POSTMODERN POLICIES?
THE ERRATIC INTERVENTIONS OF CONSTITUTIVE CRIMINOLOGY

By Mark Cowling[1]

Abstract

The constitutive criminology of Henry and Milovanovic and associated writers is the most positive and systematic attempt to develop a postmodern criminology. One way in which to judge a new departure of the sort is in terms of its results: what interventions, what ideas about policy or politics, does it offer in contrast to its antecedents? This article starts by very briefly outlining the theoretical foundations of constitutive criminology, which it identifies as a particular interpretation of Lacan, matched with chaos theory. It then reviews some of the main interventions proposed by constitutive criminologists. It argues that these add little to existing radical ideas, except for a potentially disastrous fascination with far-from-equilibrium conditions.

[1] Mark Cowling is a Reader in Criminology, School of Social Sciences and Law, University of Teesside, UK

Introduction

Many criminologists use aspects of postmodernism as a critique or as a source of inspiration (for example, Smart, 1989, 1990; Sumner, 1994; Carrington, 1998, 2002, Presdee, 2000, Ferrell and Saunders, 1995, Ferrell et al., 2004) but the only well-developed attempt to rethink the central issues and themes of criminology in terms of postmodern theories is the constitutive criminology of Henry and Milovanovic and others. This article starts by briefly reviewing their underlying theorising, arguing that it is open to a variety of powerful objections. The bulk of the article assesses their ideas about policy and about specific issues which follow from their postmodern approach arguing that they are either already part of the general cultural repertoire of western liberal societies, or are liable to produce unjust and oppressive consequences not intended by those who advocate them.

As Stuart Henry and Dragan Milovanovic explain (Henry and Milovanovic, 2000), constitutive criminology originated in a series of conversations between themselves. They had been working independently on various ideas which have subsequently been presented as part of constitutive criminology during the 1980s, which they got together to develop more fully in the early 1990s. They have subsequently been joined by a small group of associates (see below). Thus in one sense constitutive criminology is the work of a small group of academics not affiliated to any major party or movement. On the other hand postmodern ideas are, of course, a substantial and possibly even a dominant intellectual trend of the late 20th and early 21st centuries.

The two books which are the starting point of this critique are Stuart Henry and Dragan Milovanovic's *Constitutive Criminology: Beyond Postmodernism* (1996) and their edited collection *Constitutive Criminology at Work: Applications to Crime and Justice*, (1999). These are backed up and further explicated by extensive writings, notably Milovanovic (1997, 1997a, 2002), Arrigo, Milovanovic and Schehr (2005), Williams and Arrigo (2004). My criticisms are restricted to the more substantial direct collaborators of Henry and Milovanovic. I have charitably assumed that some of the more exotic discussions of monsters (Dion, 1999) or of the bodily degradation of the members of the US Supreme Court (Brigham, 1999) are included in the *Applications* collection without detailed analysis of their relation to the main constitutive criminology theories. Most postmodernism engages in the deconstruction of existing discourses. Postmodernists find it harder to construct positive theoretical frameworks. Henry and Milovanovic attempt just that.

Henry and Milovanovic's account of post-modernism is fairly standard. There are no privileged knowledges: everyone or anyone is an expert. Post-modernism celebrates diversity, plurality and the subjugated. It does this so much that it includes authors who deny that they are post-modernists. Post-modernism had its roots in poststructuralist French thought in the late 1960s and 1970s. Its starting point is a disillusion with the modernist thought, notably Marxism, but also with liberal theories of progress. Post-modernism links to a shift from manufacturing of goods and services for their usefulness to the manufacturing of goods and services valuable only for their image. This could be described as a shift to a 'consumer society', an 'informational society', or a 'risk society'. The chief way in which modernism is attacked is through 'deconstruction' of 'texts'. All discourse of any kind is a text, as are all phenomena and events. Thus discourse can be written, spoken, or can be a film or television image, or indeed, a dream. Deconstruction tears a text apart and reveals its contradictions and assumptions. Various earlier ideas anticipated some

of postmodernism, notably Freud's ideas as interpreted by Lacan, symbolic interactionism and Matza's theory of neutralisation and drift. As we have seen, post-modernism involves discourse analysis. Discourse analysis sees people as formed by and through their use of language. People do not occupy 'roles', they occupy 'discursive subject positions'. Heisenberg's indeterminacy principle is important because it stipulates the impossibility of simultaneously specifying the precise location and velocity of social phenomena (Henry and Milovanovic, 1996: 4-11).

There is a fairly standard and widespread riposte to postmodernism, some main features of which are as follows. There *are* arguably some quite widespread patterns of oppression, e.g. capitalism, patriarchy, which have quite well established explanations, even if there are problems and anomalies. It denies grand theory except for its own grand theories. Given the overwhelming number of dubious theories employed it is a bit hard to know where to start in producing a critique. Postmodernists play fast and loose with scientific theory. Heisenberg's indeterminacy principle properly applies to subatomic phenomena, and society is not subatomic. Postmodernism is a reaction to the failure of the left in France in 1968 and in Britain from 1979. A very lengthy book would be needed to give a thorough account of these criticisms, which are in any case available elsewhere (e. g. Callinicos, 1989; Geras, 1990; Norris, 1990; Gross and Levitt, 1994; Sokal and Bricmont, 1999).

For the purposes of the present article it is worth expanding a little on one issue which separates postmodernism and its critics. Postmodernists emphasise some features of the modern world which lead to claims that we are now living in 'postmodernity'. This is one major reason for their advocacy of what might be called the postmodernist theory of knowledge involving the death of grand theory and the equal status of a multiplicity of approaches to truth. There is a twofold critical riposte to these claims. The first line of argument is that the division between postmodernity and modernity is not at all sharp. There may, for example, be more emphasis today on the consumption of images than in past. However, 'postmodern' societies still manufacture steel, aluminium etc using large quantities of gas, electricity and coal. Looking back to 'modern' societies, they were not exclusively concerned with usefulness. The consumption of products linked to image was discussed at least as far back as Thorstein Veblen's *The Theory of the Leisure Class* (1899) and noted in the pop sociology of Vance Packard (1959). Recognising a greater shift to the consumption of images does not in itself require a new theory of knowledge. The same comment is made in the context of criminal justice by Penna and Yar (2003). They point out that Hallsworth's identification of a 'postmodern penality' involves the conflation of statements from politicians and selected aspects of the criminal justice system of some countries mixed with a new epistemology to produce an entity which has very limited and dubious claims to reality.

The unthinking conflation of modernist and postmodernist elements is also found in the work of the constitutive criminologists. Having set out their postmodernist credentials and criticised the foundations of modernism, one would expect the central concepts used by the constitutive criminologists to be found within a postmodern analysis. However, the constitutive criminologists depend on aspects of modernism in order to identify variables to put in their equations and to identify the marginalised, oppressed etc. For example, at the beginning of an analysis of power, crime, and chaos we find Young (1997a: 88) stating: 'There are several forms of power available with which one can manage uncertainties. I want to focus on four: physical power, economic power, social power, and moral power'. What makes him start with these

(sensible) forms of power, rather than, for example, astral power, magical power and spiritual power? Surely he is implicitly accepting the fundamentals of modernist social science, but without explaining why he is doing so? Milovanovic states that the 'control parameter' in the bifurcation diagram that chaos theory offers us to understand - 'the dynamic movement toward the creation of new master signifiers and replacement discourses' - is: 'the emerging postmodern society characterised by alienation, the intrusion of the hyperreal, and capital logic (the commodification process and the law of equivalence)' (1997a: 207). 'Alienation' and 'capital logic' are both concepts derived from Marxism, part of the modernist social science that the new paradigm overthrows; and the three concepts listed would require considerable work before they could appear in any sensible way on a diagram with a numerical basis (cf. Milovanovic, 2002: 125).

Henry and Milovanovic claim to derive their theories from numerous sources:
> …the strengths and limitations inherent in: the insights of Laclau and Mouffe; the notion of hyperreality developed by Baudrillard; the semiotics of Saussure and Lacan; the autopoiesis/dissipative structure theses; the paralogism of Leotard; the structuration theory of Giddens; the dialogical pedagogy of Freire; the summary representation hypothesis of Knorr-Cetina; the calls for deconstruction or 'reversal of hierarchies' of Derrida (Henry and Milovanovic, 1996: 69).

Alternatively, and with some variation:
> .. it draws on complexity theory (Mandelbrot, 1983; Gregerson and Sailer, 1993; Pickover, 1988), structural coupling (Luhmann, 1992; Teubner, 1993), strategic essentialism (Spivak, 1988; Jessop, 1990), relational sets (Hunt, 1993), critical race theory and intersections (Matsuda et al., 1993), autopoietic systems (Teubner, 1988, 1993; Cornell, 1991), dialectical materialism (Marx, 1975; Sayer, 1979), and topology theory (Lacan, 1961; Milovanovic and Ragland, 2001; Milovanovic, 1996) (Henry and Milovanovic, 2000).

In practice, however, the two main theoretical foundations of constitutive criminology are a particular interpretation of Lacan, and chaos theory, which will now be briefly examined in turn.

Lacan

Milovanovic in particular has devoted a great deal of time and effort in order to make sense of Lacan's theories. (For expositions of these see: 1994; 1997: 28-42, 48-53 60-72 171-185; 2002: chapter 2, Henry and Milovanovic, 1996: 29-34; Arrigo, 1996) A lengthy article would be needed to follow him through this process. However, the net effect of the discussion is that Lacan is seen as understanding psychoanalysis as a process in which there are four major discourses: the discourse of the master, that of the University, that of the hysteric, and that of the analyst. Frequently it is the role of the discourse of the analyst to help develop the discourse of the hysteric in order to assist her through a collaborative process in articulating her desire (desire is simply celebrated -- see Milovanovic, 1997: 11; 1997a: 11, 23). The 'hysteric' in this context is a prisoner or an oppressed community or group who are being helped by an expert activist (for juvenile delinquents involved in restorative justice, see Williams and Arrigo (2004: chapter 6); Arrigo, Milovanovic and Schehr (2005: 105-113)). In the more recent writings Lacan's theories are supplemented by the ideas of Guattari and Deleuze on the body without organs and the rhizome (particularly in Arrigo, Milovanovic and Schehr, 2005). This use of Lacan links to Freire's idea of conscientisation, to the extent that most of what is derived from Lacan could

actually have been derived from Freire (cf. Milovanovic, 1997: 202). Freire's conception of conscientisation is that rather than having a banking conception of knowledge in which an educator fills the minds of, for example, peasants with materials from the bank of his knowledge, the educator discusses the peasants' ideas on a mutual basis and helps them to articulate their needs and demands (e. g. Freire, 1972). Freire's conception fits well with a postmodernist approach in which all theories are seen as enjoying equal claims to truth (e.g. Milovanovic 1997: 15), as opposed to modernist science which sees itself as a bank with some (provisional) contents which anyone can access and challenge given appropriate training and resources.

Milovanovic's Lacanian version of conscientisation raises a variety of problems. The idea of articulating one's 'desire' is never much elaborated. There may, surely, be desires which are unrealisable whether because of lack of resources -- not enough people are willing to back my desire to build a new city -- or because they conflict with other equally legitimate desires -- I can't live near both my widely dispersed daughters. -- or because they damage other people or the environment, which is why nuclear power workers are discouraged from engaging in experiments which they find interesting but which led to the Chernobyl disaster in the former Soviet union. People who are being repressed by the criminal justice system may well be suffering oppression, and would benefit from help with articulating their needs, but may also have desires which are not socially acceptable in their current form, desires which got them into trouble with the law in the first place. Even assuming that desires translate without any problem into group needs, there is still an issue of resources. Global poverty, the environment, the elderly, sports people, aspiring space explorers and many other lobbies have legitimate aspirations which cannot all be satisfied immediately with current resources. As Henry and Milovanovic say, 'satisfying positions of desire can occur at another's expense', (2001: 168), which displays some awareness of this problem, but to really make sense of issues such as this there is an obvious need for a theory of distributive justice.

There is a strong commitment in the writings of constitutive criminology to social justice rather than simply criminal justice. Henry and Milovanovic aim for 'constitutive theorising [which] is a contingently and provisionally based humanistic vision of what could be, a radical superliberalism.' (Henry and Milovanovic, 1996: 64). Justice is held to be specific to particular sites, and justice cannot be linked to a desire for consensus or universally posited agreement. Tracy Young (1999) adopts a similar approach, but applies it to criminal justice. Modernist justice systems, he says, are concerned with the rationality and uniformity in treatment before the law, whereas postmodern justice systems, grounded on chaos theory make room for creativity. This does not lead to discrimination because the overriding principles of praxis and empowerment continue to inform legal principles. Variation and creativity is desirable in a criminal justice system (Young, 1999: 278-80). Some of this is attached to the idea that different local justice systems can coexist with each other, for example a Native American system or one within a professional body can coexist with the wider US justice system (Young, 1997a: 48) . On the face of it there are several problems with Young's ideas. Why should overriding principles of praxis and empowerment be the characteristic features of all the justice systems in a society unless there is in fact an overriding modernist system? Surely the possibility of appealing from a professional body's proceedings to those of the general legal system is part of what makes a plurality of systems acceptable? Is not predictability in a legal system something people value very highly? Most people would be alarmed if speeding were punished by anything between a caution and life imprisonment.

Turning to wider ideas about social justice, the constitutive criminologists do not seem to engage to any extent with postmodern political theorists beyond Laclau and Mouffe and Unger. Williams and Arrigo (2004: ch. 5) spend a lot of time elaborating on Derrida's deconstruction of the gift, with the idea that this is linked to theories of justice, but very little indeed on showing how, for example, affirmative action is a 'gift'. The major constitutive theme is 'the deconstruction of discrimination, alienation, violence and aggression, oppression, and iniquity' (Arrigo, Milovanovic and Shehr, 2005: 112), and of giving voice to the excluded, marginalised, disenfranchised, disempowered and oppressed (cf. Milovanovic, 1997: 7; 1997a: xiii), but there is no analysis of what concepts, groups or individuals might fit in these categories, nor of any principles which might be of use in deciding between incompatible claims. The following all have claims of this sort, but it is highly unlikely that the constitutive criminologists would want to simply engage in a Freirian dialogue with them to help to articulate their desire: rightwing militias in the United States; paedophiles; members of the British National Party; Angolans in Britain guilty of abusing children who they claimed were 'witches'; the London underground suicide bombers.

Chaos Theory

Chaos theory is, 'a central thrust in much postmodernist analysis' (Henry and Milovanovic, 1996: 11). Chaos theory is based on fractal geometry rather than Euclidean geometry. This raises a problem which the constitutive criminologists do not deal with. Their view of society is that it is an intersubjective construction. Because most people think in terms of Euclidean geometry, social space will therefore be basically Euclidean, and does not offer much purchase for chaos theory.

This is not the only problem in applying the mathematics of chaos theory to society. Chaos theory tends to be seen as applicable to physical phenomena governed by deterministic laws which are predictable in principle but which are unpredictable in practice because they are so sensitive to initial conditions. This is figuratively expressed in the idea that a butterfly flapping its wings in Brazil might cause a hurricane in Florida three weeks from now (e. g. Milovanovic, 1997: 20). This is why, although it is possible to predict roughly the sort of weather which can be expected in a particular place in three weeks' time it is not possible to produce an accurate weather forecast (Sokal and Bricmont, 1999: 129). As Sokal and Bricmont comment:

> Another major confusion is caused by mixing the mathematical theory of chaos with the popular wisdom that small causes can have large effects... One constantly hears claims of chaos theory being 'applied' to history or society. But human societies are complicated systems involving a vast number of variables, for which one is unable (at least at present) to write down any sensible equations. To speak of chaos for the systems does not take us much further than the intuition already contained in the popular wisdom (Sokal and Bricmont, 1999: 135-6.).

Thus the sort of situation in society where a small cause can produce a large effect will also be a highly unpredictable situation, where it is not at all clear what will eventually emerge. (For further useful references and discussion of postmodernist abuses of chaos theory, see Gross and

Levitt, 1994: 95-105.) Some of those involved in the constitutive criminology project simply want to use chaos theory as a metaphor (see, for example, Simons and Stroup, 1997: 111-12, Arrigo 1997, Williams and Arrigo, 2004: ch. 4), but in the main the authors see themselves as *applying* chaos theory.

Constitutive criminologists adopt three main outcomes from chaos theory: undecidability or uncertainty; the idea that one individual can make a difference, and the analysis of far from equilibrium conditions. Both of the first two outcomes flow from the idea that a very small initial difference can have a massive effect following repeated iteration (e.g. in Milovanovic 1997a: 6, 19). Given that there are very many possible initial variables the effect of the idea of undecidability is that social science becomes impossible: we simply cannot know what outcome to expect from an initial set of variables. The constitutive response to this is to celebrate 'the unexpected, surprise, ironic, contradictory, and emergent' (Milovanovic, 1997a: viii), but this seems to be in a context where there is no background of regularity against which to contrast the unexpected.

The idea that one individual can make a difference is found repeatedly in constitutive criminology. Just like the Brazilian butterfly mentioned above, small actions by an individual can, after repeated iteration, have massive effects (e.g. Henry and Milovanovic, 1996: 35; Milovanovic 1997a: 20; 2002: 60). Because of the problems already mentioned in a strict application of the mathematics of chaos, the best way of assessing the idea is to consider some ways in which we might recognise it in practice. The examples from the constitutive criminologists concern things such as a crossing guard who takes an interest in one particular juvenile, thus helping him avoid becoming delinquent when his circumstances would make this likely, or going on a demonstration, signing a petition, engaging in civil disobedience or voting (e.g. Milovanovic,1997: 20). The idea that individuals can make a substantial difference to those around them is hardly new, however, whether we think in terms of particular other individuals or small communities. It is also widely recognised that individuals can, at least sometimes, make a difference through collective action, be it demonstration, trade union membership, consumer boycott or lifestyle decision. None of these examples is as spectacular as that of the Brazilian butterfly.

The third main use of chaos theory concerns situations where, following a great deal of iteration, far from equilibrium conditions result, and the system may change dramatically.. One application of this approach is Tracy Young's idea that white-collar crime may be precipitated by four or more unmanageable parameters. A doctor, for example, might cope with a general drop in income, failure of investment portfolios and reduction in rent payments if a major corporation moved from the city, but any further losses such as patients defaulting on bills might drive him to crime. Similar considerations would apply to a corporation (Young, 1997a: 92-3). This seems mechanistic. The doctor might cope with six small losses of income perfectly well but be driven to crime by a catastrophic loss of his main income even though other small sources increased. The idea is further criticised below.

A rather different use of Chaos theory is the claim that truth values are 'fractal': matters of right or wrong, good or bad, just or unjust are matters of degree (Arrigo, 1997: 185). This seems to be simply a metaphorical way of putting a view that most people except religious fundamentalists would accept. It needs to be pointed out, however, that the 'matters of degree' claim is over-

optimistic. The practical consequence of the unpredictability which follows from chaos theory is that standard moral judgements become impossible. We commend acts of charity because they help people in need and condemn random unpremeditated violence because it harms people who do not deserve to be harmed. Occasionally, of course, the consequences can be the reverse. Random violence can just happen to incapacitate someone who was about to commit murder etc. Chaos theory undermines any confidence in typical consequences, and hence any basis for moral judgement.

Policy Implications

Henry and Milovanovic together with authors in their edited collections and associated authors in jointly written works have quite a lot to say about policy. To what extent do the theoretical upheavals sketched above yield new ideas about ways of changing the criminal justice system or the wider world?

Henry and Milovanovic define crime thus: 'Crime is the power to deny others. It is a recursive production (i. e. a repeated, self-referential activity) born of historically, and culturally specific discourses which have retained a relative degree of stability.' 'Consciously striving to reconstruct the discourse of the excessive investor at both a societal and a systemic level, crime feeds off itself, expanding and consuming the energy that is intended to control it. The result is that conventional crime control efforts, in the form of growing criminal justice institutions - police and prisons - or as political rhetoric rehearsed in the media, fuel the engine of crime.' What they aim for is the development of 'replacement discourses' that fuel positive social constructions. Their aim is not to 'replace one truth with another' instead it is to invoke 'a multiplicity of resistances' 'to the ubiquity of power' (Henry and Milovanovic, 1996: ix-xiii; Milovanovic, 1997: 91). They are therefore opposed to imprisonment. Commenting on imprisonment as incapacitation, they argue that this approach posits a false separation between inside and outside. The incarcerated can commit more and worse crimes in their 'new architectural spaces'; they are harming people 'in corrections' who 'come to construct themselves in self- and species-deprecating ways'. Expenditure on prisons is money not spent on (say) education. Prison expansion is accompanied by increased fear of crime. Incapacitation offers the fiction of a safer society but actually offers more freedom for the powerful to commit more crimes (Henry and Milovanovic, 1996: 194; cf. Milovanovic, 1997: 153-169). Just deserts is a policy of counter-harm. 'The difference it makes is to who is harmed next (displacement effect), not whether people are harmed at all.' Rehabilitation is also just a temporary displacement '[u]nless discursive constructions of harm and their accompanying social-relational matrices are replaced with discourses committed to producing less harm' (Henry and Milovanovic, 1996: 195).

What does this concretely mean? They are plainly opposed to the war on drugs, which fits the above analysis well (Henry and Milovanovic, 1996: 198). Beyond this, are they telling us anything much which is not already present in abolitionist arguments (for example: Christie, 2000, Mathiesen, 2000) plus some support for 'mediation, conflict resolution, and reconciliation programmes' and the idea of relating crime more to the wider society (Henry and Milovanovic, 2001: 174-175)? Does the imprisonment of serial killers and rapists simply make things worse? Would it be better if the state did not interfere in domestic violence? Should progressive criminologists be supporting 'resistances' by men who have engaged in battering against the

'ubiquity' of the power of the police and courts? The expansive claims need to be unpacked and argued rather than just asserted.

Let us look at some positive policy approaches from constitutive criminology.

The first of these is newsmaking criminology: the criminologist challenges perspectives and data in the media, or gets his or her own work into the media, thus offering replacement discourses. They include some reflections on ways in which the contribution of the criminologist may be diverted or distorted through the editorial process. A concrete example is the way in which Barak was able to become the resident criminologist on a local radio station, commenting on the O. J. Simpson trial. As well as providing coverage of the major developments in the trial, he was able to include wider reflections on the American criminal justice system and on issues of race and class (Barak, 1999). This idea is an excellent one for any radical to pursue. However, it is hardly original to postmodernist criminology, and will obviously only be as good as the theories which are being put forward as the replacement discourse. As the media in modern society is so very extensive, and as much of it functions as entertainment, there are limits to how seriously any set of comments from an expert will be taken.

Another is the use of social judo. This involves a 'minimal use of energy toward redirecting the considerable power of those seeking to exercise power over us. The object is that they are made abundantly aware that the more energy they expend in harming us the more that energy converts into constraining them, limiting their ability to harm us.' (Henry and Milovanovic, 1996: 221). The examples they offer all concern giving prisoners or ex prisoners more control over their environment and lives (Henry and Milovanovic, 1996: 222-28). The idea of redirecting energy used to create harm into socially useful activities is plainly excellent, but it is not clear how much the examples given are genuinely examples of constitutive criminology at work and how much they are simply a collection of desirable initiatives which fit to some extent with the ideas of Henry and Milovanovic. The basic idea of reforming criminals is surely to redirect energies which are not being used in the best possible way. Although it may be possible on occasions to use social judo to redirect the energies of powerful corporations and states there will surely be many occasions where this is impossible, and other strategies are needed to deal with that situation.

Henry and Milovanovic's next policy idea is the encouragement of mutual aid groups for victims (Henry and Milovanovic, 1996: 230-235). Again this approach is obviously highly commendable, but hardly new or exclusive to constitutive criminology.

Moving on to associated authors, Lisa Sanchez (Sanchez, 1999) looks at the sex trade in 'Evergreen', a North Western U S City, concluding that the women she interviewed frequently switched between different aspects of the trade. Partly as a consequence of this she says that 'identity for these women is conflicted and multi-faceted. While elements of the logic of contracts and the PROs rhetoric were common in women's talk about their everyday life, these women were also quite conscious and concerned about their own victimisation.' (Sanchez, 1999: 54). She looks towards a replacement discourse in which the women would 'resist the law's inscription of the prostitute identity upon their bodies' and insist that 'the violence of rape or battery is still violence regardless of the status or identity of the victim' (Sanchez, 1999: 57). I have no quarrel with her strategies, but am not sure that her account of a multi-faceted and

conflicted identity is entirely helpful. The women involved were in a significantly different negotiating position according to where they were working, and their exposure to violence also varied with different working situations. Thus it is not surprising that the sex worker account of prostitution looks more attractive in some situations whilst abolitionism appears more fitting in others. What looks plausible for Annandale (2005) or Belle de Jour (Anonymous, 2005), who worked as middle-class escorts, would not look remotely appropriate for a teenager taking to the streets in the aftermath of sexual abuse and with a background of drug addiction. (On abolitionism see, for example, Barry, 1995 Jeffreys, 1997; for one example of the sex worker perspective see Sanders, 2004.) Sanchez does not even discuss the legal situation of prostitution in Evergreen. An uncharitable approach to her work would be to say that postmodernism allows her to engage in a well-intentioned but sloppy discussion of issues which could benefit from a sharper analysis.

Bruce Arrigo produces an interesting Lacanian analysis of how residents at a hostel 'co-produced a discourse which they actively resisted but which they, nonetheless, contributed to as their criminal and/or deviant self definitions were linguistically restructured and discursively reified.' (Arrigo, 1999: 73; Williams and Arrigo, 2004: ch. 4; Arrigo, Milovanovic and Schehr, 2005: 126-30). He then discusses changes in policy and the pattern of life in the hostel in terms of chaos theory, but in metaphorical rather than rigorous terms. A detailed discussion of his various accounts would, I suggest, show that his analysis could be couched without undue loss in terms of Freire's ideas together with demonstrations of the benefits of autonomy and democracy.

Jim Thomas and Dragan Milovanovic discuss the role of jailhouse lawyers. For constitutive criminologists jailhouse lawyers face the dilemma that they must make use of the machinery of the oppression in attempting to redress grievances (Thomas and Milovanovic, 1999: 234; Milovanovic, 1997: 95-101). They look at the possibility that individuals might move on from being jailhouse lawyers to becoming revolutionary by developing the rudiments of an alternative subject which are already present (Thomas and Milovanovic, 1999: 241). The dilemma is analysed elsewhere in terms of Lacan's four discourses, Freire's ideas about conscientisation and ideas from Deleuze and Guattari that the co-opting jailhouse lawyer becomes 'a body without organs… of the empty form', whereas the aim of the cultural revolutionary is to make the lawyer a full body without organs (Arrigo et al., 2005: 61-63, quotation at 63, cf. Milovanovic, 1997: 74; 2002: ch. 8; 242-46).

In a chapter heavily influenced by Manning, James Williams argues that the police are not an 'unproblematic medium of social control. The police do not really operate to impose a set of abstract principles and regulations upon the populace; rather they are engaged in a process of negotiation between institutional demands made of them and the situated ambiguity of lived events.' On this terrain 'dramas of resistance' may be played out (Williams, 1999: 168). While I am sure he is right to draw attention to the effects of low level everyday events, the converse idea that we could neglect the overall administrative and legal context of policing must surely be resisted. There is every suggestion that the Police and Criminal Evidence Act of 1984 led to a sea change in the way in which policing is conducted in Britain. The idea that policing in Northern Ireland is just down to immediate relations between police and members of the public and that the political and legal context is irrelevant is surely laughable. And it is surely legitimate for Marxists to argue that a major function of policing under capitalism is the defence of private property, even if there is considerable local variation and flexibility in the way this is done.

Victor Kappeler and Peter Kraska argue that the rhetoric of community policing coincides with the shift in the US towards a postmodern society and has allowed the police to 'expand targets of control and draw openly on a much larger array of control tactics' (Kappeler and Krasker, 1999: 177), which may well be true but which provides no ideas about policy.

Looking at women in a British prison Mary Bosworth uses the post-modern idea of a variety of possible feminine identities which provided the prisoners with various different possibilities of resistance to the strains of imprisonment. Because they were crucially involved in the construction of daily prison life they were also able to subvert it (e. g. Bosworth, 1999: 220). Although this provides a clear and interesting set of ideas it does not in itself lead on to any specific policy. A review of Bosworth's ideas by Arrigo et al. (2005: 59) to 'augment' her insights merely offers more elaborate ways of relating them to French postmodern theorists.

One of the most mind-boggling productions of constitutive criminology is a discussion of the execution of the mentally ill by Arrigo et al. (2005: 52-56). The death penalty is the most obviously barbaric feature of the United States penal system. There are cogent and well rehearsed arguments against it, for example from the American Civil Liberties Union (see: http://users.rcn.com/mwood/deathpen.html , which summarises arguments and provides references to a substantial literature). These have been found persuasive in most Western democracies. The dilemma involved in treating mental illness, possibly with a view to making an execution legal, stems from the initial barbarity. Arrigo et al. do not refer directly to modernist critiques of this sort, but instead produce two pages of insights such as the following:

> Relatedly, Lyotard's (1984) use of chaos theory's notion of far-from-equilibrium conditions suggests that the law's desire to arrive at a fixed, equilibrium resolution (i.e., a point attractor) regarding the execution of psychiatrically ill prisoners, dismisses the more natural and fluid behaviour of the law. The law is a system of signs (Kevelson, 1988) and, as such, is more dynamic than static, more indeterminate than determinate, more unpredictable than predictable (55-56).

Do the constitutive criminologists really think that arguments such as this will make any difference? It is at least incumbent on them to indicate how this approach could be seriously used either in legal argument or in public debate.

The approaches considered so far are all limited and local. This is acknowledged in a more sweeping strategy, which is intended to 'transform structural, state and institutional systems that are deeply entrenched'. For this they advocate Unger's notion of superliberalism, 'a society in which people are more fully empowered through the development of institutional arrangements that both diminish the gap between framework-preserving routine and framework-transforming conflict and weaken established forms of social division and hierarchy' (Unger, 1987: 362 in Henry and Milovanovic, 1996: 236, cf. Milovanovic, 1997a: 197). They put this idea together with chaos theory, aiming for 'far-from-equilibrium conditions' where 'structural instabilities produce periodic crises which necessitate change' (Henry and Milovanovic, 1996: 236). 'Forces are mobilised in order to maintain far-from-equilibrium conditions, but in a way which safeguards the basic security of recovering subjects and assures them necessary welfare rights' (Henry and Milovanovic, 1996: 237). A series of rights protects humans: 'market rights, offering capital to teams of workers', 'destabilisation rights' guaranteeing the right to criticise; 'immunity

rights', guaranteeing freedom from government or private oppression and assuring welfare entitlements to basic subsistence; solidarity rights, assuring trust and good faith dealings, and the right to define your own risk (Henry and Milovanovic, 1996: 237). More details on 'far-from-equilibrium conditions' are found in Schehr. He says that consistent with chaos theory 'social theorists can anticipate that social movements demanding changes in between one and three aspects of politics, economics and culture ..will be unlikely to produce systemic instability.' (Schehr, 1999: 261). As the total number of 'outcome basins' increases a state of flux or 'far-from-equilibrium conditions' emerges. A practical example would be the USA in the mid-1960s where the anti-war movement was joined by the Civil Rights, feminist, environmental, counter-cultural, Black Power and student movements[1] (Schehr, 1999: 264). This raises again the issue already mentioned about whether one extremely drastic challenge might outweigh several minor ones. Let us disregard this and focus on Young's statement that: 'only chaotic dynamics can give us those great leaps, jumps, twists and turns in human activity that mark invention, evolution, mystery, and miracle' (Young, 1997: 30). We are now dealing with a definite but alarming strategy.

This final set of ideas is politically highly dangerous in people who have, arguably, such naive and incoherent conceptions of how society works. To start with, what, in a highly unstable situation, guarantees the comprehensive set of rights which are supposed to protect people? Let us briefly consider four unstable social situations. I have not counted outcome basins in each for the reason given above. A serious period of instability characterised Germany in the 1920s under the Weimar Republic, involving bitter clashes between right and left, economic instability and hyperinflation. The outcome was, of course, the rise of Hitler. Any limited progressive developments under his regime were massively outweighed by domestic repression in numerous directions and an aggressive foreign policy leading to the Second World War. Moving on to another unstable situation, Salvador Allende became President of Chile in September 1970 in a narrowly contested election. As the leader of the Socialist Party he pressed ahead with a socialist and populist programme. Instability resulted from his narrow majority, middle-class opposition and various forms of United States intervention. It led to the successful coup by General Pinochet, which was followed by the disappearance and presumed execution of some 3000 leftists and incarceration, and in many cases torture, of some 27,000 more. In addition to the social repression Pinochet experimented with monetarism. Instability can also lead to a leftist dictatorship. The civil war in Cambodia in the early 1970s which involved not just domestic forces but also the North Vietnamese Army, forces from South Vietnam and bombing by the United States led to the triumph in 1975 of the Khmer Rouge. The subsequent experiment with an extreme form of peasant socialism led to the death of at least a million of the population of some 7 million.Market rights were not much in evidence. A less drastic period of instability characterised Britain in the 1970s. The trade union movement had become exceptionally powerful. The well conducted miners' strike had effectively brought down the Heath government; a series of successful strikes raised pay dramatically, leading to inflation well above 20 per cent, and groups of workers found it very easy to breach national pay agreements which were attempted at various points. Instability was finally resolved by the electoral victory of Mrs Thatcher in 1979 and crushing of the trade union movement through successful government resistance to a series of strikes and five anti-union Acts of Parliament. Along with this went the curtailing of the welfare state, the abolition of progressive local government initiatives, and a general worsening of conditions for groups which might be considered oppressed.

All four unstable situations created consequences which were disastrous for oppressed groups. It can by no means be assumed that the outcome of unstable situations will respect even their minimal rights, let alone producing the positive outcomes assumed by the constitutive criminologists.

Conclusion

Other than the potentially disastrous flirtations with instability which we have just been considering, the constitutive criminologists have very little to say about wider political strategies, except for Williams and Arrigo (2004: ch. 1) who argue that chaos theory provides some scientific support for the claims of anarchism, but without considering either how an anarchic society could emerge in the face of existing or rival accretions of power, or how it might be possible to move from a capitalist economy to a mutual society on the lines advocated by Kropotkin. The more limited policy ideas mentioned above are very miscellaneous. They lack consistent theoretical rationales. The groups and individuals who would benefit from them are identified by use of an implied modernist theory which would seem to unite Marxism, feminism, anti-racism and some form of radical deviancy theory. It is not, however, spelled out, and the issue of whether or not it would be undermined by the post-modernist themes derived from chaos theory is not explored. In my view the flaws of constitutive criminology are sufficiently serious to warrant a preference for a theory developed from critical criminology which would unite a modified Marxist approach with elements of feminism and liberalism and an awareness of some of the features of the real world which have been emphasised by post-modernists.

Not surprisingly the political approach of the constitutive criminologists is also flawed. They fail to consider the possibilities of attempting to influence a Social Democratic Party and getting it into power. In Britain aspects of this policy have been quite effective. For example the current Labour government has been influenced by feminists, and has therefore been seriously reviewing policies in the areas of domestic and sexual violence. It has also substantially increased spending on health and education, both of which should benefit excluded groups, and has specifically addressed the issue of social exclusion. Unfortunately the party's leadership felt it necessary to adopt the slogan of 'tough on crime, tough on the causes of crime' and to focus chiefly on the first half of the slogan, meaning that much of its criminal justice policy has comprised a continuation of previous Conservative initiatives and a relentless rise in the number of prisoners. In the United States where constitutive criminology originates things are less straightforward. However, feminists have achieved reforms of the rape laws in the various states so that marital rape is now generally criminalised and most states have a rape shield law restricting the use of sexual history evidence. There are national and local campaigns for the human rights of prisoners, for example Human Rights Watch, for Common Sense for Drug policy, against the death penalty, against the use of supermax incarceration etc. The Democratic Party is basically a catchall party, but is a possible venue for advancing the interests of the socially excluded by an increase in the minimum wage, the retention of affirmative action, pro-choice abortion laws, a universal health service etc. All of this is possible within a Liberal or social democratic framework to which the policies of constitutive criminology add little but confusion.

REFERENCES

Arrigo, B. A. (1996) 'Postmodern Criminology on Race, Class, and Gender', in Schwartz, M. D. and Milovanovic, D., *Race, Gender, and Class in Criminology: The Intersections*, New York: Garland.

Arrigo, B. A. (1997) 'Dimensions of Social Justice in a Single Room Occupancy: Contributions from Chaos Theory, Policy and Practice', in Milovanovic, 1997a: 179-194.

Arrigo, B. A. (1999) 'Constitutive Theory and the Homeless Identity: The Discourse of a Community Deviant', in Henry, S., and Milovanovic, D. (1999): 67-85.

Arrigo, B. A. (2001) 'Critical Criminology, Existential Humanism, and Social Justice: Exploring the Contours of Theoretical Integration', *Critical Criminology* Vol. 10: 83-95.

Arrigo, B. A., Milovanovic, D., and Schehr, R. C. (2005) *The French Connection in Criminology: Rediscovering Crime, Law and Social Change*, Albany: State University of New York Press.

Barak, G. (1999), 'Constituting O. J.: Mass Mediated Trials and Newsmaking Criminology', in Henry, S., and Milovanovic, D. (1999): 87-110.

Barry, K. (1995) *The Prostitution of Sexuality*, New York: New York University Press. Bosworth, M. (1999), 'Agency and Choice in Women's Prisons: Towards a Constitutive Penology' in Henry, S., and Milovanovic, D. (1999): 205-226.

Brigham, J. (1999), 'Bodies of Law: the Supreme Court, the Justices and Death', in Henry, S., and Milovanovic, D. (1999): 127-145.

Callinicos, A. (1989) *Against Postmodernism: A Marxist Critique,* Cambridge, Polity.

Carrington, K. (1998) 'Postmodernism and Feminist Criminologies: Fragmenting the Criminological Subject', in Walton, P. and Young, J. *The New Criminology Revisited*, Houndmills: Macmillan: 76-97.

Carrington, K. (2002) in Carrington, K. and Hogg, R., *Critical Criminology: Issues, Debates, Challenges*, Cullompton: Willan Publishing.

Christie, N. (2000) *Crime Control as Industry : Towards GULAGS, Western Style*, London: Routledge.

Cornell, D. (1991) *Beyond Accommodation: Ethical Feminism, Deconstruction, and the Law,* New York: Routledge.

Dion, D. (1999), 'Reconstituting the Monster: Images of Techno-Criminality at the Century's End', in Henry, S., and Milovanovic, D. (1999): 111-126.

Ferrell, J. A. et al. (eds.) (2004) *Cultural criminology unleashed*, London: Glasshouse.
Ferrell, J. and Saunders, C. R. (eds) (1995) *Cultural criminology*,   Boston : Northeastern University Press.

Freire, P. (1972) *The Pedagogy of the Oppressed,* Harmondsworth: Penguin.

Geras, N. (1990) *Discourses of Extremity: Radical Ethics and Post-Marxist Extravagances,* London, Verso.
Gregerson, H. and Sailer, L. (1993) 'Chaos Theory and Its Implications for Social Science Research', *Human Relations*, 46: 777-802.

Gross: R.and Levitt, N. (1994) *Higher Superstition: the Academic Left and its Quarrels with Science*, Baltimore and London, Johns Hopkins University Press.

Henry, S., and Milovanovic, D. (1996) *Constitutive Criminology: Beyond Postmodernism*, London, Sage.

Henry, S., and Milovanovic, D. (1999) *Constitutive Criminology at Work: Applications to Crime and Justice*, New York, State University of New York Press.

Henry, S., and Milovanovic, D. (2000) 'Constitutive Criminology: Origins, Core Concepts, and Evaluation' *Social Justice*, Vol. 27, No. 2, 268. Questia. 9 Nov. 2006 <http://www.questia.com/PM.qst?a=o&d=5001793345>.

Henry, S., and Milovanovic, D. (2001) 'Constitutive Definition of Crime: Power as Harm' in Henry, S., and Lanier, M. M. (eds) *What is Crime? Controversies over the Nature of Crime and What to Do about It*, Lanham, MA: Rowman and Littlefield, pp. 165-178.

Hunt, A. (1993) *Explorations in Law and Society: Toward a Constitutive Theory of Law*, New York: Routledge.

Jeffreys, S. (1997) *The Idea of Prostitution,* North Melbourne, Victoria : Spinifex
Jessop, B. (1990) *State Theory: Putting the Capitalist State in Its Place,* Cambridge: Polity Press.

Kappeler, V. E. and Kraska: B., 'Policing: Scientific and Community-Based Violence on Symbolic Playing Fields' in Henry, S., and Milovanovic, D. (1999): 175-203.

Lacan, J. (1961) *The Seminar of Jacques Lacan: Book IX: Identification 1961-1962,* Translated by Cormac Gallageur (unpublished).

Luhmann, N. A. (1992) 'Operational Closure and Structural Coupling: The Differentiation of the Legal System', *Cardozo Law Review* 13: 1419-1441.

Mandelbrot, B. (1983) *The Fractal Geometry of Nature,* New York: W.H. Freeman.
Mathiesen, T. (2000) *Prison on Trial*, Winchester: Waterside.

Matsuda, M. J., Larence, C.R. Delgado, R. and Crenshaw, K.W. (eds.) (1993) *Words That*

Wound, San Francisco: Westview Press.

Milovanovic, D. (1994) 'Law, Ideology, and Subjectivity: A Symbiotic Perspective on Crime and Justice', in Barak, G. (ed.) (1994) *Varieties of Criminology: Readings from a Dynamic Discipline*, Westport: Praeger, pp. 231-251.

Milovanovic, D. (1996) 'Postmodern Criminology', *Justice Quarterly* 13: 567-610.

Milovanovic, D. (1997) *Postmodern Criminology*, New York: Garland Publishing.
Milovanovic, D. (ed.) (1997a) *Chaos, Criminology, and Social Justice: the New Orderly (Dis) Order*, Westport: Praeger.

Milovanovic, D. (2002) *Critical Criminology at the Edge: Postmodern Perspectives, Integration, and Applications*, Westport: Praeger.

Milovanovic, D. and Ragland, E. (eds) 2001 *Topologically Speaking,* New York: Other Press.

Norris, C. (1990) *What's Wrong with Postmodernism: Critical Theory and the Ends of Philosophy*, London, Harvester Wheatsheaf.

Packard, V. (1959) *Status Seekers*, London: Longman.

Penna, S. and Yar, M. (2003) 'From modern to postmodern penality? A response to Hallsworth', Theoretical Criminology, Vol. 7 (4): 469–482.

Pickover, C. (1988) 'Pattern Formation and Chaos in Networks.' Communication of the ACM 31: 136-51.

Presdee, M. (2000) *Cultural Criminology and the Carnival of Crime*, London: Routledge.
Sanchez, L. (1999), 'Sex, Law and the Paradox of Agency and Resistance in the Everyday Practices of Women in the "Evergreen" Sex Trade' in Henry, S., and Milovanovic, D. (1999): 39-68.
Sanders, T. (2004) *Sex Work: A Risky Business*, Cullompton: Willan.
Sayer, D. (1979) *Marx's Method*, New York: Humanities Press.

Schehr, R. C. (1999) 'Intentional Communities, the Fourth Way: A Constitutive Integration' in Henry, S., and Milovanovic, D. (1999): 249-274.

Simons, G. L. and Stroup II, W. F. (1997) 'Law and Social Change: the Implications Of Chaos Theory in Understanding The Role of the American Legal System', in Milovanovic, 1997 a: 111-121.

Smart, C. (1989) *Feminism and the Power of the Law*, London: Routledge and Kegan Paul.

Smart, C. (1990) 'Feminist Approaches to Criminology: Or, Postmodern Woman Meets Atavistic

Man' in Gelsthorpe, L. and Morris, A. (eds) *Feminist Perspectives in Criminology*, Milton Keynes: Open University Press.

Sokal, A. and Bricmont, J. (1999) *Intellectual Impostures,* London, Profile Books.

Spivak, G. (1988) 'Can the Subaltern Speak?' in C. Nelson and L. Grossberg (eds.), *Marxisms and the interpretation of Culture,* London: Macmillan.

Sumner, C. (1994) *The Sociology of Deviance: An Obituary*, Buckingham: Open University Press.

Teubner, G. (1988) *Autopoietic Law: A New Approach to Law and Society*, New York: Walter de Gruyter.

Teubner, G. (1992) 'The Two Faces of Janus: Rethinking Legal Pluralism', *Cardozo Law Review* 13: 1443-1462.

Teubner, G. (1993} *Law as an Autopoietic System,* Oxford: Blackwell.

Thomas, J., and Milovanovic, D. (1999) 'Revisiting Jailhouse Lawyers: an Excursion into Constitutive Criminology' in Henry, S., and Milovanovic, D. (1999): 227-246.

Unger, T. (1987) *False Necessity,* New York, Cambridge University Press.

Veblen, T. (1925) [1899] *The Theory of the Leisure Class*, London: Allen and Unwin.

Williams, C. R. and Arrigo, B. A. (2004) *Theory, Justice and Social Change: Theoretical Integrations and Critical Applications*, New York: Kluwer.

Williams, J. W. (1999), 'Taking It to the Streets: Policing and the Practice of Constitutive Criminology' in Henry, S., and Milovanovic, D. (1999): 149-173.

Young, T. R. (1997) 'Challenges: for a Postmodern Criminology', in Milovanovic, 1997a: 29-51.

Young, T. R. (1997a) 'The ABC's of Crime: Attractors, Bifurcations, and Chaotic Dynamics', in Milovanovic, 1997a: 77-96.

Young, T. R. (1999) 'A Constitutive Theory of Justice: The Architecture of Affirmative Postmodern Legal Systems' in Henry, S., and Milovanovic, D. (1999): 275-285.

---

[1] This does not even seem historically accurate; the green and feminist movements only attained any real strength in the 1970s, by which time some of the other movements had faded.