and are related to each other like two sides of the same matter."¹⁷

II

The example of humanitarian rationalism and bodily punishment: a site for forces both internal to criminal justice and external to interpenetrate.

Throughout Discipline and Punish Foucault drew clear distinctions in order to impress the occurrence of a "transformation". This has become a subject of controversy and in commenting upon Foucault Minson,¹⁸ for example, draws out how Foucault conflates various elements to construct clear images of legal as opposed to a disciplinary mode of power. Drawing upon Langbein's work on legal history¹⁹ Minson argues that the 'transformation' out of reliance upon physical pain can be seen as resulting from subtle changes in the law of evidence (proof). Namely, the move to

accepting more circumstantial evidence which removed the necessity for torture for confession (which was a personal statement of 'truth'), the rise of the jury as a forum of judgement and the emergence of new penalties such as galley service or incarceration in workhouses which cannot be credited either to humanitarianism or corrective designs per se.

Foucault thus appears to overstate the reformers' role in securing the abolition of torture. Instead of torture being a product and continuation of the ancient symbolisms of blood, Langbein argues it was part of a move away from the foundation of Divine guidance that underpinned the trial by ordeal while at the same time retaining some Divine status for 'evidence' which circumstantial evidence, involving the total reliance upon human judgement, replaces with the contingency of human judgement. This move was also linked to necessary changes in the legal system as it became geared to handling rather petty offences as its norm rather than the capital offence.

While Spierenburg agrees that to see the abolition of torture during the Enlightenment as a logical consequence of the age "is simply not true" and that the works of the rationalists restated arguments that had been advanced against torture earlier, he argues, however, that it was not mainly as a consequence of the old law of proof losing its force but a situation where "the rationalist critique, which had never been successful before, could acquire a new effectiveness because of a change of sensibilities".²⁰

Spierenburg's work outlines an increased sensibility to the sight of corpses - a question often not only of sight and sound but also of a bourgeois concern with the value of real estate close to the gallows as towns expanded. Part of the explanation for the decline of physical punishment and the public spectacle is the changing attitudes towards death:

"in the long run familiarity with death and the infliction of pain decreased". (S. p.191)

An encompassing process of privatization was in play wherein the territory of a developing private life began to hide scenes and actions directly related to the human body. From the 5th century to 1850 Western Europe experienced a "promiscuity between the living and the dead", which became superseded by a general privatization. Poggi reminds us that in the absolutist state the ruler, such as the King of France,

"was thoroughly, without residue, a 'public' personage. His mother gave birth to him in public, and from that time his existence, down to its most trivial moments, was acted out before the eyes of attendants who were holders of dignified offices..... When he died (in public), his body was promptly and messily chopped up in public, and its severed parts ceremoniously handed out to the more exalted among the personages who had been attending him throughout his mortal existence."

The royal court was constructed so as to magnify and display his existence in a visible world of privilege, conveying a symbolic, ritualised splendour.²¹

For Spierenburg from the mid-nineteenth century the stage managed theatre of repression - the symbolism of public punishment - became part of a process of privatization. Repression as a phenomena moved on to a period of more impersonal and less visible modes of control. Control and repression which, however, still needed in the nineteenth century a minimum of exemplary and openly repressive character. Prisons tended to be located on a conspicuous spot where a road or a railway entered a town and indirect knowledge of the death penalty, carried out within prison walls remained alive. Against the Foucaultean picture of sudden 'transformation' Spierenburg presents a picture of gradual change, of social privatization at the same time that the system of public order maintenance was depersonalised and acquired a more bureaucratic character. While enthusiasm for 'moral treatments' prevailed in the first half of the nineteenth century "the penitentiary cannot be considered as the successor to public executions", instead "classical nineteenth century imprisonment represented an experimental phase contemporary to the last days of public executions". The new penal measures had their own set

of justifications. The heyday of the penitentiary and solitary confinement was the middle of the century after which enthusiasm declined - such experimental penal methods and public executions were both generally superseded by the century's end:

"routine imprisonment succeeded - with capital punishment indoors for a few heinous offenses - to the top of the penal system.

....feelings of sensitivity did not vanish... every modern western society witnesses the conflict between a perceived necessity of punishment and an uneasiness at its practice."(S. p.206)

Why had the play of power in the public execution been necessary? Spierenburg combines a description of the rise of the state and the sensitivities of the populace. Central to criminal justice is the relationship of subordination. Criminology recognises this in two major forms:

1) the central theme of the concept of 'punishment' is an evil applied by a person of authority over the receiver - if there is no such relationship then it is not punishment but vengeance or feud.

2) in the creation of the legal enactment, the proclamation of norms, the criminal law places the power of definition as central. This is recognised by both 'Conflict' and 'Labelling' schools. The result is a process of definitional stabilization and colonization of the social by the power of the state.

The social terrain of 'the penal/criminal justice system' is effectually created with the emergence of the feudal system setting up a complex web of subordination with the King at the top (incidentally the only person for whom wergeld [compensation for assault and injury] was impossible as he had no equal). The journey of the criminal justice system is the journey of the central authority of society - in time the 'state'.

Early in the development of this terrain the offender is 'placed at the mercy of the Lord' and here the implication is that a religious notion has entered criminal justice since "mercy was an attribute of God, the ultimate judge". The relationship of all

people to God was one of subordination, hence God was able to punish and to show mercy. By analogy this line of thought was given to the territorial lord. By the twelfth century private vengeance had been pushed back to a degree but continued in abated form and the various courts were not in a very strong position often acting as mediators between the parties involved. Criminal justice evolved as the formation of the state took place and also as urbanization took place. The town represented a geographical locality in which traditional relationships of subordination were disrupted and in time new systems of stratification emerged. Private vengeance was transferred to the authorities of the towns; any 'prosecution policy', however, was confined to the major crimes, with reconciliation and mediation surviving in cases of petty theft and minor violence. The mediators were not the courts but prestigious members of local communities and this infra-judicial resolution of conflict prevailed beneath the system of justice from above. This form of infra-judicial resolution survived until the end of the 'ancien regime', which meant that preindustrial repression was never the automatic response to all sorts of illegal acts. For Spierenburg the increase in frequency of corporal and capital penalties from the twelfth to the sixteenth centuries was not a reflection of any increase in taste for the sight of violence and suffering but primarily a consequence of the growth of the system of criminal justice.

"Physical punishment was simply introduced into a world which was accustomed to the infliction of physical injury and suffering. In that sense it was not an alien element. The authorities took over the practice of vengeance from private individuals. As private retaliation had often been violent, so was the penal system adopted by the authorities. Similarly, as the first had always been a public affair, so was the second. Attitudes to violence remained basically the same."(S. p.12)

This expropriation of private vengeance by the medieval rulers explains much of the theatrical nature of public punishment in that they were drawn into a display which served the double function of warning potential transgressors of the law that criminal justice would be practised and warning everyone to

remember who practised it. In that it retains the symbolism of the early 'displays of righteousness', part of the edifying aspect is of punishment suffered humbly and dutifully; ideally the offender himself recognises his mistake in breaching the order of things (thus it is a penitent and edifying death that is witnessed). The power of the display tells the populace that 'justice' reigns in the particular locality (the town) and the reign of justice implies the presence of persons powerful enough to catch and punish transgressors of the law. The element of exemplariness is clearly the purpose of actions performed on dead bodies (for example, the hanging of the body of the suicide 'offender') and the exposure of dead bodies secured a degree of permanence for the example. For instance, in a town the executions themselves were primarily meant as an example to the inhabitants and the exposure of corpses along the roads was a special warning directed at non-residents.

The abolition of the exposure of the criminals' bodies comes about at the end of the 'ancien regime'. It is not simply from an increased sensitivity of the populace linked to feelings of stronger inter-human identification, but with the early beginnings of the nation-state the image of a city of law lost its meaning and it was easier to abolish the display of dead bodies. Spierenburg states: "no political counter-argument opposed the demands of increased sensitivity". We may restate this in terms of political arguments that complemented the demands of increased sensitivity. The tracts of both Hume and Beccaria, for instance, explicitly use the concept of sensitivity and intra-human identification (also involved in the use of 'sympathy') at the same time as change is demanded in the name of progress and reason.

Although Spierenburg is correct in attacking Foucault's image of a sudden transformation, and perhaps implicitly for seeing that the concept of power is too weak a notion to solely base the hold knowledge and discourse have over social change, his arguments neglect the fact that Foucault is especially interested with

highlighting matters of criminal justice and social control in the 'modern age of communications' and 'disciplinary information'. The message is of the power of language and of social theory, 'disciplinary power', the ability of the suppositions of a modernity to see its image as progressive growth through knowledge, to shape the practice and composition of the world in a flow of power reminiscent of Weberian domination:

"The situation in which the manifested will of the ruler or rulers is meant to influence the conduct of one or more others and actually does influence it in such a way that their conduct to a socially relevant degree occurs as if the ruled had made the content of the command the maxim of their conduct for its own sake."²²

Thus the open commands of the sovereign give way to the supposed 'objectivity' of rational discourse and democratic consent.²³ Spierenburg's analysis is not such a contradiction of Foucault as he appears to believe since he also demonstrates the rationality of what traditional criminology had treated as 'irrational barbarity' and locates its expressions in the context of the theologies (metaphysics) and ethics of ordinary life; a context which is the arena of communication and symbolism. Foucault's example of punishment in the Ancien Regime had, after all, not been a normal crime but parricide. The rationality of the horrific public punishment inflicted in that case is that parricide openly offends against 'the order of things' - it is an upsetting of the sovereignty/obedience hierarchy of power and the accepted metaphysics of life (the backdrop of the cosmic order). It does not matter that the mass of crime may be intra-group or between people similar in status, and perhaps basically 'unreported' and unpunished or arbitrated, since, at least individually, they are not threats to that order.

Similarly, the punishments of today link to a changed theology and ethics of everyday life as well as the changing position of the ordinary life. In modernity the everyday life, the common life which Hume champions, becomes more important than the 'other'. The other, the pursuit of abstract contemplation, the

concern with the 'after life', or the refined life of scared mediation in a structured community, of which MacIntyre ends After Virtue with an image, becomes subjected in modern life to the creation and betterment of one's individual space within the plays of ordinary life (production, consuming, marriage, the career). The image of penal power which modern life offers then should be congruent with the sensibility of that ordinary life (as is indicated by Foucault's emphasis on 'normalization' as the dark side of this relationship). As the ordinary life gains in sensitivity to violence so must the state lower the violence of penalty but this lowering of violence is as a result of social processes which it only becomes aware of under reflexivity. A reflexivity which threatens to rob modernity of its confidence in its humanitarian progress. The ordinary life, as it were, becomes so over burdened as a creation of modernity, that it can not stand the self-realization that it was not 'ordinary'.

III

The necessity for the partial self-regulation of the ordinary/common life in modernity.

H.L.A.Hart was clear about the relationship of criminal justice to the features of modern man and what particular feature 'liberal' criminal justice was congruent with:

"even if things go wrong... a man whose choices are right and who has done his best to keep the law will not suffer...Our system does not interfere till harm has been done and has been proved to have been done with the appropriate mens rea. But the risk that is here taken for granted is not taken for nothing. It is the price that we pay for general recognition that a man's fate should depend upon his choice - and this is to foster the prime social virtue of self-restraint."²⁴

This mirrors the preface he wrote with Honore to the second edition of Causation in the Law where the argument was that irrespective of the epistemological status of legal notions of responsibility the adherence to legal notions rather than social

science reinforced responsible behaviour.²⁵

What is the formation of 'responsible behaviour' is not placed within a social theory in such legalist texts. Conversely Foucault's analysis portrayed modern humanitarianism, the growth of knowledges of the self, the use of these knowledges to gain self-control, and the socializing of self-restraint in the individual and the civilizing of the state, as a kind of stratagem of a new growing structure of control. In a different project Norbert Elias offers a grand overview of 'the civilizing process' which highlights aspects of the relationship between the 'civilizing' of punishment, social control, and the civilizing of the state.

In The History of Manners²⁶ Elias set out an account of the internalisation or growth in self control of conduct and sentiments. The rationalization of man consisted in an increase in self-restraint and calculation concerning longer term goals, concomitantly the more 'animal' activities were increasingly forced out of the norm of man's communal life and invested with shame. The structural-functional account of this process of spread of the personality of what Hume called the modern 'middling class' lies in the development of the changing position and demands on individual life inside the process of formation of the modern centralised states.²⁷

In State Formation and Civilization²⁸ the process of state formation relies upon establishing a central monopoly on official or legitimate violence and taxation - the driving force for change is the continuous competitive struggles between individuals and between larger social groups bound up with each other by functional interdependencies. The modern state allows a particular, stratified, competition for resources which are largely controlled by the monopoly unit (the nation state) which is itself in a field of competition with other units (other nation states). The modern state retains its stability as a consequence of its combined monopoly on violence and taxation and

of the enhanced functional differentiation of society. The process of functional differentiation is intensified by the state's pacification of its territories and its role as superordinate coordinator. The state strengthens its stability while operating to secure the space for functional differentiation to develop further.

In the ordinary life of modernity the individual is exposed to different constraints from those of the smaller and local societies - the increase in the range of interdependency and functions of people necessitates a changed and increased degree of regulation of conduct and relations; this regulation is increasingly self centred with the individual being compelled to regulate his conduct in an increasingly differentiated, more even and stable manner. It is a form of regulation which increasingly comes to take the form of correct socialization in the early years of the individual.²⁹

The civilizing of the individual and the civilizing of the state are thus co-dependent. The state is required to act in a stable and even manner to facilitate the process of competition and functional differentiation within it; the individuals are required to act in an even and stable manner to facilitate the operation of functional differentiation and to ensure that civil society remains free from the state's direct intrusion as a dominate and visible player rather than as a superordinate co-ordinator. The state is itself dependent upon the functioning of society and from being a monopoly formation governing in the interests of a small minority the state comes to govern on behalf of 'the system' - organising as a superordinate co-ordinator and mediating the various interests and demands of individuals organised according to specifically functionally bound interests. It is this process which writers such as Foucault and Garland grapple with.

Foucault, for instance, says of this connection between the inputs and desires of these differentiated groups of individuals

in the field of 'philanthropy' in the early nineteenth century:

"people appear who make it their business to involve themselves in other people's lives, health, nutrition, housing: then, out of this confused set of functions there emerge certain personages, institutions, forms of knowledge: public hygiene, inspectors, social workers, psychologists."³⁰

It is precisely at this "compromised form of knowledge" which Garland directs his attack in The Power to Punish and later analyses in more depth in Punishment and Welfare. The point here is that these analysts cannot, and do not in the main, assert that the development and use of these knowledges and forms of regulation is a simple plot laid by any particular group, rather the model of change is more the Elias model of demands and interests arising out of the differentiated body of society which require to be mediated, analyzed, and integrated into operative formations (under the guise of the rationally organised managerial state).

Garland's understanding of this however, appears to be that the power to punish operates as a mechanism of control and Foucault's early understanding is that this results in a constellation of domination not humanitarianism, a functional fit to a certain constellation of power. This requires some reduction, implicitly at least, to a historically evolving hierarchy of power which is highly questionable and illegitimate on Foucault's own terms (since his thesis claims to refuse to hierarchise). Although Elias sees the development of the modern state as tending towards monopoly formation, the general form of that analysis proposes that the 'civilizing process' is an auto-dynamic societal development which cannot easily be reduced to a dominant directional dynamics, but which produces a modern mode of life whose 'pleasures' it constitutively develops, reinforces and which it responds to. The two poles of the civilizing process, the evolution of a state monopoly on violence and the development of a psychic discipline, are ambivalent.³¹ The monopoly on violence grants to the state a power to implement one-sided interests which coincide to its monopoly formation, yet the psychic self-disciplining of the individual has not only resulted

in a production of behaviour commensurate with the requirements of the external monopoly and the development of repressions and sublimations but has also created a relative autonomy for individuals which also serves as a focus for resistance.³²

The escape of individuality from structure is enabled by reflexivity. Since reflexivity, as understood by ethnomethodology, consists of routine self-accounting behaviour which can lead the individual onto new patterns of action otherwise structured from without.³³ Luhmann has put forward this dialectic of reflexivity - new form of behaviour, as the motor force of social change. Although it has been argued that reading the functionalist social theory of Luhmann, one "must confront the contempt for the subject characteristic of the stoicism of Luhmann's social technology",³⁴ in Luhmann's analysis of "love as passion" reflexivity functions as the methodology by which resistance to structure is accomplished and change generated. Almost paradoxically, reflexivity occasions change, by revealing the 'soft foundations' and uncertainty endemic in analyzed social life.³⁵

Luhmann chooses to take modern love as his example since from the point of view of systems theory:

"Intimate relationships are social systems which are expected, particularly by the participants, to do complete justice to the views and needs of those involved." (L as P. p.172.)

The social system of intimate relationships is thus then a micro-example of the striving for justice in the social system of a society.

The modern appearance of love as passion is socially induced - the vocabulary and modes of communication which constitute feelings and modalities of expression, for example, courting, living together, marriage, are at one and the same time provided by society and manufactured in the dialectics of individuality and sociality. The interaction of two individuals is within the universality and givenness of social structure but in their

attraction, in their interaction, they find socially provided methodologies, vocabularies, for mutual absorption, for example, 'being in love', which differentiates the formed 'couple' from 'society'. This potentiality for differentiation, this difference from the social, is, however, provided by the codified conventionality of the social. The codes of love's vocabulary provide a mechanism by which the experiences of the self, attraction, intimacy, desire, can be understood. Understood in the vocal expressions 'I'm in love'/'we are in love'/'we are now a couple', and yet socially affirmed in these expressions since the conditions for the interiority of the private experience conditions the mechanisms for positive feedback both to the individuals and to the social. That is, the couple receive or are denied social acceptance of the 'match', 'you are good together'/'he is not right for you', and data on this aspect of the health of the population is produced for state organizations, namely, social research on the stability and demands of 'love relationships'.

Passionate love is thus a relationship in which individuals' private feelings can be understood and expressed in such a way as to be socially affirmed. Furthermore in the sociality of the code the 'others' gain understanding and commensurability of the private experience of the individuals. The others understand that 'they are in love', which is something that the sociality of the code entails is a possibility, if not already experienced for the others who may say: 'I was in love once'. Yet this arouses an impossible tension, since it demands both constant scrutiny which calls into play reflexivity. Reflexivity, both for the individual constituting the 'couple' and the others. 'Are we still in love?', 'is that the behaviour of true love?', 'were we really like that?' are questions which continually surface. This self accounting, aroused by the differentiation of the other, impacts upon the self denying the possibility of stability. Some change, therefore, of states of awareness, or of action, ensures. Further the very existence of the code provides the conditions for the uncertainty of the ontology of the relationship. 'Is this really

love?' is always the question. Empassioned love is never static, or certain but in movement. Becoming intensified, enhanced, or downgraded by the reflexivity of the couples use and embedment in the social code which provides the modality for the expression and affirmation of their relationship to each other. The richness of the codes of love, found in common sense, religiosity, prose, poetry and economics, provide the material for all the excesses and mundaneness, for the idealizations and bitterness, and for the expansionism and finiteness, of the human activity to be expressed. Under the impact of authenticity, under modernity's dictates of subjectivity, a code is utilized

"which attempts to express that the lover himself is the source of his love, this also being what spontaneity must now mean. Love should not wait for an inquiry before making itself known; it must pre-empt every wish and question so as not to seem like a duty or a conciliatory gesture." (L as P. p.166)

The lover preserves his own freedom and self-determination by anticipating the wishes of the person who is the centre of his attention:

"And then the paradox of voluntary submission, of wanting to stay in chains, is also lifted, and one sees what is most important in everyday life: being able to act as the self of one's own ego, as the source of one's own love." (L as P. p.166)³⁶

This throws up, however, the problem of "sincerity in communication between lovers", since Luhmann has asked us "to understand intimacy as interpenetration", and again this interacts with reflexivity. How can one truly be certain that the communication is actually taking place - how can one calm the ambiguity of the others' and one's own gestures and utterances? For Luhmann this uncertainty is contained by "self-referential systematization".

"Self-referential systematization increases in direct proportion to the improbability of communicative success and the uncertain fate of the social relationship. The more uncertain one is of how the other will adapt to expectations, the more indispensable it becomes to a system within which one can interpret one's own utterances and the ensuing reactions to them." (L as P. p. 30.)

The preservation of true love becomes a problem when the couple realise the instability of passion. Realizing the problem of preserving the relationship, transforms the relationship, when the couple learn that marriage is a viable solution. Marriage is codified as the solution to preserving impassioned love, and is freely entered into by the couple, in their acceptance of the necessity for self-preservation. For self-preservation as a couple. The uncertainty of ontology under reflexivity creates codified institutionalization.³⁷ By extension the solution to the uncertainty of the ontology of the social world, the undecidability of 'mystery', is patterned institutionalisation.

IV

Luhmann on law and social systems.

Luhmann's analysis of modern Western societies is similar to Elias; they are "centerless". 'Sociologically' the distinctiveness of modernity is the creation of societies of high differentiation which are composed of a complex of relatively autonomous sub-systems which interact creating a whole which is better viewed as a sort of evolutionary terrain rather than some determinate system easily definable into a set of dominant productive forces.³⁸

Furthermore, Luhmann's denial of the possibility of uncovering 'objective society', his construction of interactional, differentiated 'mystery' to replace the transcendental illusion of grand theory, grants to the subject the being of mystery itself. It is not possible for the subject to 'know' reality since the very possibility of the subject is only occasioned in the meaning of the process which locates the meaningful itself. This, apparently tautological proposition, follows from the absolute repudiation of anything outside of the 'system'. Neither a stance to grant positivistic 'objectivity' to reality, or a

determinate motor is locatable. Neither a grand history to penalty (to borrow Garland's term), or a definite meaning to punishment, is possible. In the penalty/punishment complex, within the interactions of normative theory, sociological empirical observation, humanitarian passion, and metaphysical horror, undecidability is a consequence of the process of modern social transformation. Since the differentiation of criminal justice, which is part of the process of the differentiation of modern social development, inevitably throws up problems of procedure. These problems occur because the procedures or conventions which codify and stylise social conduct are seen to be self-referential. All activities of social existence, activities of social identity, are activities of meaning in socially generated codes. The differentiation of totality, a totality which holds out the dream of definite definition, and thus of a philosophically mediated unity to existence, at the same time as all attempts to encompass this totality throw up perspectivism and disciplinisation, entails instead a unity only of difference. The total is a totality only because it is other than the differentiation of spheres.

For Luhmann, social claims, expectations, desires and fears are expressed in four societal media: 1) political power relations, 2) monetary, exchange and market relations, 3) cultural norms and socialization relations, 4) the medium of truth or knowledge. Society has evolved from basically a kinship-orientated, segmentally differentiated form to become characterised by functional differentiation, with the development of multiple sub-systems exhibiting both relative autonomy and interdependence.

The complexity of this social formation demands law; law functions as the congruent generalization of normative behaviour expectations.³⁹ This version of 'sedimentation theory' gives to law the effect of reducing complexity in social formations, assuring predictability, and allowing reciprocal presumptive behaviour. We have come from Hume through Durkheim to a new form of grand social unification. In the coordination mechanisms of

Luhmann, however, functionalist reductionism ends not in an underlying natural flow but in unpredictability and undecidability. The paradox of this social theory is that the very structures which create predictability ensure an ongoing developmental undecidability and unpredictability to social evolution. Put another way, the pragmatism of grand theory results not in the solution of the 'problem' of social being, but in its 'mystery'.

The reflexivity of social structure provides the route to this unpredictability. This reflexivity occurs when individuals operating a media seek to understand the 'truth' of their performance. Law is a facilitative mechanism and a media of understanding and structuring predictability in the increasing differentiated social system. It is a mechanism which responds to the demand for expectational structures. Law's existence is not reducible to a tool of coercion. Nor is it reducible to economic determination. Law is not simply the extension of a central coercive apparatus. Law is not the grand imposer of social control. Law's existence minimises the openness of social 'reality' which otherwise would be an infinite spiral/regress of interactional interpretative 'expectations of expectations' constituted and reconstituted in interaction. The existence of law means that individual interaction is rescued from multiple realities by the constructive reality of law. In Luhmann's analysis social life-worlds tend to complexity, contingency and randomness of combination under differentiation whilst law tends to simplicity, order, and predictability. Thus two key postulates exist in his overall scheme. First, social evolution tends to greater differentiation, and greater complexity. Conditions which appear to go against the human demand for stability. Second, the human demand for stability creates the myth of the one, of the absolute. This demand establishes the unescapable mythical and irrational basis to 'rationality'.⁴⁰ The universality implicit in rationalism and empiricism is mythical.

Law's undecidability results from a reflexive analysis of society

attempting to impose a universal binary code to structure predictability in differentiated societies. The binary code of legality contains an unremovable paradox, however, since what is the right is definable only in relation to the other, to the wrong and not to any supra-code reality. Thus even when the Rule of law replaces certain traditional paradoxes by distinctions, for example, the old paradox of the right to change the law, the advent of reflexivity ensures that the problem is only moved backwards in a regress and not removed. In the case of the right to change the law, the old paradox of turning the right into wrong, is resolved in modernity with the distinctions political-legal and the resolution to the problem of change where "the legal system may recognise political motives as sufficient for changing the law - but only at the level of legislation and not at the level of adjudication".⁴¹ However, this new distinction between the legal and the illegal, between the constitutional and the unconstitutional, (or, put another way, adherence to Hart's secondary rules guaranteeing the primary rules) merely transfers the paradox. Since, in addition to the doubt that not all legal paradoxes can be replaced by distinctions, we have

"the paradoxes implied in using distinctions, the paradoxes of the same that is treated as different? And above all, what about the paradox of defining the law by the distinction of legal and illegal?"⁴²

Put another way, does not Hart's system of the creation of valid law depend upon the prior acceptance of a legal and illegal process of creation? Reflexivity comes about in the question:

"how can society enforce a binary code? How can one ever be sure that the true is not untrue and the right is not wrong...what happens within a legal system when the society enforces its code?"⁴³

The procedures or conventions which codify social conduct are found to be self-referential. The solution is pragmatic consistency, the grammertization of words into life forms. Codified convention is thus both self-referenced and fed into life in a meaning-in-use, as opposed to under the dictates of a 'right' above right and wrong, for no such super-right exists. Instead:

"the validity of a programme depends on its own execution. The execution of the programme becomes a condition of the execution of the programme. Hang the man if - and only if - you hang him. This instruction, of course, would make issues undecidable."⁴⁴

V

A concluding reading on prospects for contemporary penal change.

So we have come to the situation of pragmatism: the splitting of universalistic claims into paradigmatical references. The splitting of the social, of the concept of society into differentiated spheres and processes of monopolistic formations. The pragmatist has lost the goal of the clearly designed, utilitarian functioning, fully commensurable totality as the dream of social engineering. We are left with tactics, 'steering mechanisms' and the allure of pluralism. The image gives some hope for the pragmatist in the field of social control for if the social is a collection of differentiated spheres, opportunities for experimentation and diversity of social life may occur. Stanley Cohen identifies seven possible "semi-autonomous fields", that is:

"social units which can generate rules, customs and symbols internally and which have the means to induce compliance - but which are vulnerable to rules and decisions from the outside world."⁴⁵

These are:

1. Experiments in community control and informal justice;
2. Self-help and mutual-aid organizations (the diverse forms include the 'anonymous deviant' groups, alternative health centres, shelters for women);
3. Systems of private and work-place justice (including workers courts, workers councils);
4. Organizations possessing internal justice mechanisms (for example, the army, professional associations, and educational institutions);
5. Communes and other 'utopian' social collectivities;
6. 'Spontaneous' forms of living and working communally; and
7. Previous societies where entire non-centralised, non-statist forms of social control existed (such as acephalus societies).

If these fields may help to realise certain 'human' values,⁴⁶
Cohen's conclusion

"is rather simple and predictable: the further away we move from the discourse of criminal justice, the more likely we are to find the conditions for realising those values...
....You cannot, that is have it both ways: statist criminal law and decentralization. To be realistic about law and order must mean to be unrealistic (that is, imaginative) about the possibilities of order without law. To take decentralization seriously means that you must be an abolitionist." ⁴⁷

Accepting the Elias analysis, however, runs counter to this aspect of Cohen's practical conclusion. For these are examples of forms of social control and collective expression in the nature of semi-autonomous fields which, if they are to exist in modified form, must exist in the shadow of the state. When Cohen categorises the criminal law as "a state run organization which maintains the monopoly on defining certain behaviour as criminal and then organising the punishment of such behaviour by the deliberate infliction of pain", he also neglects the work of 'living law' which takes Ehrlich as its distant founder⁴⁸ - everyday negotiation of normative behaviour is not necessarily encompassed in the hegemony of law. Moreover, the strategy under the Elias analysis instead of abolitionism would be a question of limiting the intrusion of the power to punish under the criminal law by convincing the state that the civilizing of the social is better achieved by alternative means which leave intact those crucial aspects of the state's domain (i.e. the monopoly over violence and taxation). The structural conditions for the limiting of the state's power to punish is the balanced self-regulation of the social which makes illegitimate the overt intrusion of the state.

As to understanding the role of the state in contemporary penal practice Elias and Luhmann are underdeveloped in their impact upon legal theory or criminological discourse. The intellectual narratives used in locating the phenomena of the changing mode of involvement of the state are more delineated and stylized. Kamenka and Tay, for example, set out a threefold typology of

Gemeinschaft (organic communal-familial), Gesellschaft (contractual commercial-individualist), and Bureaucratic-administrative types of regulation. In his analysis of trends in juvenile justice Pratt recognises that the 'back to justice' demands espouse Kamenka and Tay's Gesellschaft model which

"emphasizes formal procedure, impartiality, adjudicative justice, precise legal provisions and the rationality and predictability of legal administration. It distinguishes sharply between law and administration, between the public and the private, the legal and the moral, between the civil obligation and the criminal offence."⁴⁹

However, as Pratt also understands, the complex happenings around the 'return to justice' do not amount to a Gesellschaft position but correspond more to bureaucratic-administrative law. The features which Pratt outlines in contemporary juvenile justice, i.e. an increase in cautioning and pre-court disposal of cases, the growth of inter-agency co-operation, the development of alternatives to care/custody programmes, a decline in personal autonomy of decision makers, an increase in the role of the voluntary sector, the development of a juvenile justice technology and bifurcation, depict a situation where

"the presupposition and concern is neither an organic human community nor an atomic individual; the presupposition and concern is a non-human abstracted ruling interest, public or on-going activity of which human beings and individuals are subordinates, functionaries or carriers... [the object of the regulations is] ..the efficient execution of tasks and the attainment of goals and norms... which are set by the authorities, or the 'community', or the bureaucracy as its representative."⁵⁰

The relationship is not, however, fully controlled, the discourses of the delinquent refuse to become silent. Delinquency 'fights' back. The various arenas where decisions are made present opportunities where discourse on delinquency can arise anew, discourses which come out of the pragmatism of the sites which new frameworks provide. Pratt turns to the third element in the typology which Unger provides (the rule of law, welfare law, and corporatism), viz. corporatism, as a 'third model of juvenile justice'. Unger's picture of corporatism is the 'post-liberal state' whose attributes are

"the gradual approximation of state and society, of the public and the private sphere. For one thing the state's pretence to being the neutral guardian of the social order is abandoned. For another thing, private organizations are increasingly recognised and treated as entities with the kind of power that traditional doctrine viewed as the prerogative of government. People may become conscious...[that] society consists of a constellation of governments, rather than an association of individuals held together by a single government.

The state that has lost both the reality and the consciousness of its separation from society is a corporate state."⁵¹

Corporatism is a development, it is not a return. The penology of Just Deserts is not the situation of classicism where the tariff may be thought to be the work of a group dominating the state. It is perhaps one instead where the populace have democratically affixed the tariff - by voting for instance on mandatory penalties (or, alternatively, the corporatism of the proposed 'sentencing tribunal'). The catch is that this democracy will enforce the messages by which the populace vote. Nor is rehabilitation wholly expunged, it is not converted into an 'other' by which the purity of the normal is to be judged, for there are places where rehabilitation is the normal and places where it is the 'other' and both are within the complexity of the social body.

Just Deserts also comes about with the realization that the things done in the name of 'treatment' and 'expertise', although taken from the prerogative of the 'political' state and handed to spheres of expert competence, do not transcend the political but are necessarily an extension or effect of state organization.⁵² Under corporatism the state attempts to regulate the workings of these non-state bodies which now operate in a interdependent relationship (in British Juvenile Justice regulating 'diversion' in the criteria of diversion, cautioning, for instance⁵³).

In the general concept of diversion, namely cautioning for juveniles as mentioned above, the range of Intermediate Treatment schemes in British Juvenile Justice and in some aspects of

Intensive Supervision or Community Service we see the dialectics of state decentralization. Criteria of decision making are imposed, criteria, which are, however, at least claimed to be wide enough to allow scope for variation on the local level. This is, however, a controlled diversity. The diversity of operationality in Community Service, for example, may be curtailed in the name of creating a form of 'punishment in the community'.⁵⁴ In general, however, the persistence of some forms of rehabilitative ethos in these areas becomes understood under the social theory of Elias as something which is not merely an ally of the welfare state or the social engineering aspect of modernity. It is rather a necessary condition of the complex functional differentiation of modern society - part of the preparation of a specific type of late modern individuals. In advanced modern societies, where the government plays the role of a super-ordinate coordinator of the sub-spheres of civil society, complex, detailed and highly advanced technologies will increasingly be utilised - technologies which intensify even further individuals interdependence upon each other. These societies will require that the individuals in this situation exercise a high degree of self discipline and self motivation as well as respect for others and the institutions that they deal with. Conversely, these new technologies applied in social control will make it both increasingly possible to observe what citizens are doing and less possible to understand what they are doing. Thus normative training, or training in sets of reciprocal expectations, will be required, such training must encompass the youth in delinquency and offender groups. This prognosis or macro-sociological picture of post-modernity, of the post-industrial advanced societies, is thus one of the need for a new form of rehabilitation, of social training for citizens adjudged deviant or delinquent.⁵⁵

It is as well to note that recent writings have stressed the degree to which the 'sciences of rehabilitation' cannot be separated out of their life as part of general sciences of the human self. Sciences which play their part in the socio-econ-

political government of modern population. Techniques of psychotherapeutics, for example, are argued by Rose to be in accordance with political rationales for the government of conduct, for semi-political projects for forming specifically 'modern' selves able to occupy the historically open space of choices of modernity.

"They are characteristically sought when individuals feel unable to bear the obligations of selfhood, or when they are anguished by them. And the rationale of psychotherapies - and this applies equally to contemporary psychiatry - is to restore to individuals the capacity to function as autonomous beings in the contractual society of the self. Selves unable to operate the imperative of choice are to be restored through therapy to the status of a choosing individual....

The psychotherapies provide technologies of individuality for the production and regulation of the individual who is 'free to choose'"⁵⁶

In the life situations of 'delinquents', a situation Matza characterised in terms of 'drift' and 'subterranean values', the establishment of regimes of choice and operation of life projects appears to be demanded by the prospect of post-industrial society.⁵⁷ There are grounds, therefore, to expect some form of resurgence in rehabilitation. This process does have its price, partly the effect of rehabilitation would be to enable the individual to play the other games of regulation not so visible in modernity. To an extent writers such as Foucault are correct to stress the degree to which regulation of social thought in late modernity does not occur through the law, since,

"the same forces that de-legitimate 'public' interference in 'private' life open the details of wishes, desires, and pleasures to a plethora of new regulatory forms, no less powerful for being 'decoupled' from the authoritative prescriptions of the public powers. Television, advertising, magazines, newspapers, shop windows - the signs and images of the good life were being inscribed on every surface that could carry their imprint. The new technologies of citizenship formation were to gain their power through the subjective commitment to values and ways of life that were generated by the technologies of choice and consumption."⁵⁸

The rehabilitated offender is to take his place in this environment and hence the previous statement must be strongly qualified.⁵⁹ The contention that modern society requires a new

form of rehabilitation concerns those citizens that a society needs and it is possible that advanced post-modern societies economically do not need as many employed citizens as previously. If so, and there is grounds for believing that this is the case already, the client group for penalty will increasingly come from the 'underclass',⁶⁰ a redundant group who may offer a political positive usage in the imagery of punishment - their usefulness to the state may lie in their resource as a symbolic scape-goating group. As the source of the 'other' who may be seen as that entity which threatens the stability of society for the 'supra-class' and whose existence provides an opportunity for state authoritarianism.⁶¹ From our understanding of modernity, however, we also conclude that state authoritarianism stifles growth, stifles economic welfare - hence it is in the interests of the supra-class to avoid authoritarianism.

Thus a careful balancing act of state and civil society over crime prevention, re-training, and socialization is functionally required in post-modernity. However, this does not resolve the practical problem of epistemological orientation. For, it is one thing to identify the structural necessity for a balanced connection of state and civil society it is yet another to determine the rhetoric of the political connection. In his analysis Cohen recognised that an element of transcendence is required to interact between sub-spheres and the super-coordination of the state, possibly "the overriding criterion of an independent critical relationship to the state criminal law system".⁶² In empirical observations on after care in a post-borstal era, for instance,

"it would seem that in the experience of the change from borstal to youth custody, probation officers will find little evidence that rehabilitative methods may be preserved in the absence of an unequivocal commitment to rehabilitation as a sentencing goal."⁶³

Yet how, in light of the critique of rehabilitation, can practically such a commitment be entered into, or, for that matter, normatively be said to be the right thing? Reflexivity cannot be escaped from, and thus the uncertainty, and

undecidability, as to 'true' ontology and 'correct' praxis must be lived with. But this does not negate the socio-political domain of the attempts to satisfy, or give practical life to, the desires and dissatisfactions which have driven modernity, and which, within the meta-narratives of modernity, the constructivist projects of modernity were meant to satisfy. That is to recognise, in parallel fashion to the pragmatic recognition that knowledge spheres are founded upon suppositions and 'value decisions' concerning man's relation to the world, that so too are spheres of action concerned with value positions. The commitment to knowledge was a commitment to a value position. That this commitment has brought us to the reflexivity of a post-modern condition may illustrate both change through reflexive pragmatism and the need to bring to light not the basic structure of human nature, or the structure of transcultural Reason, but the value positions and political arrangements we may find, temporarily, satisfactory.

That this is not a matter of grasping onto the 'essential' truth of mankind's meaning is obvious to the pragmatic imagination. It can only be a task of working on what has been done before and paralogising the games we are in at present. It is a task of reading, and 'mis-reading' the narratives and texts, the discourses, we are situated within. It involves the task of seizing the minor and jumping the marcation into the major.

Thus, as at present the rhetoric of imprisonment presently is of 'control and maintenance' and increasingly progress seen in alternatives of 'punishment in the community' coupled with the procedural formalism of mandatory sentencing under Just Deserts, one must raise the easily overlooked consideration that the arguments for strict procedural safeguards through criminal justice and the championing of Just deserts were not what much of the charges against the treatment model were about. The charges may also be read as concerned with achieving equity, for instance, with protesting the unjust nature of the particular things done in institutions legitimated by the oversweep of

treatment philosophies of punishment, rather than pro-formalism.

As Unger puts it:

"formality is the willingness to allow the rights and duties of the parties to be determined by the presence or absence of external solemnities...Both formality as rules and formality as ceremony appear to make it possible to ascertain entitlements and obligations without evaluating the goodness or badness of particular results. This intention to find the legal antidote to the subjectivity of values is what unites the two senses of formality."

For Unger equity is the polar opposite of the formalist justification by rules. Yet in criminal justice the replacement of the rehabilitative stance by a formalist justice model, resounding with the rhetoric of Kantian morality, can be seen as the submergence of the theme of equity. A commitment to equity as a procedural criteria which may focus not only on the situation of the offender and feel an unease now at his fixed punishment (wishing to introduce some positivistic notions which it previously felt unable to do at the prospect of unbridled determinism and the rhetoric of doing good to the offender actually 'excusing' the crime), but also upon the victim. In Unger's scheme equity stands close to the informal justice of the living community - the localised, particular resolutions which necessarily cause that evil of modern formalism, sentencing disparities.⁶⁴

For Unger equity is the opposite of the imposition of objectivity via formalism and the collateral of equity is solidarity. Human solidarity becomes again, as it was for Durkheim, the task for social theory. Achieving solidarity the task for criminologists writing about the individual and the social, about the state and power, about cruelty and suffering; but this time the task is radically different, for we neither know the confidence that society actually exists as an ontology, nor do we even know that we are justified in using the 'we'. Each expression that we use is but an articulation, a move in the games of epistemological constitutionalism, a move of formative action which instantly becomes subject to a constant self-doubt, to a scrutiny of how it performs. The world becomes the target of a different form of

objectifying gaze devoid of any certainty apart from human commitment.

NOTES.

1. The level of analysis of what Liberalism is, however, is quite low, never approaching that now assessable in texts like Anthony Arblaster's The Rise and Decline of Western Liberalism, Basil Blackwell, Oxford, 1984.

2. G. Pearson, The Deviant Imagination, Macmillan, London, 1975.

3. Gianfranco Poggi, The Development of the Modern State: a Sociological Introduction, Hutchinson, London, 1978.

4. Quoted in Stuart Hall and Phil Scraton, "Law, class and control", in Crime and Society.

5. See Ignatieff's revision of his own earlier work and critique of Foucault in "State, Civil Society and Total Institutions" in S. Cohen and A. Scull (eds), Social Control and the State, and David Garland is presently working on a more 'eclectic' approach which revises his own earlier 'neo-marxist' perspective (Garland, personal communication, 1989). Stanley Cohen revises his position in "The Critical Discourse on 'Social Control': Notes on the Concept as a Hammer", International Journal of the Sociology of Law, 1989, 17, 347-357.

6. In understanding the complexity of modernity and seeking its deriving force sophisticated, yet non-marxist, interpretations of the liberal state, such as Poggi, resist reducing the state to sets of economic demands which so dominated the second period of criminological histories or to the role of the supervisor of a growing system of social control. [See Stuart Hall and Phil Scraton, "Law, class and control", in Crime and Society, for a later more revisionist text noting how critical arguments slowly distanced itself from crass 'functional fits' between the law and the economic interests of capital to a recent position of "marxism without final guarantees".] The pre-Foucaultian character of "the invention of Delinquency" in Platt's The Child Savers: the Invention of Delinquency, for instance, saw the 'invention of the pathology of delinquency' and the establishment of courts and reformatories as instrumental for semi-coercive class control. [A. Platt, The Child Savers: The Invention of Delinquency, Chicago University Press, Chicago, 1969, p.15.] For Poggi-style readings this can only be a partial approach since Poggi presents a model where the political structure develops a fluid body of 'interests' unable to be simply reduced to a monolithic narrative. Complementing economic considerations the

political sphere takes on a set of desires and aspirations which have a separate character and effect.

7. In the heyday of classical criminology, for example, the actors of the political stage occupied a political role in a political terrain limited in inclusion, due to the restricting of suffrage to men possessing property and/or educational qualifications, and predominantly concerned with the rise of capitalist-bourgeois institutions and values. At such a time 'politics', as the activity of a limited political realm, i.e. the concentrated area of Parliament and Crown executing, and enhancing the spread of, state-wide policies, may be clearly definable. It is understandable then that the path to a fully rational society will be seen as enshrining as the peak of glorious reason the state acting in the name of a rational sovereignty (as in Hegel) and the fully rational development of Aufheben (rational raising of principle to light) govern philosophical penalty. This development of the 'public' sphere contrasts with the desire that the bourgeois 'private' realm be a realm of autonomous development, for example that of free contract, employment differentiation, the pursuit of artistic fashion and the family. The bourgeois citizen is emancipated by freedom of contract and property law whose social interactions are governed by the control of the 'hidden hand' of the market operating inside a framework of law and moral operation defended by the state as sovereign. The state is to address the populace in a set of capacities as taxpayers, subjects, potential offenders, but not as participators in the active political part of rule - civil society is the object of rule not a co-determiner of the activity of rule. The subsequent development of modernity demonstrates that this narrow conception of citizens' rights became seen as inadequate to ensure fair participation in an unequal market - under the ideals of fraternity, equality, and opportunity a redefinition of citizens rights came to include political, welfare, social and civil rights reinforced substantively by the development of the institutions of the welfare state. Currently the neo-classical approach criticises both the operation of the institutions of the welfare state, and the spread of such claims to rights, as a diluting of the meaning of rights and an overburdening of citizenship.

8. In the early modern stages of this development the change of 'absolutism' into 'enlightened despotism', through in part the injection of discourse such as Beccaria's, can be seen not so much as a forced movement arising from protest but as a process of accommodation with actors demanding a more active and decisive role in the political process. This accommodation preserves and develops the achievement of the absolutist state over the feudal, i.e. the creation of an agency which can exercise rule from a unified centre structurally apart and over all social groupings in a distinctive publicly sovereign sphere of its own, while avoiding direct interference in the activities of the mechanism of interchange increasingly viewed as essential to social progress, i.e. the market. It would be content to set out a framework for and to tax the interactions of the market, thus allowing the bourgeoisie freedom to draw upon the increasing

benefits of capitalist industrialization without necessarily claiming a full political participation. The opposing neo-Aristotelian visions of constructing socio-political life, which served to provide a contrast and which desired the satisfactions of participation in the life of politics, is rendered deviant, constituted as a counter culture to commercial, capitalist modernity.

9. That is to say that given the 'entire' course of history the probability of this particular event or interaction occurring in exactly this form is mathematically (close to) zero.

10. For example, the rhetoric of universalism inherent in the discursive stratagems of the public spheres of modern reason, albeit based on the symbolic generalization of particular traits of modernity, provides by its very nature a contrast to the particular interests which power was held to serve in the absolutist state. In other words 'universalism', as the essence of the reason of modernity's progress, has the functionality of self-constituting modernity. Under this 'ideal' the exercise and acknowledgement of power needed to be legitimated by a framework able to withstand the attention of the public realm of reason. For instance, Beccaria and the classical school mount both an appeal to the practices of the absolutist state and also a claim that the self constitution of the modern age can make a new beginning through philosophy. The rhetoric of this claim becomes the power of its production - a production which is so meaningful in itself that its philosophy only requires coherence to a part of the outside world (it ignores thus the realm of things non-philosophical, i.e. the positivist, or enters into schemes of translatability of the positive into the philosophical, thus containing the possibility of discourse). The programme of the classical school, essentially a philosophical vehicle, does contain, however, enough elements of a scientific theory (the postulate of crime causation) and a sociological thesis (the state, civil society division), to be largely self-sustaining and they become the early generalizations of modernity in their areas which are to be discarded when the complex is shown as wrong. That is, when the search for 'knowledge' disturbs the intimacy of its power complex with the inflow of new knowledges, new 'discoveries of truths'. Yet it can, perhaps, adequately be held that the philosophical programme for the beginning of the modern age 'failed' because its preconditions and expressive outcomes were superseded by social change. The conditions of that change were, however, the products of that programme - the structural conditions of the free space to pursue knowledge in criminology, the rise of the professional, the self-image of state rationality which requires knowledge.

Although the reasoning public did not openly claim for itself the right to rule (i.e. as a class), as the personalistic claims of absolutism had, the recognition of the ruler's claims to rule was to be increasingly in terms of the reason articulated in the process of rule, i.e. it became the process of governing as Foucault put it. Whatever structural changes in the positioning of individuals and groups occur there is already a complex change

in the legitimation of power. For if power is to be responsive to the demand of legitimation by reason then the reasoning activities of the populace as 'publics' are not simply to critically monitor the operation of the state but to play a part in the demand for and direction of action. The legitimation of such action is the expression of the reason arising out of civil society and, as the generalization of a later sociology of this phenomena's positivity, i.e. marxism, notes, since the bourgeois class was the dominant class within civil society the reason arising out of civil society would reflect the institutions and projects initiated by the bourgeoisie. Or to put it another way, the prejudices (opinions) of the bourgeoisie would become powerful influences upon the reason of the state. Yet this is also to say that the mode by which the knowledges of modernity implant themselves and achieve change is via the cosmos' dominant social interface, i.e. humans. The statements of this 'Reason' must be the assertions of mankind, of individuals and groups. The assertions need to establish themselves as more than mere utterance, they need to become information, knowledges, to partake of a universalism beyond the power of the utter (and thus to converse is to seek consensus on the basis of the discourse, facts, theorems, and truths, rather than through the powers of the individual, i.e. status, sexuality, physical dominance).

Theoretical assertions, which purport to be analysis, for example a reactive discovery of the inherent rights and features of man, are also proactive, they are strategies of development; their entities are constitutive of social change. Reflexively, for example, this means that the rights of man are not discovered, but created - a self-awareness which if known earlier would have rendered the rhetoric of the production sterile but whose delay in coming to consciousness robs reflexivity of negativity in the face of the 'reality' of such rights, that is in the face of their role in modern language games as a result of successful positing.

The changes in the legitimation of expression and communication, which in turn constitute the ontology of rights now impact upon structural change. One structural change concerns the growing possession throughout the nineteenth century of civil rights by the populace. These rights give the disfranchised a toe-hold in the clearly political activities of the larger society and are a means of taking part in 'public activities' with the end of gaining political rights. In the area of the 'social problem' of criminality a nineteenth century example is the increasing view of this area as a social problem offering an avenue of activity able to be engaged in by women taking on the role of social reformers. [A. Platt, The Child Savers, pp. 75-100; see also Tove Stang Dahl, State intervention and social control in nineteenth-century Europe, Institute for Kriminologi og strafferett, Nr.21, Stensilserie Universitetet i Oslo.] In turn the temperance movement functioned both as a vehicle for social reform and an opportunity for semi-political involvement for women. The development of non-political associations formed among people sharing interests and views produces over time coalitions or organizations which represent and mobilise interests of such

magnitude that they become capable of engaging various state organs in a developmental 'pressure' or 'interest' politics. (In the twentieth century penal reform becomes a movement in which the Home Office, as a state organ, is successfully pushed, pulled, or mediates across what sociological commentators call the state/civil society divide. [For an in-depth study see Victor Bailey's Delinquency and Citizenship: Reclaiming the Young Offender. 1914- 1948.])

11. Any thought experiment demonstrates this. For example, according to our current descriptions from 'hard sciences' some thousands of years ago our globe experienced an amount of volcanic activity which released a certain quantity of radioactivity on to our planet - if the amount had been ten times what it was, for instance, the entire course evolution would have been different. Subsequent forms of 'life' that were 'functional' would have been vastly different and that which evolved into the 'dominant' life form, which we currently call, humans, certainly would not have exhibited the characteristics that 'we' currently exhibit. Of course any attempt by 'rationalists' to claim that human rights have always existed, and which also define human rights substantively by direct reference to the current capacities of humans, are simply mystifications of what such entities 'actually' are - temporal entities of language games brought into existence by politics and maintained by politics.

12. See last note.

13. John Rawls, A Theory of Justice, Cambridge, Mass., Harvard University Press, 1973.

14. Earnest Van den Haag, Punishing Criminals, New York, Basic Books, 1975.

15. There are of course different forms of stylising our understanding of power, the three forms previously mentioned by Etzioni are typologies of involvement, complemented by typologies of social action such as ideological, political and economic power.

16. See Kant's "Idea for a General History" previously referred to; "The struggle for the Social Contract" being Chapter 3 of Ralf Dahrendorf, Law and Order,

17. Hannah Arendt, Between Past and Future, Viking Press, New York, 1954, pp. 148-9.

18. In Genealogies of Morals.

19. John Langbein, Torture and The Law of Proof: Europe and England in the Ancien Regime, London, 1977.

20. Pieter Spierenburg, The Spectacle of Suffering. Executions and the evolution of repression: from a prehistorical metropolis to the european experience, Cambridge University Press, Cambridge, 1984.

21. The Development of the Modern State, pp. 68-70.

22. Economy and Society, Vol. 3, p. 953.

23. If we need to state again the difference between Foucault and Habermas: for Habermas the true validity of social norms is ideally not to rest on coercive sanctions and open power, but on the consensus of those affected which is reached by rational debate and on the strength of plausible reasons; for Foucault this process can never be free from domination.

24. Punishment and Responsibility, p.182.

25. See reference and brief discussion in Nelken, "The Truth about Law's Truth", University College Working Papers No.7, 1989, at pp.44-5.

26. Norbert Elias The Civilizing Process, Vol 1, The History of Manners, Basil Blackwell, Oxford, 1978.

27. As Elias put it in Vol II. State Formation & Civilization. "Just as the personality structure characteristic of a particular stage of social development, so specific traits of civilized conduct are at the same time a product of and a lever in the workings of the larger social process within which individual classes and interests form and transform themselves. Civilization, and therefore rationalization, for example, is not a process within a separate sphere of 'ideas' or 'thought'. It does not involve solely changes in 'knowledge', transformations of 'ideologies', in short alternations of the ^{content} of consciousness, but changes in the whole human make-up, within which ideas and habits of thought are only a single sector. We are here concerned with changes in the whole personality throughout all its zones, from the steering of the individual himself at the more flexible level of consciousness and reflection to that of the more automatic and rigid level of drives and affects." pp.283-4.

28. The Civilizing Process, Vol 2, State Formation and Civilization, Basil Blackwell, Oxford, 1982.

29. In The History of manners Elias documents "the advance of shame and embarrassment frontiers" which amounts to "a pronounced shift towards the internalisation of fears". In the linkage of the development of shame on exposure of the human body to location in types of social structure, the feudal experiencing of shame at exposure only among equals or an inferior to a superior changes "only when the walls between estates fall away, when the functional dependence of all on all increases and all members of society become several degrees more equal, does such exposure, except in certain narrow enclaves, become an offence in the presence of any other person. Only then is such behaviour so profoundly associated with fear in the individual from an early age, that the social character of the prohibition vanishes entirely from his consciousness, shame appearing as a command

coming from within himself." State Formation and Civilization, pp.295-6.

However: "Nowhere in human society is there a zero-point of fear of external powers, and nowhere a zero-point of automatic inner anxieties. Although they may be experienced as very different, they are finally inseparable. What takes place in the course of a civilizing process is not the disappearance of one and the emergence of the other. What changes is merely the proportion between the external and the self-activating fears, and their whole structure....

...today, as formerly, all forms of adult inner anxieties are bound up with the child's fear of others, of external powers." State formation and Civilization, p.300.

30.Power/Knowledge, p.62

31.The theories of Elias make visible the dilemma of the state: for the state to intrude too obviously into the regulation of the social would disrupt the complex processes of differentiation, experimentation and pluralistic market mechanisms whereby modernity energises itself. The balance depends on the social largely self-regulating itself, via the creation of civilized behaviour. Yet more and more of the mechanisms whereby the social regulates and civilizes itself are meditations of the state - the school, the medical clinic, welfare, and the subsidized institutions of culture, for example the arts, the opera - thus the state/civil society divide continually dissolves and reconstitutes itself. This manifests itself with state-mediated social control in the twin features of the present situation which we have called the duality of Just Deserts - an expanding institutionalization (i.e.prisons) with a return to formal legality in punishment coupled with widespread 'diversion' programmes aimed at activating the resources of the 'community' (the social). As Morris, Giller et al, put it in Justice for Children:

"We suggest that justice and fairness should be key concepts in any new system, and that the juvenile justice system itself should be but a small part of a broader system of responses to criminal behaviour, the aim of which is social education. An overriding concern, supported by empirical data, is the need to minimise the harm likely to accompany coercive intervention." [Justice for Children, p.52.]

Understanding Elias alerts us to the thesis that the harm in question is to the legitimacy and operation of the state as well as to the individual. These authors stated their intention as:

- "1. to persuade the community, family and school to respond informally to lawbreaking;
2. to emphasise positive and constructive responses to delinquency (e.g. reparation by the offender to the victim or to the community);
3. to engage, where possible, the victim directly in working out a settlement (either informally through the parents or formally through the independent sift);
4. to emphasise the responsibility of the offender (in a way in which we feel formal processing often ignores);

5. to provide the offender with guidance, supervision and other assistance in coping with any difficulties he may feel he has." [Justice for Children, p.65.]

32. Two final questions before we leave this area. First, what then is the status of those disciplines which arise out of middle class interaction in civil society in the nineteenth century and which continue now, i.e. positivist criminology, vis-a-vis the Foucaultian assertion of their role as a modern form of despotic control? Second, is the Foucaultian/Nietzschean (Romantic) notion of modern society being created at the cost of repudiating or repressing whole areas of our inner nature accurate, or at least of value?

Concerning the first, the question of knowledge is far more ambiguous and interactional than any submission to domination could hold. One point is that these knowledges have fed back into and sustained much of what modernity is and much of modernity is a product of desire; desires which may partly be a response to the control of the previous order but which cannot all be simply related to the status of instruments of new technologies of control. Furthermore these new knowledges, these forms of self-knowledge and of self-discipline (of understanding of one's history, social position, childrearing practices, psychology) have made possible new forms of social life with more space for individuals (as well as new 'individuals' for space) and more avenues for participation (through praxis as doctors, researchers, workers, sportsmen and so forth) in the operation of the social body. The disciplines thus straddle, while not necessarily positioning themselves at either extreme, a line which moves from structures of domination to being the basis for individual/collective action. They may demonstrate at a particular time the tendency to go to one extreme, or the absence of 'faith' in such knowledge may allow a structure of domination to fill the gap, but the point is that the disciplines can function in both ways and it is the combination of context-knowledge-practice which sets this out, not the inherent nature of the disciplines themselves. It is the 'pragma', not the 'theory', the making sense in actuality not the 'contextless discipline' which gives a progressive programme. But it is also true that the contextless discipline is only an idea, it never exists other than as an idea, Popper's World Three objectivity is an idea not a reality. The reality is that all disciplines are situated, engaged and engaging - the philosophy of knowledge undercuts itself into the human locus. Another point relates to reflexivity for it is an unavoidable feature of Foucault, or Santos, or Feyerabend, that their denial of the discipline's legitimacy is only listened to because of their status as master of a discipline. Santos' declared movement beyond true/false in favour of collective action is itself legitimated by his disciplinary (sociological) analysis of the fate of 'the scientific paradigm of knowledge' and of the domination implicit in its epistemological hold over action (thus this is itself an example of a discipline being used as an instrument of collective action).

There appear two prongs to the second question: a general suppression of key features of humanity throughout the social body, and an objectifying and domination of the individual's inner nature through training in an interiorization of certain disciplines. What Foucault denies at the same time as he offers this assertion, as opposed to critical theory which rests on the presupposition that it can be uncovered, is that we can come to express our 'true' nature. To Foucault to talk of gaining freedom for our 'true' desires, our true expressions of ourselves, is to fall into the trap of one or other technology of control. We are left with an impasse (which he may have been moving to resolve in his later works on 'the care of the self' when he died) of domination with no liberation possible, no such emancipation, which critical theory is premised upon as its normative prescription, is possible.

The response of the pragmatic perspective is apparent from the earlier discussion of the notion of human nature. It also asserts the impossibility of some transhistorical human nature, of some pure essential structure of natural human nature - but it then replies to Foucault 'what is wrong with giving up the notion of liberation and of freedom, of emancipation in the absolute sense that these notions have been used in the past?' What is wrong in attempting to develop modes of comprehension which allow us to see that various things are suppressed, various created, highlighted, emphasised and constituted, as the mode of being?

That is to state that human nature is created in techniques of subjection, of promotion, or reactive control and proactive expression? This would mean, certainly, to give up the absolutism of the Romantic wing of the Enlightenment's notion that the true nature inside us must come to expression. A notion which is reflected in the rationalist claim that our true nature corresponds to certain objective principles a priori to context and experience, or the empiricist claim that our true nature is such as can be objectified and known by the bio-human sciences. The task is to replace this notion with a pragmatism wherein socio-human nature is a product of processes of intensifying, and in turn defending, certain plays, moves, features, of activities in life and countering others. And further developing the collective consciousness that what we call human nature and human society is a result of our choices in the past, of our projects, and of the interaction of these in the contexts of the past and present.

33. See H. Garfinkel, Studies in Ethnomethodology, Prentice Hall, New Jersey, 1967.

34. Karl Heinz Bohrer, "The Three Cultures", in Observations on 'The Spiritual Situation of the Age', Jurgen Habermas (ed), MIT Press, Cambridge, Massachusetts and London, 1985, p.152.

35. Niklas Luhmann, Love as Passion, Polity Press, Cambridge, 1986, references to this work are annotated in the text as (L as P. p..)

36. Luhmann draws much of his analysis of differentiation from Durkheim and here we can see a refined meaning given to Durkheim's claim that:

"The individual submits to society and this submission is the condition of his liberation. For man freedom consists in deliverance from blind, unthinking physical forces; this he achieves by opposing against them the great intelligent force which is society, under whose protection he shelters. By putting himself under the wing of society, he also makes himself also, to a limited extent, dependent upon it. But this is a liberating experience. There is no paradox here." Sociology and Philosophy, p.72.

37. Of course Luhmann has loaded the dice to some extent; his work is a thesis on the "semantics of love" but these are not the only codes which are in play. The language games and codes which 'couples' are situated within and engage with are not restricted to those of love but are also those of economics, careers, and self-advancement to name a few. Luhmann also assumes a form of equality between partners, in his work they appear to come from the same culture. These reservations do not, however, lessen Luhmann's impact since the difficulties of communication, of reading gestures and degrees of intensity, as between Greek, English, Jamaican, and New Zealand individuals can only increase the strength of his analysis.

38. See Elias, State Formation and Civilization. Also Luhmann, The Differentiation of Society, 1982, and the commentary by Tim Murphy, "Niklas Luhmann on Law, Politics and Social Theory", 47 Modern Law Review, pp. 603-20.

39. See Luhmann, A Sociological Theory of Law, Routledge & Kegan Paul, London, 1985, ch. 2.

40. As Kolakowski put it in Metaphysical Horror:

"the gods in various mythologies are not necessarily good either in the sense of being kind and helpful to people or that of providing us with models or moral conduct; some are, some are not, and many display both good and evil sides in their adventures. But good in mythologies seems to be invariably linked with peace and harmony, evil with war, chaos and destruction. Once the myths are sublimated into metaphysical speculation, these elementary insights tend to achieve a complete conceptual consistency: if good equals peace and harmony, perfect good equals perfect peace and harmony, and this means the perfect absence of tension, and thus, ultimately, absolute undifferentiation and immobility, or One. The more unity, the more goodness... And so, when the good reaches the point of completeness, it loses any recognizable quality of goodness; by achieving perfection, the goodness vanishes. Since the One remains impossible in its total unity, it seems to be severed from any reality other than itself. Life, at least in the sense we are able to conceive, involves differentiation and tension; one reaches a complete peace by reaching lifelessness." pp.39-40.

The point can be made of Law and life. Law's rationality is established at the cost of law's removal from life - hence the study of criminal law is the study of House of Lord's judgments, not of magistrates decisions.

41. Luhmann, "The Third Question: The Creative Use of Paradoxes in Law and Legal History", Journal of Law and Society, Vol 15, No. 2, 1988, p. 160.

42. Ibid., p.155.

43. Ibid.,

44. Ibid., p.160.

45. Stanley Cohen, "Taking Decentralization seriously", Transcarceration: Essays in the sociology of social control, John Lowman et al, Gower, Aldershot, 1987, p.371.

46. Cohen quotes Abel from Informal Justice: "the preference of harmony over conflict, for mechanisms that offer equal access to the many rather than unequal privilege to the few, that operate quickly and cheaply, that permit all citizens to participate in decision making rather than limiting authority to 'professionals', that are familiar rather than esoteric and that strive for and achieve substantive justice rather than frustrating it in the name of form." Transcarceration..., p.368-9.

47. Transcarceration..., 374.

48. Ehrlich, E. Fundamental Principles of the Sociology of Law, W. L. Moll (trans.), Arno Press, New York, 1975 [1936].

49. Kamenka, E, and Tay, A. E-S, "Beyond Bourgeois Individualism" in E. Kamenka and R. Neal, (eds.) Feudalism, Capitalism and Beyond, quoted in Pratt, "Corporatism: The Third Model of Juvenile Justice".

50. Ibid., p. 246.

51. Unger, Law in Modern Society, p.193.

52. See our earlier quotation from the 1990 White Paper Crime, Justice and Protecting The Public, and the obvious necessity felt in this document for the Government to claim both that it is embarking on a positive campaign against crime, and that it is merely coordinating the activities of the Judiciary (i.e. the Court of Appeal guidelines and magistrates' Association work), public feelings, and moves in civil society for crime prevention. See Chapter One, Introduction, in this respect.

The 'Just Desserts' introduced by this Document is distinguished from the American, it is not to be as rigid. One central reason given for this is that would not fit perceived public conceptions. "The Government rejects a rigid statutory framework, on the lines of those introduced in the United States,

or a system of minimum or mandatory sentences for certain offences. This would make it more difficult to sentence in exceptional cases. It could also result in more acquittals by juries, with more guilty men and women going free unjustly as a result." (pp. 8-9 emphasis added)

53. For the development of cautioning and its subsequent regulation see "The Police and Diversion", being Ch.5 of A. Morris, H. Giller, Understanding Juvenile Justice, Croom Helm, London, 1987. In Crime, Justice and Protecting The Public, the pre-sentence report prepared by the probation service is to be structured by new National Standards and the purpose of the report directed to giving information relating the offender to specific non-custodial measures rather than making "recommendations as to sentencing or to be a plea in mitigation". (see pp.13-4)

54. Corporatism can be seen in the recent moves to structure of community service orders. Prior to Government "Guidelines" for operation (namely, Criminal Law of England and Wales, Community Service Orders Rules, 1989, Statutory Instrument, No. 191, 1989; National Standards for Community Service Orders, 1989.) the experience which an offender may undergo with a Community Service order could demonstrate considerable variation both in the type of placement offered to him/her and the degree of participation in decision making the local area allowed him/her in the course of the order. Community Service orders began experimentally and local diversity was a result of the considerable discretion afforded regional probation services, responses to the potential sites of work at local level and local initiative. The attitudes and operational ideologies of Community Service (C.S.) staff could have an important influence upon the actual 'grammar' of the 'universal' order. What it actually meant in terms of the offender's experience to be sentenced to 200 hours community service could therefore vary considerably. In investigating C.S. operationality Tzannetakis stylised the administrative operation of C.S. in reference to three models: 1) a personalised, individualist, 'treatment' model where great attention was paid by C.S. staff to the perceived needs of the offender and when there was extensive participation of the offender, a search for varied projects utilizing individual placements characterised this model; 2) a order and security orientated model which emphasised uniform handling of offenders and which was not really interested in the benefit for him/her of the type of experience the individual offender encountered, rather routine group placement work characterizes this model; 3) a mixed work orientated model where a variety of projects were undertaken but where the operational orientation was very much concerned with the successful completion of the hours worked with as low an amount of breach proceeding as possible.

The guidelines introduce a standardised approach to the administration of C.S. Orders and regulated matters such as breach proceedings, they limit local discretion. Although they were expressly stated to be "reflective of the best schemes in operation", they actually amount to a socio-political choice of

some aspects of the models over the other possibilities. In effect the first model is severely curtailed.

Some aspects of this can be noted: There appears a clear attempt to structure the discourse of C.S. to gain the confidence of the Courts and the Public that this is 'punishment in the community'. Retribution and reparation to community are expressed as goals. Furthermore the standardising enables the system to gear up to handling potentially larger numbers of offenders; reduced time and resources per offender seem likely with a speed up of response time. A systems approach is clearly evident in the demand for feedback of information on costs and rates of breach and hours served to the courts and co-operation between agencies involved. The public is presented with an image that the type of work involved is heavier and a greater control over C.S appears to have been gained by the state via rules. The result appears to fit Kamenka and Tay's 'bureaucratic-administrative' model of social change. For Tzannetakis to understand the operationality of the change in C.S and its concrete operation, recourse to traditional 'philosophies of punishment' will not suffice. Instead 'questions of administration' are paramount; including, at least to some extent, the demands of the organisation itself. The guidelines appear to establish a greater amount of control over C.S both over the offender and over the staff operating the schemes. But is this degree of control, introduced partly at least, in the name of accountability, really necessary? One consequence is that control over the offender during the course of the order is, in terms of Etzioni's typologies mentioned earlier, heavily coercive (i.e. a reliance upon external control). One question which arises is, is this external coercive control compatible with the type of control of offenders which is best suited to enable the successful completion of orders, and, furthermore, what effect, if any, does it have on offenders self-discipline as a result of completing the order. Cf. A. Tzannetakis, "Operational Diversity in Community Service", University of London Phd Thesis (in preparation).

In Crime, Justice and protecting The Public, the issue of Standards of practice was addressed as follows:

"The Government wishes to encourage local initiative and flexibility, but sees a case for developing greater consistency in the basic elements of supervision." Variation was concerned with breach procedures, attendance, frequency of supervision, unit costs and quoted the Audit Commissions report on "The Probation Service: promoting value for Money" that "it would be inappropriate to fix rigid guidelines to be followed in all cases, since flexibility is required to fit programme to the needs of individuals, but it is reasonable to expect similar cases to be treated in similar fashion in different areas. Strategies which promote greater consistency between services, taking account of 'best practice' identified through evaluation are needed." The document went on: "Some variations in practice are necessary to fit local circumstances (e.g. the differences between urban and rural areas). But it is unjust if court orders are much less demanding in some parts of the country than others. Certain ground rules and minimum standards should apply everywhere."(pp.37-8) Not only does this concept of 'demand' appear to contradict their more individualised concept elsewhere

in the document but to the pragmatic imagination what exactly determines the 'similar cases'. The categorising of cases may be as much the result of the questions and perspectives of the probation service, i.e. the administration. The uniformity of offenders may be a characteristic imposed by administration.

55. The White Paper Crime, Justice and Protecting The Public, is illustrative. As a mode of control deterrence is seen as limited. We are not offered strict classicism, the distance from Bentham and Beccaria is now mediated by Matza as well as opportunity theory. Thus we read:

"Deterrence is a principle with much immediate appeal. Most law abiding citizens understand the reasons why some behaviour is made a criminal offence, and would be deterred by the shame of a criminal conviction or the possibility of a severe penalty. There are doubtless some criminals who carefully calculate the possible gains and risks. but much crime is committed on impulse, given the opportunity presented by an open window or unlocked door, and it is committed by offenders who live from moment to moment; their crimes are as impulsive as the rest of their feckless, sad or pathetic lives. it is unrealistic to construct sentencing arrangements on the assumption that most offenders will weigh up the possibilities in advance and base their conduct on rational calculation. often they do not." (p.6)

Instead the tactics are varied:

- 1) encouragement of reporting of serious, particularly violent crimes, so that realistic indices are created and the possibilities of locating 'dangerous' offenders intensified;
- 2) the incarceration of the violent, serious, and dangerous;
- 3) the development of target hardening measures and inter-agency co-operation with work on offenders;
- 4) a concentrated effort on young offenders.

This later point is expressly to be done in conjunction with the primary means of installing self-discipline, the family. Thus we are told: "When effective family control is lacking, children are more likely to grow up without self-discipline and a sense of concern for others. They are more likely to commit crimes." It is proposed to construct "arrangements which allow parents' diminishing responsibility for their children's behaviour as they grow older to be balanced by placing increased responsibility on the young people themselves." This includes involving parents more in the operation of criminal justice, for example, entering into a recognisance to take proper care and to exercise proper control over their children, or night restrictions or curfews. See Chapter Eight.

56. Nikolas Rose, Governing the Soul, pp. 227-8

57. Compare Matza's picture of the chaotic 'free will' of delinquency aided by 'techniques of neutralization' to Rose's assertion of the demands on the truly modern self.

"However constrained by external or internal factors, the modern self is institutionally required to construct a life through the exercise of choice among alternatives. Every aspect of life, like every commodity, is imbued with a self-referential meaning; every choice we make is an emblem of our identity, a

mark of our individuality, each is a message to ourselves and others as to the sort of person we are, each casts a glow back, illuminating the self of he or she who consumes.

The self is not merely enabled to choose, but obliged to construe a life in terms of its choices, its powers, and its values. Individuals are expected to construe the course of their life as the outcome of such choices, and to account for their lives in terms of the reasons for those choices. Each of the attributes of the person is to be realised through decisions, justified in terms of motives, needs and aspirations, made intelligible to the self and others in terms of the unique but universal search to find meaning and satisfaction through the construction of a life for oneself." Governing the Soul, p.227.

In Crime, Justice and Protecting The Public, the theory of delinquency appears Matzeran. Thus the effect of "supervision" is defended against being an easy ride since "the best supervision makes real demands on offenders as well as restricting their liberty by cutting into their spare time. It does this by imposing the discipline of regular reporting to the supervising officer. For many offenders whose lives are chaotic and impulsive, this requirement alone can be most testing of all, because they have to discipline themselves. The courts may also require the offender to take part in additional activities or undergo a 60 day course at a probation centre. All of this may be more demanding on some offenders than custody which removes them from the responsibilities, problems and temptations of everyday life."(p.36)

58. Nikolas Rose, Governing the Soul, p.225.

59. The examples which Crime, Justice and Protecting The Public give of the success of supervision concern a) 19 year old convicted of handbag snatching and estranged from his parents who was at first very difficult under supervision but then "settled down under this supervision, began seeking work and resumed communication with his parents." B) A 30 year old offender with many convictions put on probation for burglary and theft. "Much of his offending was due to his poor control over his temper. The day centre programme helped him to control his temper better, to think more about the consequences of his actions, and to make sensible plans for his future." (p.36-7)

The features are: developing a state of self-discipline, an control of emotions and response; a familiarity of the difference' of others, i.e. the appreciate the possible effects of one's action on others whom one is separated by social distance and functional differentiation.

60. For example, L. Curtis, "The March of Folly: crime and the underclass", in Tim Hope and M. Shaw (eds.), Communities and Crime Reduction, HMSO, London, 1988.

61. This is felt across a range of perspective see Dahrendorf, Law and Order, the warning in Roshier, Controlling Crime, Phil Scraton (ed.) Law, Order and the Authoritarian State.

62. Transcarceration..., p.375.

63. Judith Rungay, "Taking Rehabilitation Out of After-care?", Brit. J. Criminology, Vol 30, No.1. (1990)

64. "The polar opposite to justification by rules is equity, the intuitive sense of justice in the particular case. The formalist views equity as amorphous because it cannot be codified as a system of rules and as tyrannical because all moral judgments are subjective even if they are widely shared. Hence, the most that can be granted to equity is the role of tempering the consequences of formalism that seem intolerably harsh in the light of prevailing moral ideas." [Law in Modern Society, p.205.]

Conclusion.

This work has offered readings on the theme of criminal justice, epistemology, and modernity. To give it a conclusion as if there was a 'problem' and it had offered a 'solution' would offend its own canons. Some final reading can, however, be told simply. The epistemology of criminal justice has come to share in the fundamental paradox of modernity, that is of a system which is characterised by complex differentiation, interconnection and interdependency. As modernity has outgrown the narratives which created the freedom to become modern, so has our pursuit of truth and the search for absolute foundations of our assertions and claims gone beyond the confidence of rationalism and empiricism into the much more ambiguous space of pragmatism.

Modernism gave an enthusiasm for the good society, a society which was to be built - artificially designed and constructed whereby mankind was to be freed from the tutorage of nature by subordinating nature to human desires and needs and creating an abundance of goods via science and technology. The anchoring points of this process, the security of human subjectivity and the reference of truth, have in their turn been undercut by their very products. That is by the processes of authenticity and the reflexivity, or self-accounting, which accompanies modern development. The product of this reflexivity is an uncertainty as to foundations - the templates of rationalism and the deep-structural images of empiricism no longer appear to have 'truth', even if they have metaphysical appeal. The human foundation to the social world becomes undeniable to the pragmatic imagination. To conceive of the social world in the terms of the pragmatic imagination is to live in a radically ambiguous environment. The problem of constructing the Grand Society which provides the 'fit' to true human nature, or realizes the absolute potential of mankind's rational structuring, is unresolvable. The meaning of humanities existence is not a problem to be solved but a mystery to lived and no set of meanings can be enjoyed as the final reading, no construction of social life is to be viewed other than as 'experimental', as temporary. All are both natural

and unnatural. Mankind is both without a home and always with one. Accompanied by human yearnings which are irreconcilably unquenchable, human desires which can neither be satisfied by stylised markings in the name of the natural, or the rational, or by their exhaustion for what of expression.

Epistemologically the pragmatic realisation is that the 'truth', or 'warranted assertability', of assertions and claims depends on their coherence to the range of suppositions and procedures for testing which are internal to a system, i.e. to a discipline or tradition. Correspondingly, the practical task of judging societal concepts, for example, progress, justice, fairness, lies in their coherence to values and suppositions as to the modality and conduct of human life. In the grammaticization of concepts, the performability of hope and desire in the concrete experiencing of pain, pleasure, cruelty, suffering, joy, satisfaction and despair, lies the ultimate test of thought. Therein lies the substance of humanity.

Ultimately pragmatism's metaphysical message is simple, there is not, and never was any 'God' whose wishes we explore, depart from and find our repentant way back to. There is not, and never was, any structure of Reason whose template human activity dialectically encompasses, slowly, hesitantly, and often mistakenly, but inevitably 'progressively', and which, in time, we will come to know fully. There is not, and never was, a foundational operation to 'natural order' which the apparently haphazard operation of human experiencing functionally reflects its deep structure and which functionally guides onwards social evolution and with the knowledge of which we could construct the grand society. There is instead only the centrality of the human focus to social change, only the objectivity of human involvement. Only the dialectics of contingency.

Present criminal justice inhabits the complex space of the juncture when modernity reflexively seeks its self-consciousness, the impossibility of its desires and lurches in

search of new conceptions. The mistake would be to continue the illusion of the solution, the notion that arrangements, that rules, are anything more than socio-cultural, historical structures of being. Historical creations which may have great worth, but which equally may prevent future worth. Instead of the search for the solution to self-contained 'problems', as if that would uncover sections of final ontology to be co-operatively joined together in the interdisciplinary task of uncovering the framework of the grand society, pragmatism the understanding that in this process the ontology of social being would itself become more, forever eluding its final reading.

In the face of the ambiguity and complexity of the present, the pragmatic imagination takes hope in realising the extreme complexity and differentiation, the pluralism of the changing present. The paradox of the totality to being which is understandable only through difference.

The concern of criminological theorists must be two fold. Since Durkheim's claim that the operation of legal structures reflected social solidarity and state organization is apt. Thus, if Human societies, and all that 'we' may find of value in the expressions of those entities, are historical contingencies the role of analysis, of social theory, becomes important not only to understand but to help construct. The task of realising better forms of human solidarity. To help build and defend the construction of greater and better tools by which the manifold 'mystery' of being may be granted terrain and energy for expressive creation, for positive paralogy. For the procedualisation of living that 'we' may find expressively worthwhile, and in whose reflexivity, is discovered the currency of the 'we'. And if to the sceptic that task lacks a foundational security, an absolute guarantee, that is not its weakness, but its strength, for the paradox of reflexive pragmatism may be that in the dialectic of assumed ontology, reflexive questioning, uncertainty, developmental practice, ontological confidence, reflexivity... lies the 'nature' of social constructivism.

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¹Where two or more authors appear in the credits the reference is located under the name of the first author.

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