

# GAMBLING AGAINST RAWLS

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## ABSTRACT

In *A Theory of Justice* (1971) John Rawls attempted to solve the problem of distributive justice by combining self-interest, ignorance and risk-aversion. He argued that if self-interested persons in a situation of uncertainty imposed by a veil of ignorance were choosing principles for the basic structure of society, then they would be risk-averse and choose two principles – The Principle of Equal Liberty and the Difference Principle. Critics have argued against this risk-averse element of Rawls' theory but those critics as well as Rawls made certain presuppositions about risk-aversion, risk-taking and gambling. This thesis also examines the risk-aversion in Rawls' theory but addresses the previous shortfall by exploring the issue of risk and gambling in two interrelated ways. It applies a Foucauldian approach to the history of risk and gambling in order to contextualize the current views and then investigates the contemporary meaning by drawing on research leading up to the UK Gambling Act 2005. Drawing on these findings it argues that not only might risk-taking occur in the original position but that different types of participants could show different degrees of risk-taking behaviour. By exploring the theoretical debates between essentialism and anti-essentialism, it further argues that it is unlikely that the veil of ignorance would be able to screen out those differences. It then employs theories of identity and difference in the work of Heidegger, Deleuze and Lyotard in an attempt to overcome that weakness in Rawls' theory but finds that this may not be possible. After highlighting a connection between impartiality and gambling, it concludes, in contrast to Rawls, that risk-taking rather than risk-aversion lies at the heart of social justice. The implication of this reversal is that it may have an impact on policy-decisions in other areas of the justice system.

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## INTRODUCTION

*Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise, laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust.*<sup>1</sup>

After more than two and a half thousand years of theorising about justice, it is still understood as a contested concept. That amount of time has passed since Socrates, in Plato's *Republic*, asked what justice was. Some of the responses included Thrasymachus' suggestion that justice serves the interests of the rulers and is no more than the advantage of the stronger.<sup>2</sup> Glaucon thought that people stick to the conventions of justice to avoid punishment and that justice was just a matter of self-interest.<sup>3</sup> Socrates suggested that justice was more than self-interest and convention and Plato spent the rest of the book finding out what it was. From Plato's perspective, knowing what justice is, like knowing the truth about anything, requires the ability to ascend from particular contingent things. The idea of justice as a tool for the leaders, justice as might, justice as conventions, justice as self interest, justice as something more, and the truth and untruth of justice have all filtered down through history in varying guises. In addition, this history has included Aristotle's distinction between different areas of Justice.

In the *Nicomachean Ethics* Aristotle divided justice into two main categories, the general and particular. He further divided the latter into distributive and rectificatory.<sup>4</sup> The former is about what people deserve and he based that on equality, which is more like proportion. *'Hence what is just [since it requires equal shares for equal people] is in some way proportionate.'*<sup>5</sup> Conversely, if something is to be distributed between two unequals, the ratio of that distribution has to be equal to the ratio of the merits of the two unequals.<sup>6</sup>

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<sup>1</sup> John Rawls, *A Theory of Justice*, Oxford: OUP, 1973, p. 3

<sup>2</sup> Plato (Trans. D. Lee) *The Republic*, London: Penguin Books, 1987, pp. 76-77

<sup>3</sup> *Ibid.* 102-114

<sup>4</sup> See G. Vlastos, 'Justice and Equality' in R. Brandt (Ed.) *Social Justice*, Englewood Cliffs, New Jersey: Prentice Hall, 1962, p. 32

<sup>5</sup> *Nicomachean Ethics* 5.43. Cited in R. Solomon, *What is Justice*, Oxford: OUP, 2000, p. 40

<sup>6</sup> *'A better means, therefore, than equalizing property for securing a stable society would be to ensure that those who are by nature a superior class should not wish to get more than their share, and that the inferior should not be able to do so; and that means that they should be*

Modern theorists make the distinction between distributive justice and criminal justice<sup>7</sup> yet the two are not hermeneutically sealed. For example, risk-aversion underpins John Rawls' theory of distributive justice<sup>8</sup> and there seems to be a 'culture of risk aversion throughout the criminal justice, immigration and asylum systems.'<sup>9</sup> Unfortunately, if this culture of risk-aversion was taken to its logical conclusion then it could end in a form of closure not unlike the myth of objective truth.<sup>10</sup> John Rawls may have escaped the latter by basing justice on agreement and impartiality but he might have inadvertently contributed to the culture of risk-aversion in the modern world.

Current debates concerning distributive justice have been traced back to John Rawls' *A Theory of Justice* (1971).<sup>11</sup> They did not originate there of course but it was the publication of Rawls' book, which rejuvenated discussions of distributive justice. Utilitarianism was the main focus before Rawls and it was also the primary alternative to his own theory. As a theory of justice, Utilitarianism argues that society is just when its basic institutions are structured in such a way that brings about more total happiness than other ways of setting up those institutions.<sup>12</sup> Rawls criticized this type of notion because it placed the

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*weaker but not dwnthrodden.*' Aristotle, *Politics* (Trans T.A. Sinclair) London: Penguin 1962, p. 77. See also pp. 236-240.

<sup>7</sup> This distinction has some similarities and some differences with Aristotle's distinction. For further information about this see A. Ryan (Ed.) *Justice*. Oxford: OUP, 1993, p. 9

<sup>8</sup> This risk-averse element of Rawls' work will be examined throughout the thesis.

<sup>9</sup> The Joint Committee On Human Rights Thirty-Second Report, Part 4. See The Human Rights Act: the DCA and Home Office Reviews HL Paper 278/HC 1716 (November 2006).

<sup>10</sup> For example, the Frankfurt School criticise Hegel's unity of subject and object. See chapter 4 section C below on Adorno's *Negative Dialectics*.

<sup>11</sup> See R. Solomon, *What is Justice*, op. cit. p. 5. John Rawls (1921–2002), the James Bryant Conant University Professor Emeritus at Harvard University, has been acknowledged as one of the most influential political and moral philosopher of the late 20th century. The Dean of the Faculty of Arts and Sciences at Harvard summed up Rawls' contribution to the field when he stated that '*John Rawls' consideration of questions of social justice has marked him as one of the greatest political theorists of our time.* See Ken Gewertz, 'John Rawls, influential political philosopher, dead at 81,' *Harvard University Gazette* (November 25, 2002). Prior to joining the Harvard Philosophy Department in 1962, Rawls was stationed at Princeton from 1950 until 1952. He was assistant and associate professor of philosophy at Cornell from 1953 until 1959. And from 1960 until 1962 he was professor of philosophy at M.I.T. He was appointed the Conant University Professor at Harvard in 1979. Among his more important publications were *A Theory of Justice* Cambridge, Massachusetts: Belknap Press of Harvard University Press, 1971 which was nominated for a National Book Award; *Political Liberalism* New York: Columbia University Press, 1993; *Lectures on the History of Moral Philosophy* Cambridge, Massachusetts, Harvard University Press, 2000; and *Justice as Fairness: A Restatement* Cambridge, Massachusetts: Belknap Press, 2001.

<sup>12</sup> For example see John Stuart Mill, *Utilitarianism*, Chapter 5 'On the Connection between Justice and Utility', in John Stuart Mill, *Utilitarianism, On Liberty, and Considerations on Representative Government*, (Ed. H.B. Acton) London: J.M. Dent & Sons Ltd., 1972, p. 61.



good over the right.<sup>13</sup> While neither Plato nor Aristotle would take issue with the over-riding of individual rights<sup>14</sup> Rawls argued that Utilitarianism could sacrifice the individual if it increased the overall wellbeing of society.<sup>15</sup> In opposition to Utilitarianism Rawls' theory safeguards against the sacrifice of the minority for the majority and he has been called the theorist of the welfare state.<sup>16</sup> However, it is worth mentioning that the welfare state rose during the reign of Utilitarianism and has declined since Rawls.<sup>17</sup> That said Utilitarianism might not have been the underlying theory of the welfare state.

In 1950 T.H. Marshall published an essay, which argued that there had been a gradual increase in rights of citizenship between the eighteenth and twentieth centuries. Civic rights, during the eighteenth century, gave more liberty to persons in the form of freedom of speech, thought and faith and a general right to justice. During the nineteenth century, there was a rise in political rights and social rights followed in the twentieth century. Social rights seem to be linked to the development of a relatively open state-funded system of education and to the development of institutions of the welfare state. It encompassed '*...the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilized being according to the standards prevailing in the society.*'<sup>18</sup> Moreover, much of this may have resulted from a report by Beveridge written a few years earlier.<sup>19</sup>

The *Social Insurance and Allied Services*' report, which became known as *The Beveridge Report*, was published on the 1<sup>st</sup> December 1942 by the wartime

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<sup>13</sup> In his examination of the difference between Utilitarianism and his own view Rawls argues that the former is a teleological theory which defines the right as that which maximizes the good, and defines the good as the satisfaction of desire, or utility. Rawls's own view is a deontological theory in which the right is prior to the good. Or in other words, something can not be good if it is not right first of all. Rawls, *A Theory of Justice*, op. cit. pp 22-27

<sup>14</sup> Ryan, *Justice*, op. cit. pp. 2-3

<sup>15</sup> Rawls, *A Theory of Justice*, op. cit. p. 33

<sup>16</sup> Ryan, *Justice*, op. cit. p. 16. Although this type of view has been disputed. For example, Edgren argued that in a number of quite specific ways Rawls's ideas are misrepresented and misused by mainstream microeconomists. See J. Edgren, 'On the Relevance of John Rawls's Theory of Justice to Welfare Economics', *Review of Social Economy*, 53, 3 (1995)

<sup>17</sup> Francesc Ortega, 'The Decline of the Welfare State: Demography and Globalization,' *Economics of Transition*, 14, 2 (2006 April): 413-415

<sup>18</sup> T.H. Marshall, 'Citizenship and Social Class,' in *Citizenship and Social Class and Other Essays*, Cambridge, UK: Cambridge University Press, 1950, p. 11

<sup>19</sup> Beveridge Report 'Social Insurance and Allied Services' (1942), Cmnd 6404, HMSO, CMND 6404.

coalition government. The aim of the report was to provide a comprehensive system of social insurance *'from cradle to grave'*. For this to happen it was recommended that all working people would pay a weekly contribution to the state. This would allow benefits to be paid to the unemployed, sick, retired and widowed. In other words, it aimed at ensuring that there was a minimum standard of living in Britain - one in which nobody fell below. This report had a great amount of support and it may have been responsible for the landslide victory for the Labor Party in the June 1945 election as they were enthusiastic supporters of the Beveridge Report.<sup>20</sup> Even Margaret Thatcher's white paper on social security recognized the report as 'by any measure a landmark', however; it did oppose many of the principles behind it.<sup>21</sup> But forty years had passed between the publication of the Beveridge Report and Thatcher's white paper. Before the publication of the Beveridge Report there had been other liberal rumblings hinting at a welfare state. The election victory in 1906 allowed the liberals to implement the basic minimum standards of living, which L. T. Hobhouse had previously proposed.<sup>22</sup> In addition, this movement towards welfarism was not confined to Britain. For example, in Germany Bismarck brought in a form of state welfare to ease the workers away from political radicalism, after banning the socialist parties in 1878.<sup>23</sup>

In terms of reform, rather than revolution, Rawls was concerned with justice in relation to the basic structure of society. In the very first sentence of the first section in chapter one of *A Theory of Justice* he writes that '*...justice is the first virtue of social institutions.*' He adds to this that '*..the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation.*'<sup>24</sup> And a few pages along he

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<sup>20</sup> See G. Rivett, *From Cradle to Grave: Fifty Years of the NHS*, London: Kings Fund Publishing, 1998, Chapter 1.

<sup>21</sup> See John Mesher, 'The 1980 Social Security Legislation: The Great Welfare State Chainsaw Massacre?' *British Journal of Law and Society*, 8, 1 (1981 Summer):119-127

<sup>22</sup> B. Jones, et. al. *Politics UK* (5<sup>th</sup> Edition) England: Pearsons, 2004, p. 97

<sup>23</sup> '*The Exceptional Law against the Socialists (Gesetz gegen die gemeinefährlichen Bestrebungen der Sozialdemokratie – The Law against the Harmful and Dangerous Aspirations of Social-Democracy)* was introduced by the Bismarck government, supported by the majority in the Reichstag, on October 21 1878 to counter the socialist and workers' movement. This law, better known as the *Anti-Socialist Law*, made the *Social-Democratic Party of Germany* illegal...' Engels, F. 'Bismarck and the German Working Men's Party,' *The Labour Standard*, No 12, July 23, 1881, Note 1. From

<http://www.marxists.org/archive/marx/works/1881/07/23a.htm> (Accessed 21/3/2007)

<sup>24</sup> Rawls, *A Theory of Justice*, op. cit. pp. 3, 7.

distinguishes between this basic structure and particular individuals and their actions, arguing that the principles apply to the former. '*The principles of justice for institutions must not be confused with the principles which apply to individuals and their actions in particular circumstances.*'<sup>25</sup> The *difference principle*, according to him, is what prevents the Utilitarian sacrifice of the worst off members of society for the good of the majority. It is this *difference principle*, which shares similarities with welfarism. As well as the *difference principle* Rawls' theory also includes the *liberty principle*. Moreover, he further argued that participants in the *Original Position* under a *Veil of Ignorance* would choose these principles.<sup>26</sup>

Other theorists have used something like Rawls' veil of ignorance in theoretical economics<sup>27</sup> and political science.<sup>28</sup> In addition, arguments have been put forward against Rawls' conclusion that people would focus on the worst off. For example, Harsanyi argued, in contrast to Rawls, that the choice would reflect a utilitarian social welfare function.<sup>29</sup> Rawls' conclusion was different to Harsanyi's because Rawls based his argument on the presupposition that the participants in the *Original Position* would be risk adverse. Risk aversion, according to him would be the rational option to take.<sup>30</sup> This presupposes that risk taking would not be rational behavior. However, some scholars have criticised Rawls' presuppositions concerning the risk aversion resulting from the veil of ignorance. Raphael argued that Rawls was not justified in presupposing that a self-interested person would be cautious rather than a risk-taker.<sup>31</sup> Dworkin argued that some less cautious people might not

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<sup>25</sup> Ibid. 54-55

<sup>26</sup> Ibid. 136-141

<sup>27</sup> W. Vickrey, 'Measuring marginal utility by reactions to risk,' *Econometrica*, 13 (1945): 215–236; R. Dworkin, 'What is equality? Part 2: Equality of resources,' *Philosophy & Public Affairs* 10 (1981): 283-345; J. Harsanyi, 'Cardinal Welfare, individualistic ethics, and interpersonal comparisons of utility,' *Journal of Political Economy*, 63 (1955): 309–21; H. Cremer and P. Pestieau, 'Social insurance, majority voting and labor Mobility,' *Journal of Public Economics*, 68 (1998): 397–420

<sup>28</sup> N. Frohlich & J.A. Oppenheimer, *Choosing Justice*, CA: University of California Press, 1992

<sup>29</sup> J. Harsanyi, 'Cardinal utility in welfare economics and in the theory of risk-taking,' *Journal of Political Economy* 61(1953): 434-435

<sup>30</sup> Rawls, *A Theory of Justice*, op. cit. p.142

<sup>31</sup> D.D. Raphael, *Moral Philosophy* Oxford: Oxford University Press, 1981, p. 73. For earlier work related to impersonality see K. Prasanta Pattanaik, 'Risk, Impersonality, and the Social Welfare Function,' *The Journal of Political Economy*, 76, 6 (1968 Nov. - Dec): 1152-1169

choose the principles.<sup>32</sup> However, theorists who have criticized the anti-risk element of Rawls' theory suggesting that people might gamble do not seem to have gone into any great detail about the relationship between risk aversion, risk taking and gambling. For that reason the notion of risk aversion is the area of Rawls' theory that will be the focus of the present thesis.

A central reason for re-examining this aspect of Rawls' theory is that he developed it when there was limited research into gambling. Gambling is currently on the increase in the Western world and this increase has led to more research on the topic in five interrelated and controversial issues related to that development. These issues include the proposed changes to the gambling laws in the UK, developments in attitudes towards gambling, changes in gambling behaviour, research into gambling and problem gambling, and the problematic line which needs to be drawn between individual freedom and the public good.

A key pivotal point between these areas and highlighting their significance was the publication of the *Gambling Review Report* in July 2001.<sup>33</sup> That report was the result of a decision in December 1999 by the then Home Secretary, Jack Straw, who announced the appointment of an independent body to conduct a 12-month review of the laws governing gambling.<sup>34</sup> Sir Alan Budd chaired the appointed independent Gambling Review Body and the findings of that review were published in the *Gambling Review Report*. This report, which became known as the Budd Report, was also a public consultation exercise. The final version contained 176 recommendations for changes to gambling laws and regulations in the UK.<sup>35</sup>

The Budd Report was commissioned by one government department, the Home Office, but delivered to another, the Department of Culture, Media and

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<sup>32</sup> R. Dworkin, 'The Original Position,' in Norman Daniels (Ed.) *Reading Rawls*, New York: Basic Books Inc, Publishers, 1975, p. 17

<sup>33</sup> Department of Culture, Media and Sport (DCMS) *Gambling Review Report Cm 5206*, July 2001 (Also known as the Budd Report)

<sup>34</sup> On the 8<sup>th</sup> December 1999 Mr. Ernie Ross asked the Secretary of State for the Home Department 'when he last reviewed the working of legislation on gaming; what plans he has for further reviews; and if he will make a statement.' Mr. Jack Straw responded that 'much of the law on gambling is more than 30 years old. Social attitudes have changed markedly in these three decades and the law is fast being overtaken by technological developments.' A little further along he said that 'I intend to set up an independent review body next year, bringing together a wide range of relevant expertise. It will be asked to report to me within 12 months on proposals for reform.' See 8 Dec 1999: Column: 535W. Transcript available online at [http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmhansrd/vo991208/text/91208w02.htm#91208w02.html\\_sbhd0](http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmhansrd/vo991208/text/91208w02.htm#91208w02.html_sbhd0) (Accessed 21/12/04)

<sup>35</sup> The correspondence and recommendations will be examined in chapter 3 below.

Sport. The latter responded to the report in Tessa Jowell's white paper entitled *A Safe bet for success*.<sup>36</sup> This response accepted 157 of the recommendations but 10 were felt to require further consideration and 9 were rejected.<sup>37</sup> The movement of the responsibility for gambling from the Home Office to the Department of Culture, Media and Sport seems to correlate with a shift in attitudes towards gambling. At one time gambling was understood to be at the borders of vice<sup>38</sup> but now it seems to be in the area of acceptable entertainment. This was only one stage of the journey where social, political, economic, technological and cultural forces have changed the public perception of gambling from a sin, to a vice, to irrational behavior, to a mode of entertainment. The latter was not prevalent when Rawls was developing his theory of justice.

The new technologies have been cited as one of the main reasons for updating the gambling laws.<sup>39</sup> There are two main elements to this. As well as contributing to changes in attitude towards gambling the new technologies have had an impact on gambling behavior.<sup>40</sup> For example, Internet gambling has been cited in many places, including the Budd Report and Tessa Jowell's response, as one of the main reasons for updating the gambling laws.<sup>41</sup> There are two key reasons here. Many of the Internet gambling companies are based offshore and therefore they do not come under the UK's taxation or gambling laws. One of the recommendations from the Budd Report, which was accepted by Jowell's response, was an attempt to address those issues. The former recommended that the law be changed to allow Internet gambling companies to advertise their casino type games.<sup>42</sup> However, in order to be able to advertise they must gain a license and be regulated by the UK. Moreover, they will also be required to pay tax. This recommendation has caused much controversy because it has been alleged that advertisements will increase the number of online gamblers and with that, there will be an increase in problem gambling. The possible increase

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<sup>36</sup> Department of Culture, Media and Sport (DCMS) *A safe bet for success – modernising Britain's gambling laws* Cm 5397, March 2002

<sup>37</sup> This response will be examined more fully in Chapter 3 section B below.

<sup>38</sup> The Budd Report, *op. cit.* Chapter 14.1-14.2

<sup>39</sup> *Ibid.* Chapter 30

<sup>40</sup> This will be examined more fully in Chapter 3 section A below

<sup>41</sup> The Budd Report; *op. cit.*; *A safe bet for success*, *op. cit.*

<sup>42</sup> The Budd Report, *op. cit.* Chapter 1.34

in problem gambling is also an issue with other changes to the law that will affect land based gambling.<sup>43</sup>

The proposed changes to the UK's gambling law have led to much research related to many of the changes to Internet gambling and the new laws regulating casino gambling. For example, at the Centre for the Study of Gambling at the University of Salford (in Manchester which won the bid for the UK's first Super Casino) much research has been conducted in relation to the impact of casinos in the local area.<sup>44</sup> Moreover, suggestions that a rise in Internet gambling will lead to a rise in problem gambling have attracted much research.<sup>45</sup> The literature on problem gambling from the UK is small on the international scale but it is growing. In May 2004, the Gambling Research Centre, Auckland University of Technology, Auckland, New Zealand was commissioned by the RIGT (Responsibility in Gambling Trust) to prepare a critical review of existing problem gambling research making specific recommendations for future research on gambling problems in the U.K.<sup>46</sup> Much of the current research on problem gambling comes from North America and Australia. However, as a result of the review the ESRC, in partnership with RIGT invited applications from within the UK social science community for research into problem Gambling. £1million was awarded to the successful applicants. These included Dr Gerda Reith and colleagues at the University of Glasgow and the Scottish Centre for Social Research; Dr Rebecca Cassidy and colleagues at Goldsmiths, University of London; Professor Trevor Robbins and Dr Luke Clark at the University Of Cambridge; Dr Stephanie Van Goozen and Dr Simon Moore at the University of Cardiff; Dr Robert Rogers at Oxford University; and Professor Gill Valentine and colleagues at Leeds University.<sup>47</sup> The University of

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<sup>43</sup> These arguments will be examined in Chapter 3 sections D & E below.

<sup>44</sup> M.W. Nichols, B.G. Stitt, D. Giacomassi, 'Does the Presence of Casinos Increase Crime?—An Examination of Casino and Control Jurisidictions,' *Crime & Delinquency* (April, 2003): M.W. Nichols, B.G. Stitt, D. Giacomassi, 'Community Perception of Casino Gambling's Effect on Crime in New Gambling Jurisdictions,' *Justice Professional*, 14, 2 (2001)

<sup>45</sup> Mark Griffiths & Jonathan Parke, 'The Social Impact of Internet Gambling,' *Social Science Computer Review*, 20, 3, (2002): 312-320

<sup>46</sup> The full report and recommendations can be found on the Trust's website [www.rigt.org.uk](http://www.rigt.org.uk).

<sup>47</sup> Information from the ESRC webpage [http://www.esrc.ac.uk/ESRCInfoCentre/Images/Problem%20gambling%20initiative%20specification\\_tcm6-11317.pdf](http://www.esrc.ac.uk/ESRCInfoCentre/Images/Problem%20gambling%20initiative%20specification_tcm6-11317.pdf) (Accessed 12/05/06)

Greenwich also received funding from the Responsibility in Gambling Trust.<sup>48</sup>

Gambling related research has grown at an exponential rate and has come from many different disciplines. While the most prevalent topics explored within gambling studies have been pathology, risk-taking, decision-making, addiction, other areas such as '*studies addressing epidemiology, drug abuse, comorbidity and neuroscience*' have become increasingly prevalent since 1999.<sup>49</sup> From this research, one can see that gambling studies is a truly multidisciplinary area.<sup>50</sup> However, this is not a new development as it has been so for some time. For example, developments in probability theory, Insurance, and risk management stem from the study of games of chance. According to Bernstein, '*It was a game of chance that inspired Pascal and Fermat's revolutionary break-through into the laws of probability, not some profound question about the nature of capitalism or visions of the future.*'<sup>51</sup> And, ironically enough, the probability theory which stemmed from games of chance led to the development of statistics which are now being employed to study gambling.

One small statement in the Budd Report which seemed to draw little attention for research funding was the acknowledgement that there were no clear guidelines for where to draw the line between complete prohibition and complete deregulation.<sup>52</sup> The UK's decision to regulate and the US's decision to ban Internet gambling highlighted this problem.<sup>53</sup> Even though there were no clear lines, the result of the Budd Report was to lean on the side of individual liberty within their terms of reference.<sup>54</sup> And these terms of reference became the objectives<sup>55</sup> that migrated into *A Safe Bet for Success* as three of Jowell's

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<sup>48</sup> Ros Corney (Professor of Psychology in the Department of Psychology and Counselling at the University of Greenwich) sent out an all-staff email on the 25<sup>th</sup> April 2007 asking for volunteers to take part in this funded study.

<sup>49</sup> Howard Shaffer, Michael Stanton, Sarah Nelson, 'Trends in Gambling Studies Research: Quantifying, Categorizing, and Describing Citations,' *Journal of Gambling Studies*, 22, 4 (2006 December): 427

<sup>50</sup> See W. Eadington (Ed.) *Gambling and Society. Interdisciplinary Studies on the Subject of Gambling*, Springfield: Charles C. Thomas Pub Ltd., 1976

<sup>51</sup> P. Bernstein, *Against the Gods: The Remarkable Story of Risk*, New York: John Wiley & Sons, Inc., 1998, p. 11

<sup>52</sup> The Budd Report, op. cit. Chairman's Introduction; See Chapter 3: 'The Central Dilemma'.

<sup>53</sup> See Chapter 3 sections E and F below

<sup>54</sup> The Budd Report, op. cit. Chapter 2

<sup>55</sup> Ibid. The Budd Report, Chapter 3.1 – 3.28

criteria.<sup>56</sup> Those criteria formed the framework of much of the subsequent research. Moreover, that research seems to be distorting the contemporary understanding of gambling and gamblers by focusing on problem gambling rather than gambling per se. Even within the sub-category of problem gambling, according to Orford, the focus is narrow and limited.<sup>57</sup> In order to address that imbalance this thesis will also examine risk and gambling outside that limiting framework. Therefore, unlike Rawls' critics, this thesis will have the benefit of examining the anti-risk element in Rawls' theory from a more informed position.

Rawls' argument for risk-aversion was not based on empirical evidence. This work, however, will draw on data from the area of gambling studies in order to address that omission. The central focus will be research related to the changing gambling laws in the UK but because this research includes findings from Australia and America that will also be included. A limitation on this data is that it has focused on problem gambling. In order to widen that focus this work will also draw on Foucault's methodology in order to explore gambling as an object of study. However, because the topics of Foucault's investigations were sexuality, crime and madness rather than gambling,<sup>58</sup> this thesis will also draw on research into the history of gambling in order to apply Foucault's method.<sup>59</sup> In an attempt to highlight the usefulness of Foucault's work, this work will also draw on the work of Saussure, Barthes and Heidegger.<sup>60</sup>

The following thesis will be divided into five chapters beginning with

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<sup>56</sup> This will be examined in Chapter 3 section B below

<sup>57</sup> 'We need to develop the capability, not only to combine work on substance and non-substance addictions, but also to carry out work that combines disciplines and research methods – linking the laboratory, the clinic and the community, combining experimental with non-experimental methods of both quantitative and qualitative kinds, and crossing the boundaries between social science, psychology and neuroscience – in ways that are not happening at present.' Jim Orford, 'Problem Gambling and Other Behavioral Addictions' *Foresight Brain Science, Addiction and Drugs project* (July 2005): 28. Available online at [http://www.foresight.gov.uk/Previous\\_Projects/Brain\\_Science\\_Addiction\\_and\\_Drugs/Reports\\_and\\_Publications/ScienceReviews/ Problem%20Gambling%20and%20other%20Behavioural%20Addictions.pdf](http://www.foresight.gov.uk/Previous_Projects/Brain_Science_Addiction_and_Drugs/Reports_and_Publications/ScienceReviews/Problem%20Gambling%20and%20other%20Behavioural%20Addictions.pdf) (Accessed 1/5/07)

<sup>58</sup> M. Foucault, *The Will to Knowledge: The History of Sexuality Vol. 1*, Harmondsworth: Penguin, 1981; *Discipline and Punish*, London: Penguin 1979; *Madness and Civilization: A History of Madness in the Age of Reason*, London: Routledge, 1997.

<sup>59</sup> Much of this information will be gathered from Peter Bernstein, *Against the Gods: The Remarkable Story of Risk*, New York: John Wiley & Sons, Inc., 1998 & Gerda Reith, *The Age of Chance*, London: Routledge, 2002

<sup>60</sup> Ferdinand de Saussure, *Course in General Linguistics* (Trans. Roy Harris), London: Duckworth, 1983; Roland Barthes, *Elements of Semiology*, London: Jonathan Cape, 1967; M. Heidegger, *Being and Time*, Oxford: Blackwell, 1998.



reason and ending in aesthetics. The first chapter sets the context by introducing the work of John Rawls. His *A Theory of Justice* (1971) is the main text but his later work will also be consulted. The focus will include his original position, veil of ignorance and subsequent arguments for choosing his principles over Utilitarianism. It examines Rawls' argument that the choice of principles based on risk aversion would be the rational decision. In order to explore that presupposition this chapter focuses on the notion of risk aversion and risk taking in more detail. It suggests, against Rawls, that there may be times when risk taking could be considered rational. It reveals that both are apparent in Rawls' own theory in terms of decisions under uncertainty and risk reduction. It notes that there may be a more fundamental link between these aspects of Rawls' theory and gambling but suggests that the latter will require more investigation.

One of the problems faced by the Gambling Review Body was the lack of research into what gambling was. *'As with the Rothschild Commission, more than two decades ago, we were struck by how little is known about either normal or problem gambling.'*<sup>61</sup> As we have seen there has been much research into problem gambling but the Budd Report also suggested that more needs to be understood about non-problem gambling.<sup>62</sup> Chapter 2 attempts to examine gambling in greater detail by looking at how it has been understood. It does not look at the history of gambling as such because that would presuppose what this chapter is attempting to identify. For that reason Foucault's methodology will be employed in order to look at gambling as an object of study.<sup>63</sup> In order to gain as clear an understanding as possible this chapter will begin with the work of some of the scholars who influenced Foucault's method. By examining gambling in this way chapter 2 will not only help with a better understanding of Rawls' theory but it will also address recommendations of the Budd Report and Jim Orford. In addressing those shortfalls in gambling research, this chapter also adds substance to the anti-gambling criticisms of Rawls' work.

Chapter 3 is primarily concerned with the discourse surrounding the new gambling laws. After looking at the main reasons for the changes, it examines the debates and landmarks leading up to the Gambling Act 2005. It then

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<sup>61</sup> The Budd Report, op. cit. Chapter 1.30

<sup>62</sup> Ibid. Chapter 1.31

<sup>63</sup> Foucault, *The Will to Knowledge*, op. cit. Part four, Chapter 2, pp. 92-102

undertakes a comparative study by examining the ways that the UK and US, while calling on similar research, have treated the current upsurge in Internet gambling differently.<sup>64</sup> It finds that the new UK laws are compatible with Rawls' theory but by drawing on findings in the previous chapter, it suggests that this does not make the new laws just. It further argues that parts of Rawls' theory are contradicted by some of the findings within the research surrounding the gambling laws. It draws on quantitative research embedded in the developments in the UK's gambling laws to show that different types of people have different degrees of risk aversion and it places Rawls himself within that classification. By drawing on both Rawls' theory and the discourse surrounding the new gambling laws it allows a greater insight into this criticism of Rawls' work. In particular it gives some insight into the possibility of applying the veil of ignorance to risk taking in addition to just veiling one's knowledge of their own '*aversion to risk or liability to optimism or pessimism*.'<sup>65</sup> The following chapter then attempts to re-examine the veil of ignorance to see if that weakness in Rawls' theory can be overcome.

Rawls argues that a *veil of ignorance* over certain characteristics would lead to justice as fairness. It would be fair because it would be unbiased. Chapter 4 draws on qualitative research to argue, from an epistemological perspective, that a complete *veil of ignorance* would not be possible. It begins by highlighting certain areas of Rawls' notion of the veil of ignorance. It then draws on arguments around essentialism and anti-essentialism to show that Rawls is placed within the former. It then contrasts Rawls' position with Adorno's *Negative Dialectics* and Deleuze's *The Fold*<sup>66</sup> to argue that the veil would be more transparent than Rawls suggests. It notes, however, that Rawls himself preferred the political to the epistemological reading of the original position. Findings from Foucault's work in Chapter 2 are then re-cast into an examination of this issue. The possibility of separating the two is explored

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<sup>64</sup> Hélène Mulholland, 'Jowell compares US gambling ban to prohibition,' *Guardian Unlimited*, Friday October 27, 2006. Available online at

<http://politics.guardian.co.uk/homeaffairs/story/0,,1933345,00.html> (Accessed 29/11/2006)

<sup>64</sup> Daily Mail. 'New laws could let gamblers dodge their online debts,' Available online at [http://www.dailymail.co.uk/pages/live/articles/news/news.html?in\\_article\\_id=412941&in\\_page\\_id=1770](http://www.dailymail.co.uk/pages/live/articles/news/news.html?in_article_id=412941&in_page_id=1770) (Accessed 28/10/2006)

<sup>65</sup> Rawls, *A Theory of Justice*, op. cit. p.137

<sup>66</sup> T. Adorno, *Negative Dialectics*, London: Routledge, 1990; G. Deleuze, *The Fold*, London: The Athlone Press, 1993

further in the following chapter by drawing on the work of Lyotard as well as Foucault and Deleuze.<sup>67</sup>

Rawls begins his *A Theory of Justice* with the following words which were also quoted at the beginning of this introduction. *'Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust.'*<sup>68</sup> Chapter 5 agrees with this statement by Rawls but argues that these reforms or rejections, in a move towards justice in an age of multiplicities, uncertainty and the epistemological critique of representation, also include an element of gambling. It further suggests that this gambling in justice might be related to aesthetic judgement.

**Figure 1**<sup>69</sup>



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<sup>67</sup> J-F. Lyotard, *Just Gaming*, Minneapolis: University of Minnesota Press, 1996; J-F. Lyotard, *Libidinal Economy*, London: The Athlone Press, 1993

<sup>68</sup> Rawls, *A Theory of Justice*, op. cit. p. 3

<sup>69</sup> Figure 1: 'Politician Seized in Gambling Raid,' from the *St. Louis Post-Dispatch*, March 24, 1954

## CHAPTER 1: WHAT DOES IT MEAN TO TAKE A RISK?

*It is not worthwhile for him to take a chance for the sake of a further advantage, especially when it may turn out that he loses much that is important to him.<sup>1</sup>*

### **Introduction**

This chapter is primarily concerned with the risk-averse aspect of John Rawls' *A Theory of Justice* (1971). In order to contextualize this aspect section (A) begins with a brief introduction outlining Rawls' argument against Utilitarianism and his relationship with the social contract tradition. It focuses in on the Original Position and Veil of ignorance. In Section (B) it examines the arguments for choosing Rawls' principles of justice. Section (C) then explores the arguments against such a choice. The focus in Section (D) will be on Rawls' argument that participants in the original position would be risk adverse. It highlights Rawls' notion that risk aversion would be the rational strategy. Sections (E) and (F) then examine the idea of risk aversion in more detail by comparing it with related notions such as taking a chance and risk-reduction. In Section (G) it investigates the possibility that there could be times when gambling might be understood as rational behaviour. These findings are then drawn on to re-examine Rawls' argument. It suggests that there could be times when participants in the original position under the veil of ignorance might not choose Rawls' principles.

### **A. John Rawls**

John Rawls died on November 24 2001 at the age of 81. In the early stages of his academic career during the 1950's and 1960's, while other philosophers were focusing on Logical Positivism or Utilitarianism rather than the '*ethical and political reflection embodied in the works of such thinkers as Aristotle, Hobbes, Hume, Rousseau, Kant, and Hegel,*'<sup>2</sup> Rawls was developing his idea of Justice as Fairness. In *A Theory of Justice* he reversed the then current trend by arguing for two principles of justice that would underpin the basic structure of

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<sup>1</sup> Rawls, *A Theory of Justice*, op. cit. p.154

<sup>2</sup> Martha Nussbaum, 'The Enduring Significance of John Rawls,' *The Chronicle of Higher Education* (July 20, 2001): 1. Available online at <http://chronicle.com/free/v47/i45/45b00701.htm> (Accessed 23/8/2005)

society. That book has been accredited as the driving force behind the re-emergence of the concept of social justice as an important area of study in the Anglo-American world<sup>3</sup>. Much of this renewed interest is directly related to Rawls' work while in others the link is not so obvious. Rawls' definition of liberty, his views on intergenerational justice, on civil disobedience, on desert, and his account of rationality have all been criticized by philosophers, lawyers, economists, socialists, feminists, conservatives and democrats.<sup>4</sup> It has even been criticized by two opposing poles. Communitarian theorists such as Michael Sandel, In *Liberalism and the Limits of Justice*,<sup>5</sup> argued that Rawls' theory was strongly biased in favor of individualism. Alternatively, Libertarians like Robert Nozick in *Anarchy, State and Utopia*,<sup>6</sup> criticized it for not being individualist enough. Those arguments will be examined below. But first we must continue our introduction to Rawls by looking at his own criticism of Utilitarianism and his return to the social contract tradition. These areas are important as they will be drawn on later when examining the issues around risk-aversion.

Rawls has two main criticisms of Utilitarianism: the sacrifice of the few for the good of the many and the notion of a single impartial spectator.<sup>7</sup> Rawls explains that the theory of justice as fairness is a deontological theory, but that Utilitarianism is a teleological theory.<sup>8</sup> In Utilitarian theory, the goal of producing the greatest amount of happiness for the largest number of individuals has priority over the principle of equal rights for all. In Rawls' theory, by contrast, the principle of equal rights for all has priority over the goal of producing the greatest amount of happiness for the largest number of individuals. While utilitarianism attempts to justify infringements upon the rights of some if those infringements produce a greater happiness for a larger

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<sup>3</sup> As President Bill Clinton said in awarding him a 1999 National Medal of Arts, '*Almost single-handedly John Rawls revived the disciplines of political and ethical philosophy with his argument that a society in which the most fortunate help the least fortunate is not only a moral society but a logical one.* Robert Nozick, one of Rawls' critics, wrote that '*political philosophers now must either work within Rawls' theory or explain why not*'. Robert Nozick, *Anarchy, State and Utopia*, New York: Basic Books, 1974, p. 183. See also Nussbaum, Martha 'The Enduring Significance of John Rawls,' *The Chronicle of Higher Education*, July 20, 2001 Available online at <http://chronicle.com/free/v47/i45/45b00701.htm> (Accessed 23/4/05)

<sup>4</sup> It has been argued that the focus on justice stemming from the work of Rawls has limited the scope of political theory. See Paul Kelly, 'Political Theory – The State of the Art in Politics: Surveys, Debates and Controversies,' *Politics*, 26, 1 (February 2006): 48-49

<sup>5</sup> M. Sandel, *Liberalism and the Limits of Justice*, op. cit.

<sup>6</sup> Nozick, *Anarchy, State and Utopia*, op. cit.

<sup>7</sup> Rawls, *A Theory of Justice*, op. cit. p. 187

<sup>8</sup> Ibid. 27

number of other individuals, Rawls' denies that infringements upon the basic rights of anyone can ever be morally justified.<sup>9</sup> Rawls wants equal rights for all individuals. He denies that injustice toward any particular group of individuals is justifiable unless this injustice is necessary to prevent an even greater injustice. In other words, there are times when an injustice might be understood as just but not to the degree that Utilitarianism might allow.

Rawls' critique of Utilitarianism is also connected to that part of his theory that highlights the individuality of persons. *'Utilitarianism does not take seriously the distinction between persons.'*<sup>10</sup> Rawls believes that this separateness underpins the individual rights that should not be over-ridden by considerations of some collective good. According to Rawls, Utilitarianism conflates all the different types of desires and imposes a single desire system by which to measure utility. This means that the maximal utility is made from the perspective of a single impartial spectator, or 'perfect legislator,' who represents everyone else in the society. In other words, a single system of desires and a single understanding of the good underpin the correct allocation of benefits and burdens. It follows from this logic that a Utilitarian society must be biased on the side of some type of desire system.<sup>11</sup> In relation to these two points it could also be argued that Utilitarianism's dismissal of the distinctions between individuals might result in treating people as means rather than as ends. One of Rawls' early critics, Nozick would agree with the idea of individuality yet he would also claim that Rawls still does not take the distinction between persons sufficiently seriously. He argued that the welfare state infringes on individuals rights of property.<sup>12</sup> While Rawls criticizes Utilitarianism for sacrificing the few for the many his difference principle, according to Nozick, allows the better off to be sacrificed for the worst off.<sup>13</sup> However, because Rawls does not make it very clear who these worst off might be, it might turn out that the worst off could be sacrificed for the better off. This point will be returned to after placing Rawls within the contract tradition because it is directly relates to the main focus.

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<sup>9</sup> See Rawls' argument that Utilitarianism can condone slavery. Rawls, *A Theory of Justice*, op. cit. p. 167

<sup>10</sup> Ibid. 27

<sup>11</sup> Ibid. 188

<sup>12</sup> Nozick, *Anarchy, State and Utopia*, op. cit. pp. 28-30

<sup>13</sup> Ibid. 192-196

Rawls described his own theory of justice as being within the contract tradition<sup>14</sup> although it has been argued that it is not a contract theory.<sup>15</sup> While there are elements in his theory of justice that do seem to share similarities with the early social contract theories there are also some major differences between them. The main similarities occur between Rawls' original position and the notion of a state of nature. The veil of ignorance part of the original position does not occur in the work of Hobbes, Locke or Rousseau but it does share similarities with elements of Kant's work. While Kant did not propose a veil of ignorance himself the reason for the veil in Rawls' work is meant to supply the impartial or universal aspect of Kant's categorical imperative.<sup>16</sup> As such they could be seen to share similarities. This section will therefore examine Rawls' theory in relation to the contract tradition in order to gain a better understanding of his work before focusing more fully on the arguments for and against his principles.

The notion of a social contract between citizens and state has been central to many of the discussions into the nature and legitimacy of the government.<sup>17</sup> Man's natural state, or the 'state of nature,' are terms that usually describe the so-called situation prior to this political state. Conceptions of the pre-political state vary between theorists and these variations tend to shape the natures of the governments being proposed. For example, Thomas Hobbes' pre-political state was one of '*war of all against all*' and

*In such condition, there is no place for Industry; because the fruit thereof is uncertain: and consequently no Culture of the Earth; no Navigation, nor use of the commodities that may be imported by Sea; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of time; no Arts; no Letters; no Society; and which is worst of all, continuall feare, and danger of*

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<sup>14</sup> Rawls, *A Theory of Justice*, op. cit. pp. 15-17. However, Rawls added that it '*is not a complete theory*,' p. 17

<sup>15</sup> See Jean Hampton, 'Contracts and Choices: Does Rawls Have a Social Contract Theory?' *Journal of Philosophy*, 77, 6 (June 1980): 315-338

<sup>16</sup> Rawls, *A Theory of Justice*, op. cit. pp. 251-257. For more on the issue of impartiality see Susan Mendus, 'Impartiality' in John Dryzek, Bonnie Honig and Anne Phillips (Eds.), *The Oxford Handbook of Political Theory*, Oxford: OUP, 2006, pp. 423-435

<sup>17</sup> But it is by no means the only one. Augustine said '*Take away justice... and what is a state but a large robber band.*' St. Augustine, *The City of God*, Bk 2. iv, Harmondsworth: Penguin, 1984, p. 139. Cited in Ryan, *Justice*, op. cit. p. 1

*violent death; And the life of man, solitary, poore, nasty, brutish, and short.*<sup>18</sup>

In order to avoid this problem Hobbes proposed a strong government. While that strong government restricts everyone it is to everyone's advantage. It could be argued that the current situation in Iraq describes Hobbes' state of nature but it could seem more like a post political state rather than a pre-political state. In Locke's state of nature the parties agree to establish a civil society in which the government has limited powers and the duty to protect the persons and property of citizens. Jean-Jacques Rousseau, on the other hand, described a state of nature in which people were essentially good, and he blamed civilization for corrupting humanity. Each of these theorists presupposes a certain understanding of what it is to be human and, as we will see, Rawls is no exception.

Rawls placed himself well within the social contract tradition of Locke, Rousseau and Kant but tried to overcome some of their difficulties. Rawls has little to say about Hobbes in his early work<sup>19</sup> but it has never the less been argued that he draws heavily on Hobbes in later work such as *Political Liberalism*.<sup>20</sup> On some level he appears not to use the fiction of a state of nature but he tells us that in fact he does. *'In justice as fairness the original position of equality corresponds to the state of nature in the traditional theory of the social contract.'*<sup>21</sup> And it has been argued that one needs to focus on this relation. *'And in general, as we shall see, there is a great deal in his view that can be well understood only by focusing on these connections.'*<sup>22</sup> The main focus here will be about the original position and veil of ignorance.

Rawls' notion of justice as fairness in *A Theory of Justice* (1971) is divided into three parts. He introduces the principles in part 1 chapter 2 and the method he uses to get those principles, the original position and veil of ignorance, is presented in chapter 3. There is also a fuller examination of the

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<sup>18</sup> T. Hobbes, *Leviathan*. Oxford: OUP, 1996, Chapter 13, p. 84

<sup>19</sup> Rawls, *A Theory of Justice*, op. cit. pp. 11, 240, 269, 346

<sup>20</sup> Rosamond Rhodes, 'Reading Rawls and Hearing Hobbes', *The Philosophical Forum*, XXX111, 4 (Winter 2002): 393-412. Rhodes argued that Rawls drew heavily on Hobbes *Leviathan* in his later work such as *Political Liberalism*

<sup>21</sup> Rawls, *A Theory of Justice*, op. cit. p. 12

<sup>22</sup> Martha C. Nussbaum, *Disability, Nationality, Species Membership*, Cambridge, Mass: Harvard University Press, 2006, p 14



principles in part 2.<sup>23</sup> The principles of justice that Rawls argues for are not equal but hierarchical – they are lexically ordered. The first principle is equal basic liberties (everyone is to have an equal right to a set of basic liberties). The next one down is fair equality of opportunity (we must have equal and fair opportunities to jobs and services). The third, which is the second part of the second, is known as the difference principle whereby inequalities can only be justified if they benefit the worst off in society.

According to Rawls' concept of justice as fairness, the basic structure of society is just if it reflects principles that would be chosen under fair conditions. The fair conditions, which will be discussed below, would consist of a hypothetical original position under a veil of ignorance. The early version of the first principle which Rawls argued will be chosen is that '*each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others*'<sup>24</sup>. The early version of the second principle is that '*Social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.*'<sup>25</sup> This second principle is reworked in section 13 and the final versions are located in sections 39 and 47.

There are only minor changes in the first principle but the later version of the second is that '*Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.*' Rawls also notes that further changes will be required '*Other modifications will surely have to be made.*'<sup>26</sup> Rawls alters the beginning of the first principle in his later work. In *Political Liberalism*<sup>27</sup> he replaces the words '*each person has an equal right*' with '*each person has an equal claim.*' He also changes the words '*system of basic*

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<sup>23</sup> Rawls himself was not happy with Part 3 and his later work (John Rawls *Political Liberalism*. New York: Columbia University Press, 1996) could be seen as a re-write of that part.

<sup>24</sup> Rawls, *A Theory of Justice*, op. cit. pp. 60 & 302

<sup>25</sup> Ibid. 60

<sup>26</sup> Ibid. 303

<sup>27</sup> Rawls, *Political Liberalism*, op. cit.

*liberties* to *'a fully adequate scheme of equal basic rights and liberties.'* There is virtually no change to the second principle in this later work.<sup>28</sup>

Rawls places the principles in order of priority. Liberty must be satisfied prior to equality. The first principle liberty and second part of the second principle can also be thought of as principles of distributive justice: The former to govern the distribution of liberties, and the latter to govern the distribution of opportunities. Liberty in the first is not about complete liberty. Liberty here includes political liberty, which is the right to vote and to be eligible for public office, freedom of speech and assembly, liberty of conscience and freedom of thought, freedom of the person and the right to hold personal property, and freedom from arbitrary arrest and seizure. Rawls' inequalities include the distribution of income and wealth, and inequalities set up by institutions that use differences in authority and responsibility or chains of command. These two principles are ordered in that a decrease in liberty cannot be justified by an increase in social and economic advantages. The other part of the principle - the difference principle<sup>29</sup> - regulates equality. The difference principle means that inequalities of income and wealth are justified only if they help the least advantaged in society. In other words, to be morally just the distribution must make the greatest positive or least negative difference to the currently worst off.<sup>30</sup> This is the main area in which Rawls' work compensates for a weakness he perceives in Utilitarianism. It is also, as we will see, that part of his theory, which is central to our examination of risk-aversion.

Rawls claimed that his original position could be viewed as *'a procedural interpretation of Kant's concept of autonomy and the categorical imperative'*.<sup>31</sup> Similar to Kant Rawls believed that from the moral point of view, the most distinctive feature of human nature is our ability to freely choose our own ends. As Kant would say, *'never merely as a means, but always at the same time as an end.'*<sup>32</sup> It follows from this view of human nature that the state's first

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<sup>28</sup> See Martin, Rex. 'Rawls's New Theory of Justice,' *Chicago-Kent Law Review*, 69 (1994): 737-761. Especially p. 744-5

<sup>29</sup> Rawls, *A Theory of Justice*, op. cit. Section 46

<sup>30</sup> The goal of the difference principle can be stated in either way according to Rex Martin, in *Rawls and Rights*, Lawrence: University of Kansas Press, 1985, p. 197-201. Cited in D. Boucher & P. Kelly (editors) *Political Thinkers from Socrates to the Present*, Oxford: OUP, 2003, p. 514

<sup>31</sup> Rawls, *A Theory of Justice*, op. cit. Section 40, p. 226

<sup>32</sup> Immanuel Kant, *Groundwork for the Metaphysics of Morals*, London: Yale University Press, 2002, (4.429) p. 46

duty is to respect this capacity for autonomy. Rawls argued, in opposition to Utilitarianism, that the first duty of the liberal state was to safeguard the individual's basic civil liberties, and that *'the loss of freedom for some'* can never be *'made right by a greater good shared by others.'*<sup>33</sup> In Rawls' theory this materializes as the first principle chosen in the original position – liberty.

The second principle, equality, is related to Kant's categorical imperative. Kant formulated different versions of the categorical imperative. In the Groundwork he tells us to *'Act only in accordance with that maxim through which you can at the same time will that it become a universal law.'*<sup>34</sup> Unlike Utilitarianism and Kant's hypothetical imperative, the categorical imperative is not about consequences or ends. *'...the categorical imperative would be that one which represented an action as objectively necessary for itself, without any reference to another end.'*<sup>35</sup> Rawls tells us that his *'...principles of justice are also categorical imperatives in Kant's sense.'*<sup>36</sup> However, Rawls also acknowledges, a little further down, that he adds to Kant's conception. He tells us that it applies to the basic structure of society. This is because, according to Rawls, it is central to social justice. In a sense this basic structure is to particular cases what Plato's forms were to the contingent copies.

*For us the primary subject of justice is the basic structure of society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation.*<sup>37</sup>

Rawls did not use the Original Position to justify the authority of the State or some form of government as can be seen in the work of Hobbes, Locke, or Rousseau. In Rawls' original position, the representative parties select principles of justice that are to govern the basic structure of society. Rawls uses the original position in order to try to work out what principles should govern the basic structure of a society when it is already set up. He does not see this original position as something which will actually take place *'...the original position is a purely hypothetical situation. Nothing resembling it need ever take*

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<sup>33</sup> Rawls, *A Theory of Justice*, op. cit. Chapter 1 section 5.

<sup>34</sup> Kant, *Groundwork for the Metaphysics of Morals*, op. cit. (4.421) p. 37

<sup>35</sup> Ibid. (4.414) p. 31

<sup>36</sup> Rawls, *A Theory of Justice*, op. cit. p. 253

<sup>37</sup> Ibid. 7

place'.<sup>38</sup> He tells us that the original position is the basis of a problem and the choice of principles is the solution. '*...the two principles of justice are the solution for the problem of choice presented in the original position.*'<sup>39</sup>

Rawls employs the Original position as a device to locate the principles of social justice.<sup>40</sup> And this is also where it differs from Kant. Rawls tells us that '*...premises characterizing this structure [the basic structure of society] are used in deriving the principles of justice*'.<sup>41</sup> Rawls argues that the representative parties in the original position would select two principles of justice. He acknowledged that different people have different conceptions of justice and that people disagree over their conceptions of justice. However, they should not disagree about the basic concept of what constitutes justice. In other words, Rawls makes the distinction between a concept of justice and various conceptions of justice '*...thus it seems natural to think of the concept of justice as distinct from the various conceptions of justice.*'<sup>42</sup>

Rawls argued that even if people had different conceptions of justice they could '*...still agree that institutions are just when no arbitrary distinctions are made between persons in the assigning of basic rights and duties and when the rules determine a proper balance between competing claims to the advantages of social life.*'<sup>43</sup> They may well disagree over what those basic rights and duties are but not over the basic concept of justice. Rawls argues that people will choose his principles over others. According to Martin, Rawls arrives at his choice of the basic concept and principles of justice in two stages within the original position. The first has to do with screening and the second with ranking.<sup>44</sup> The screening process rules out a number of alternative theories, and the remaining theories are then ranked in order of preference. Martin was mainly referring to the revised edition<sup>45</sup> but Rawls clearly outlined the list of

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<sup>38</sup> Ibid. 120

<sup>39</sup> Ibid. 119

<sup>40</sup> Rawls relates his original position to Kant's categorical imperative. Ibid. 251-257. '*The original position may be viewed, then, as a procedural interpretation of Kant's conception of autonomy and the categorical imperative.*' p. 256

<sup>41</sup> Ibid. 252

<sup>42</sup> Ibid. 5

<sup>43</sup> Ibid. 5

<sup>44</sup> Martin, 'Rawls' in Boucher, *Political Thinker*, op. cit. pp. 503-4

<sup>45</sup> John Rawls, *A Theory of Justice*, (Revised Edition.) Cambridge, Mass.: Harvard University Press, 1999

alternatives in the earlier edition.<sup>46</sup> Rawls argued that his principles would be on top of the list and therefore would be chosen.

A fundamental idea present in liberal theory from Hobbes through to Kant is that individual consent is of major importance for the justice of institutions. In Hobbes, the state derives its legitimacy from the fact the state of nature is so bad that every one consents to enter society. Hobbes's account has some non-liberal elements but it does include the basic liberal sentiment that justice must be based on consent. Similarly, Kant holds that a law is just if the people could have agreed to it. In a similar way, but with an added dimension, Rawls argues that the legitimacy of the principles of justice is derived from the fact that everyone not only could agree to them but also would agree to them. However, because of Rawls' view of human nature this agreement would require a little help.

Rawls' view of human nature includes that we are driven by self-interest. He further asserts that we combine this self-interest with a type of instrumental rationality.

*...a rational person is thought to have a coherent set of preferences between the options open to him. He ranks those options according to how well they further his purposes; he follows the plan which will satisfy more of his desires rather than less, and which has the greater chance of being successfully executed.<sup>47</sup>*

This would mean that participants in the original position might opt for principles that would benefit their own self-interests. However, if they did not know what those interests were they could not choose principles in their own favour. In order to censor that knowledge Rawls came up with the device of a veil of ignorance. Under a veil of ignorance persons in the original position would be made unaware of their interests and this lack of knowledge would prevent them from being biased. In other words, the veil of ignorance would introduce an element of uncertainty and this would force them to be impartial.

Rawls argued that a number of things should be placed under the veil. These included characteristics about who the participants are in the real world.

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<sup>46</sup> Rawls, *A Theory of Justice*, op. cit. p.124

<sup>47</sup> Ibid. 143

For example, they would not know their class position or social status, their natural talents, abilities, gender, intelligence or strength, and what their plan was for a good life. These things that a person does not know under the veil of ignorance are things that cannot be controlled when designing a society, so there is no point discussing how these things will get distributed among the persons. However, the design of society does determine what happens to people and how many other things, such as education, health care, welfare and job opportunities, will get distributed among the people in the society. Rawls' idea is that when designing the society people will not be biased in favor of certain of those elements. Under the veil of ignorance, argues Rawls, they will end up designing a society that will be fair to everyone because they do not want to risk ending up in an unbearable position themselves.

In line with Kant's deontological categorical imperative, Rawls believed that the veil would remove the telos based on self-interest. However, the fear of ending up in the worst off position could be seen as consequential – in the negative sense. Never the less, there are two presuppositions in Rawls' work which will be examined. Firstly, that people in the original position would be risk adverse.<sup>48</sup> Secondly, that the veil of ignorance is epistemologically possible. Before examining those presuppositions in more detail, the next section will look in more depth at the arguments for why people would choose Rawls' principles.

### ***B. Why choose Rawls' Principles?***

The last section briefly touched on three of the main elements in Rawls' basic argument that participants would choose his principles over some other possibilities. These were self-interest, ignorance, and risk aversion. This section will examine them in more detail. In Rawls' version of the social contract theory, he argued that certain principles would be chosen by '*...free and rational persons concerned to further their own interests...*'<sup>49</sup> In order to make his hypothetical original position genuinely equal, he argued that it is necessary that the persons are ignorant of certain things that would bias their choices.

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<sup>48</sup> Ibid. Section 80, p. 530

<sup>49</sup> Ibid. 11

Things such as their social position, class, natural assets and abilities, intelligence, and anything else which might distinguish their judgment of their own interest from that of any other party.<sup>50</sup> Because these people are in a state of ignorance about their own prospects, they would not have any reason to accept any inequality of distribution unless they could be sure that they themselves would gain from the inequality. But because of the veil of ignorance they would not be able to know. According to Rawls' 'maximin' principle, in a state of ignorance it is rational to choose the option for which the worst possible outcome is the best among all the alternatives in case the people themselves find that they are in the worst place.<sup>51</sup> In other words, they would be risk-averse in their choice of principles because they would be ignorant of their own position. This section will explore those three aspects in more detail before examining some of their criticisms in the following section.

The role of self-interest in society has been an issue within theories of justice from ancient times to the present. For example, justice as self-interest was a common fifth century view among the Sophists. It was highlighted by Thrasymachus in Plato's *Republic*.<sup>52</sup> In his response to Thrasymachus, Socrates mentioned the issue of different interests *'You say that what is in the interest of the stronger party is right; but what do you mean by interest?'*<sup>53</sup> In relation to self-interest Hobbes included the idea of the 'natural appetite.' *'Men from their birth, and naturally, scramble for everything they covet, and would have all the world, if they could, to fear and obey them?'*<sup>54</sup> It has been argued that self-interest, in the form of egoism, was a basic aspect of human nature for Thomas Hobbes.<sup>55</sup> Others disagree<sup>56</sup> and some argue that it is egoist only in the formal sense.<sup>57</sup> Nevertheless Hobbes referred to self-preservation as the justification for committing acts that are in one's own self-interest. He also understood those acts to be reasonable because, according to him, man's highest moral imperative is

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<sup>50</sup>Ibid. 12, 136-140

<sup>51</sup> Ibid. 152-157

<sup>52</sup> Plato, *The Republic*, op. cit. p.74

<sup>53</sup> Ibid. 77

<sup>54</sup> T. Hobbes, 'Decameron Physiologicum' in *The English Works* (Ed. William Molesworth, Bart) Vol vii, p. 73. Available online at <http://books.google.co.uk/books?id=eisCAAAAQAAJ&pg=PA73&dq=hobbes+men+from+their+birth#PPA73,M1> (Accessed 27/2/2007)

<sup>55</sup> C.B. Macpherson, *Political Theory of Possessive Individualism*, Oxford: OUP, 1962.

<sup>56</sup> A.E. Taylor, *The Ethical Doctrine of Hobbes' Philosophy*, 13 (1938): 406-24

<sup>57</sup> Cited in Deborah Baumgold, 'Hobbes' in Boucher, *Political Thinkers*, op. cit. p 165

self-preservation. And self-preservation was not a freedom that could be surrendered even in the social contract.<sup>58</sup>

Adam Smith also promoted self-interest when he tells us that *'It is not from the benevolence of the butcher, the brewer, or the baker, that we can expect our dinner, but from their regard to their own interest.'*<sup>59</sup> But, on the other hand, in relation to self-interest, he also tells us that *'How selfish so ever man may be supposed, there are evidently some principles in his nature which interest him in the fortune of others and render their happiness necessary to him though he derives nothing from it except the pleasure of seeing it.'*<sup>60</sup> These two quotes point to a sort of contradiction between Smith's two works. On the one hand self-interest is the motivation but there seems to be something limiting it. Rawls' limit, the difference principle, shares similarities with this limit. Moreover, there are similarities between Smith's Invisible hand and Rawls' veil of ignorance. This notion will be looked at in more detail later when examining Smith's invisible hand and Rawls' veil of ignorance in relation to Hegel's Geist and Adorno's negative dialectics in relation to the notion of a hidden variable.

Smith's understanding of self-interest, as a motivating force rather than a limit, seems to take pride of place when arguing for liberty over equality. Rawls himself takes this stance. He does not think that justice requires equality. For example, there may be just inequalities. This is because inequalities could be justified in relation to incentives. This is one of the traditional justifications of social inequalities in modern commercial societies. Rawls could be seen as producing a justification of what we already have. But in addition to this, Rawls also argues that inequality is unjust except insofar as it is a necessary means to improve the position of the worst off. In other words there is a limit to inequality. This provides a way for criticizing the existing society. In addition, as we will see, that limit takes central stage in Rawls' argument concerning risk-aversion.

Self-interest can also be seen in the work of and Rational Choice

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<sup>58</sup> *'If the sovereign command a man (though justly condemned,) to kill, wound, or maim himself; or not to resist those that assault him; or to abstain from the use of food, air, medicine, or any other thing, without which he cannot live; yet hath that man the liberty to disobey.'* Hobbes, *Leviathan*, op. cit. p. 144

<sup>59</sup> Adam Smith, *The Wealth of Nations*, Chicago, Illinois: Henry Regnery Company, 1967, p. 25

<sup>60</sup> Adam Smith, *The Theory of Moral Sentiments*, Cambridge: CUP, 2002. Part 1, Chapter 1, see the very first sentence.



theories including public choice, social choice and game theory. In fact Game Theory directly presupposes self-interest. Rawls also bases his theory on self-interest as he tells us that *'In choosing between principles each tries as best he can to advance his interest.'*<sup>61</sup> However, as was pointed out above, Rawls prevents people in the original position from knowing what their interests are.<sup>62</sup> But he does tell us that any self-interest would require certain things. Rational people, according to Rawls, would prefer *'more rather than less primary goods'*<sup>63</sup> even if they did not know what their particular interests were. And the reason they do not know what interests to pursue is because of that other part of his method – the 'veil of ignorance'.

As we saw above, Rawls believes that persons act on self-interest but he further thinks that they can be rational about their self-interest. This means, according to him, that they can have a plan to get what they want out of life. They might know what they need to make that plan work. And they will probably stay with the plan throughout their lives - even if they are never successful. He then argues that if that person were in the original position they would simply design a society that would help them with their own personal plan. And this according to Rawls would not be the basis of a just society. That would be an unfair procedure and Rawls' argues for a society based on justice as fairness. By fairness he meant a fair procedure. As Rawls wrote it, *'the fairness of the circumstances transfers to fairness of the principles adopted.'*<sup>64</sup> In order to eliminate this problem, and keep holding onto the idea of self-interested parties, Rawls came up with the idea of a veil of ignorance.

Ordinary individuals, according to Rawls, would not be able to get a sense of the just structure of social institutions if they only looked at the world from their own limited biased or self interested perspective. His veil of ignorance was meant to provide a distance from the particulars of ordinary life.<sup>65</sup> While private contracts might be personal and subjective, social contracts need a distance. In order to gain this distance the individuals have to detach themselves from distinctive traits that make up his or her personality, family, or

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<sup>61</sup> Rawls, *A Theory of Justice*, op. cit. p.142

<sup>62</sup> I will return to this point in chapter 4 when examining the darkness of the veil.

<sup>63</sup> Rawls, *A Theory of Justice*, op. cit. p. 142

<sup>64</sup> Ibid. 159

<sup>65</sup> That distance was an attempt at being impartial like the notion of objectivity.

general social situation. This might mean that they would be like Plato's form of a human with no contingent characteristics but they would have equal care and concern for the welfare of all individuals.

One can detect traces of Rousseau's distinction between the '*Will of All*' related to self-interest and the '*General Will*' related to public interest here.<sup>66</sup> But drawing a line between the two was more difficult for Rousseau than for Rawls. '*But to follow this will it is necessary to know it, and above all to distinguish it from the particular will, beginning with one's self: this distinction is always very difficult to make, and only the most sublime virtue can afford sufficient illumination for it.*'<sup>67</sup> So while Rawls believed that ordinary people would find it difficult to get a sense of the just structure of social institutions without the veil of ignorance, Rousseau's comments suggest that ordinary people would find difficulty with the veil. This would seem to suggest that the distance, anticipated by Rawls in the veil of ignorance, might be more difficult than he leads us to believe. This point will be examined in more detail chapter 4 when discussing the epistemological issues related to the veil.

Rousseau's notion of the General Will is extremely complex and Rawls' veil of ignorance is a very difficult concept to understand. However, Deborah Heikes, at the University of Alabama in Huntsville, developed an interesting way of teaching Rawls' concept of the veil of ignorance.<sup>68</sup> She uses an exercise in the class that mimics the conditions of the veil of ignorance. She divides the class into groups and asks each group to come up with a profile for someone in society. These profiles are then collected, folded up, and then returned to students randomly. This means that those students may receive a profile that they did not write. Students are not allowed to look at the profiles that they received. She then asks the students to write down what fundamental principles they want the society to follow. She tells us that '*students usually come up with something very close to Rawls's two principles of justice as fairness.*' However,

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<sup>66</sup> For more on Rawls' use of Rousseau see Patrick Neal, 'In the Shadow of the General Will: Rawls, Kant and Rousseau on the Problem of Political Right,' *Review of Politics*, 49, 3 (Summer, 1987): 389-409

<sup>67</sup> Jean-Jacques Rousseau (Trans. G. D. H. Cole) *The Social Contract and Discourses*, London: J Dent & Sons Ltd., 1977, p. 123

<sup>68</sup> See Deborah Heikes, 'Teaching the Veil of Ignorance,' *APA (American Philosophical Association) Newsletter*, 99, 2 (Spring 2000) Available online at <http://www.apa.udel.edu/apa/publications/newsletters/v99n2/teaching/article-heikes.asp> (Accessed 17/2/06)

she always finds that at least one or two students are prepared to gamble on the fact that they may not be among the worst off, once the veil was lifted. When using her exercise in a class, this author has also found that there are always some students who are prepared to gamble on not being among the worst off. And, as we will see below, this seems to contradict Rawls' third reason for why parties would choose his principles over other possibilities

If a person under the veil of ignorance has to choose principles for a society that they will have to live in, then according to Rawls, they will design a society with the least bad possibilities in case they end up in the worst position. In other words, they will not take a risk on the possibility of ending up in a good position. Rawls calls this the maximin rule. He explains what he means by this with an example of two pieces of cake in what amounts to a zero sum game. Two people are given one piece of cake to share between themselves. In order to do this they must cut it into two pieces. Neither seems to be on a diet (as far as Rawls seems to understand) so both want the biggest piece possible. In order to guarantee that the cake will be shared fairly, a decision is made that one person will get to cut the cake and the other will have the first choice on which piece they want. This is a micro example of the maximin rule applied to two people. But as we will see in a later chapter, real life is not a zero sum game.

It has already been mentioned that Rawls takes utilitarianism to be the main rival to his own theory but we must at this stage distinguish between classical utilitarianism and average utilitarianism. The former is about the maximization of total happiness while the latter maximizes average happiness. According to Rawls, there are three conditions in favour of the maximin<sup>69</sup> and he argues that people in the original position would choose his principles over average Utilitarianism. Contrasting the maximin decision rule with the rule of maximizing expected (average) utility, Rawls tells us that participants in the original position would prefer his two principles to (average) utilitarianism. In addition, he says there are three conditions that favour maximin.<sup>70</sup> Ignorance of the probabilities of the various outcomes, a conception of the good such that one cares little, if anything, for what one might gain above a certain minimum, alternative decision rules have possible outcomes that would be unacceptable.

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<sup>69</sup> Rawls, *A Theory of Justice*, op. cit. pp.154-55

<sup>70</sup> Ibid. 154-55

Rawls claims that these three conditions are approximated or satisfied in the original position.<sup>71</sup> But, as we will see, the third seems to dominate in his overall argument. The problem with average Utilitarianism is that it might allow some people to suffer so that others might benefit. By presupposing that people are not risk-takers, he concludes that they would not choose this option because they might end up among the suffering group within society. He argues that they will agree to a society that obeys his two basic principles of justice. However, there are also some compelling arguments for not choosing Rawls' principles and some of these will now be examined.

### ***C. Why do Rawls' principles fall short?***

There has been a huge amount of literature in response to Rawls' argument. Some of this work has been diametrically opposed to Rawls' stance while others have been more sympathetic. Dworkin can be seen as an example of the latter. Rawls and Dworkin are both advocates of what is known as liberal egalitarianism but they disagree on certain points. Rawls, Dworkin and other liberal theorists

*...disagree over which principles of social justice are to be adopted, but they all in some sense are egalitarians and argue that justice as impartiality requires (where possible) the elimination of morally arbitrary inequalities, namely those inequalities arising from differences in social circumstances and natural talents.<sup>72</sup>*

Dworkin, disagreeing with Rawls, used an example of a poker game with a missing card in the deck and argued that the agreement in the original position should only be seen as a halfway point.<sup>73</sup> This is because hypothetical agreements are not binding. He adds that a deontological theory, that takes rights seriously enough to be assumed rather than emerging from the contract, would improve Rawls' argument. In addition, Dworkin agrees with Rawls against the utilitarian view that the basis of a theory of justice should be utility, but argues that the proper measure of an individual's resource holdings for

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<sup>71</sup> Ibid. 155-56

<sup>72</sup> Kai Nielsen. 'Conceptions of Justice,' in Mary Hawkesworth and Maurice Kogan (eds.) *Encyclopedia of Government and Politics*, London and New York: Routledge, 1992, p. 90

<sup>73</sup> Dworkin, 'The Original Position,' op. cit. p. 500

purposes of justice is what others would pay for what the individual has. Rawls believes that one's resources include internal resources or talents as well as external resources such as material possessions. Dworkin agrees with that distinction<sup>74</sup> but focuses on another distinction between choices and initial circumstances or option versus brute luck. In other words, one may not be held responsible for the cards that fate has dealt but for how one plays one's hand. However, this presupposes that one is playing on a level table. This notion will be explored in chapters 3 and 5.<sup>75</sup>

Dworkin also argues that the state should treat citizens not just with concern and respect but also with equal concern and respect.<sup>76</sup> He draws a distinction between two types of welfare provision: Rawls's difference principle, which pulls back from any consideration of individual responsibility; and the hypothetical insurance approach, which attempts to make much on such responsibility as possibility.<sup>77</sup> In order to outline the insurance approach he draws on the game of poker.<sup>78</sup> In accordance with this principal both Rawls and Dworkin argue for justice in resource allocation. However, Dworkin criticizes the difference principle on three grounds.<sup>79</sup> Firstly, there is no non-arbitrary way to define the worst off group, and whatever arbitrary specification one makes will be consequential for choice of policy.<sup>80</sup> Secondly, the difference principle is unfair in that it specifies too extreme a preference for gains to the worst off in competition to gains for better off groups. And thirdly, it fails to incorporate

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<sup>74</sup> Ronald Dworkin, *Taking rights seriously*, London: Duckworth, 1977, 180ff.

<sup>75</sup> The distinction between brute luck and option luck, which will be discussed below, is a distinction between chance and choice in relation to personal responsibility. Within this context, inequalities in advantage are just if they derive from the choices people have voluntarily made. However, inequalities deriving from unchosen features of a person's circumstances are unjust. For example, if one chooses to take up a high risk activity such as riding a motorcycle, should they be treated equally to others in society, in terms of medical treatment, if they have an accident? Classic discussions about the brute luck / option luck distinction include B. Williams, 'Moral Luck', p. 20-39 in *Moral Luck*, Cambridge: Cambridge University Press, 1981; T. Nagel, 'Moral Luck', p. 24-38 in *Moral Questions*, Cambridge: Cambridge University Press, 1979. Elizabeth Anderson argued, that we have a duty of justice to redress some chosen inequalities. See 'What is the Point of Equality?' *Ethics*, 109, 2 (January 1999): 287-337; For a more recent argument defending the distinction between option luck and brute luck see Nicholas Barry, 'Defending Luck Egalitarianism,' *Journal of Applied Philosophy*, 23, 1 (January 2006): 89-107. This point will be returned to, in chapter 3, in relation to problem gambling.

<sup>76</sup> Ronald Dworkin, *Taking Rights Seriously*, London: Duckworth, 1977

<sup>77</sup> Ronald Dworkin, *Sovereign Virtue: The theory and Practice of Equity*, London: Harvard University Press, 2000, p. 5

<sup>78</sup> *Ibid.* 343

<sup>79</sup> *Ibid.* Chapter 9 'Justice, Insurance, and Luck'

<sup>80</sup> I will return to this point in Chapter 3 section D and H when discussing the criteria underpinning the review of gambling laws and Rawls' principles

personal responsibility into an account of justice in the right way. According to Dworkin, people in a society should be compensated by others in the society for defects in the unchosen circumstances they face.

Dworkin's notion of unchosen circumstances means things that the person has no control over, and, as mentioned above, he refers to this a brute luck.<sup>81</sup> This notion of brute luck, as opposed to luck based on choice, is central to what has become known in the literature as 'Luck Egalitarianism'. As will be further elucidated in Chapter 3, this notion forms one of the strongest critiques critiques of Rawls' work.<sup>82</sup> This debate will be revisited, especially in terms of the distinction Olsaretti<sup>83</sup> and Anderson<sup>84</sup> make between brute luck and luck based on choice. Using blackjack as an example, we will see, however, that the debate itself tends to deflect a more nuanced understanding of the relationship between the gambling industry and issues of justice. As will be argued, instead, the elision between probability and 'bad luck' (or any kind of luck) tends to incorrectly confuse the relation between gaming, choice, circumstances and, indeed, justice. Specific methodological contributions by Foucault, Lyotard and Deleuze, especially concerning the notions of distributive justice, discourse,

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<sup>81</sup> Dworkin, *Sovereign Virtue*, op. cit. p. 73

<sup>82</sup> John Rawls criticized the notion of basing justice on responsibility and desert by arguing that no one has full control over things that affect their actions. See John Rawls, *A Theory of Justice*, Oxford: OUP, 1999, p. 89. This argument was criticized by J. Moriarty, 'Against the Asymmetry of Desert', *Nous* 37 (2003):518-36. Cited in Serena Olsaretti, 'Justice, Luck, and Desert', in J. Dryzek, B. Honig, A. Phillips (Eds.) *The Oxford Handbook of Political Theory*, Oxford: OUP, 2006, p. 447. For more on Luck Egalitarianism, in relation to distributive justice, see S. Hurley, *Justice, Luck and Knowledge*, Cambridge, Mass.: Harvard University Press, 2003; P. Vallentyne, 'Brute Luck equality and Desert,' p. 169-86 in *Desert and Justice*, (Ed.) S. Olsaretti, Oxford: OUP, 2003

<sup>83</sup> 'Suppose one child is born to caring parents and another to parents who neglect her, or suppose that lightning strikes one man instead of another.....Such differences in luck, or at least society's failure to correct for them, may seem unjust. Other kinds of luck seem different: one person wins big on the blackjack table, while the person beside him loses all his money; someone born with good looks attracts a string of potential lovers, while someone born ugly struggles to find any. What the gambler and the lover walk away with (or without) does not seem so unjust. It appears that some but not all luck is incompatible with justice.' Serena Olsaretti, 'Justice, Luck, and Desert', in J. Dryzek, B. Honig, A. Phillips (Eds.) *The Oxford Handbook of Political Theory*, Oxford: OUP, 2006, p. 436

<sup>84</sup> Elizabeth Anderson has criticized the sharp distinction that followers of Luck Egalitarianism make between brute and opinion luck.<sup>84</sup> She also accused them of influencing a demeaning pity towards the disadvantaged. They '...put the state in the business of making official, humiliating judgements of estimability. People get compensated only on condition that they are officially stamped as despicable, repulsive, or dorky. This is deeply insulting.' This quote is from her reply to Thomas Christiano's criticism of her article 'What is the point of Equality?' See <http://www.brown.edu/Departments/Philosophy/bears/9904chri.html> (Accessed 23/7/2007)

economy and immanence will be drawn on, instead, in order that the complexities of the matter get full briefing.

In another critique of Rawls, Amartya Sen argued that the resource argument is not a sufficient condition for a just society.<sup>85</sup> Instead he introduced the concept of basic capability equality referring, among other things, to the need to take into account differences in those abilities that are crucial for citizens to function in society. He criticized Rawls for focusing on primary goods and ignoring the diversity of human beings.<sup>86</sup> Feminists have also criticized Rawls. For example, Susan Moller Okin's work centres on justice and the absence or exclusion of women from past and contemporary political thought. She criticized Rawls' original position for choosing men as the heads of households but she added that the device of the original position itself could be drawn on to critique gendered society.<sup>87</sup> His neglect of relevant social meanings has also been criticized because it means Rawls' theory is ineffective when it comes to racial and gender discriminations. That is because Rawls' theory presupposes that discrimination exists on the basis of the categories he wanted to veil.

On some level, various criticisms about self-interest and ignorance are interrelated. Self-interest is usually contrasted with the common interest or public good. And quite often the dividing line between the two points to the difference between libertarians and communarians. The former have a tendency to focus on individuality while the latter focus on the group. In fact the latter criticize the former for not taking the constituted natures of people into consideration. This constituted nature points to the epistemological issue of the veil of ignorance. The epistemological issues involved in dividing identity from knowledge have been called on to critique Rawls' veil of ignorance<sup>88</sup> and these will be examined more fully in Chapter 4 section B.

One of the longest running arguments between Rawls' critics has been between the liberals and communitarians. Some liberals argue that Rawls' is not

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<sup>85</sup> Amartya Sen, 'Equality of What?' *The Tanner Lecture on Human Values*, (Paper delivered at Stanford University May 22, 1979) Available online at [http://home.sandiego.edu/~baber/global\\_ethics/senequalityofwhat.pdf](http://home.sandiego.edu/~baber/global_ethics/senequalityofwhat.pdf) (Accessed 21/10/2005)

<sup>86</sup> Ibid.

<sup>87</sup> Susan Moller Okin, *Justice, Gender, and the Family*. New York: Basic Books, 1989

<sup>88</sup> Will Kymlicka, 'Liberal Individualism and Liberal Neutrality,' *Ethics*, 99, 4 (July 1989): 883-905

individualistic enough, while some of the communitarians' arguments revolve around the notion that Rawls's ideas are excessively individualistic. For example, the well-ordered liberal society presented in Rawls' *A Theory of Justice* has been criticized for its tendency to privilege the standpoint of self-interested individuals over communal attachments.<sup>89</sup> People in Rawls' original position do not seem to be real human beings because human beings are communal in their essence and they are a particular way of taking account of their social and natural context. Although, the difference between these two poles are not always that clear-cut. For example, it has been argued that Hayek has more in common with Communitarians than his critics would like to admit.

*Yet at the heart of Hayek's social philosophy is a regard for the socially-constituted nature of man: the individual is not taken to be asocial or pre-social, but rather it is recognized that society defines the individual. This is a point which is often neglected in considerations of Hayek's political and social philosophy. Fellow liberals may acknowledge it, but focus attention on his individualist perspective; communitarians may acknowledge it, but highlight the negative aspects of his liberalism.<sup>90</sup>*

That aside, there are two classic examples of the debate in the form of Robert Nozick's *Anarchy, State and Utopia* (1974) and Michael Sandel's *Liberalism and the Limits of Justice* (1982).

Nozick, who is a libertarian, criticized Rawls for not being individualistic enough while Sandel, whose book became one of contemporary communitarianism's foundational texts accused him for being too individualistic. Against Rawls' principles of distribution in the original position, Nozick argued that the awarding or returning of things to those who owned or were entitled to them was what justice meant.<sup>91</sup> Sandel, on the other hand, argued that the original position did not take into account that persons were constituted by their communities and could not stand outside their societies. From a Hegelian standpoint he criticized Rawls for presupposing an atomistic rational agent, an

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<sup>89</sup> Michael Sandel noted that criticism in *Liberalism and the Limits of Justice*. He argued that critics who focus on individualism and neutrality misunderstand Rawls' theory. See M. Sandel, 'Justice and Community,' in R. Solomon (Ed.) *What is Justice?* Oxford: OUP, 2000, p. 315-324

<sup>90</sup> J.R. McCann & A. Hayek. 'The Liberal as Communitarian' *The Review of Austrian Economics*, 15, 1 (2002): 1. (Kluwer Academic Publishers)

<sup>91</sup> Nozick's 'Entitlement Theory' in *Anarchy, State, and Utopia*, op. cit.



'unencumbered self', who exists prior to and independent of social relationships. His notion of the 'disembodied' self, for example, is a critique of understanding the individual apart from the social relations.<sup>92</sup> This is not taken into account by Rawls who believes that people can just pull a veil of ignorance over their consciences.

On some level Sandel's criticism shares similarities with theorists influenced by scholars such as Michael Foucault, who might understand Rawls' theory as a form of methodological individualism.<sup>93</sup> This may be why, argues Audard, that Rawls has had more influence in the Anglophone world than in many parts of Continental Europe.<sup>94</sup> Nevertheless, these types of arguments are far from new as they have their roots in the age long debates concerning the relationship between one and many or part and whole. Moreover, as we will see in chapter 2, these debates are more closely related to gambling than is immediately apparent.

Nagel also criticized the original position. In particular, he questioned why Rawls included probabilities under the veil of ignorance. *'There must be some reason against allowing probabilities (proportional, for instance, to the number of persons in each social position) to enter into the choice of distribution above an acceptable minimum.'*<sup>95</sup> Other critics do not accept Rawls's argument that people in the original position would choose his two principles of justice above others. They suggest that some people might only choose his principles perhaps by those who are cautious or conservative, rather than by those who are gamblers. For example, Dworkin argued that some might not choose the principles because *'the principles are conservative, and the critics believe they would be chosen only by men who were conservative by temperament, and not by men who were natural gamblers.'*<sup>96</sup>

In another critique, Raphael argued that Rawls was not justified in presupposing that a self-interested person would be cautious rather than a risk-taker.<sup>97</sup> He accused Rawls of too quickly dismissing the notion that a person in the original position might take a chance. According to him a rational and self-

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<sup>92</sup> Sandel, *Liberalism and the Limits of Justice*, op. cit. pp. 22-24, 54-65, 152-165

<sup>93</sup> I will return to this point in the following chapter

<sup>94</sup> C. Audard, 'Rawls in Europe,' *The Philosopher's Magazine*, 22, 2 (2003): 41

<sup>95</sup> Thomas Nagel, 'Rawls on Justice,' Cited in R. Solomon, *What in Justice?* Op. cit. p. 300.

<sup>96</sup> Ronald Dworkin, 'The Original Position,' in *Reading Rawls*, op. cit. p. 17

<sup>97</sup> Raphael, *Moral Philosophy*, op. cit. p. 73

interested person might also be a gambler. Why, he asks, should a person in the original position necessarily play it safe and think only about what will happen if they are unlucky? Why couldn't they think as a gambler does and take the chance of opting for a first principle? However, it is possible that a participant might be risk-averse and still not choose Rawls' principles.

#### ***D. The irrationality of risk-taking***

Rawls presupposed that a person in the original position would play it safe rather than risk ending up in the place of a worst off in society. Now just suppose for a moment that one of the participants in the original position was female, black, pregnant, single, low paid etc. What would be the odds of this person ending up in a worst position than they may already be in? If that person were to choose equality over liberty they might well end up in a better position. It could be suggested that the people in Rawls' original position might have more to lose than this person so they may well choose liberty over equality cushioned by the *Difference Principle*. Rawls himself states that '*It is not worthwhile for him to take a chance for the sake of a further advantage, especially when it may turn out that he loses much that is important to him.*'<sup>98</sup> Perhaps choosing equality over liberty might take Rawls' participants a step down the socio-economic ladder while it could elevate the former. Perhaps those with the least to lose might opt for the equality over liberty while those with more to lose might prefer liberty over equality and the difference principle – Rawls' preferred choice. In other words, the choices could be considered as either risk adverse or risk taking behavior depending on one's own position in society. Perhaps Rawls' argument reflects his own social position.

It might even be a more rational to be risk-taking than risk-adverse for a participant who is already down the bottom of the social / economic ladder. However, that would be less of a gamble than those in a better position because that person would have less to lose. And, as we will see, decisions would still have to be made in reflective equilibrium. Raphael made a similar point by drawing on the Old Testament. The Egyptians, he tells us, were prepared to sell themselves into slavery in return for some corn. This was a good example of

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<sup>98</sup> Rawls, *A Theory of Justice*, op. cit. p. 154

circumstances when rational self-interested people are willing to give priority to economics instead of liberty. According to Raphael, *'Rawls is writing as a modern American comes from a well-off society which sets a high value on personal liberty. The veil of ignorance, which he places before his original contractors has two flaws - it has been manufactured in the USA, and it has not been made dark enough 'to blot out all the psychological effects of [Rawls's] own culture.'*<sup>99</sup> The rationality of gambling and the darkness of the veil will be examined more fully in following chapters. The rest of this section will examine evidence about the national lottery to further explore the possibility that a representative from the worst off group (if given the opportunity – Rawls' first principle) might be more prone to taking a risk than Rawls' more well off.

What are the odds for winning the lottery in the UK? The chance of winning the lottery is the same as the chance of any similar event. And the chance of an event is equal to the number of favorable outcomes divided by the total number of outcomes. In the UK lottery a player chooses 6 winning numbers out of a possible 49 and while each of the 6 can only be chosen once, they can be chosen in any order. A blank lottery ticket has 49 numbers to pick from so there is a 1/49 chance of picking the right one. The second number is a 1/48, third 1/47, fourth 1/46, fifth 1/45, and sixth 1/44. The odds of choosing 6 correct numbers results from these odds being multiplied which gives the figure of 1/10,068,347,520. However, the 6 numbers can be chosen in any order and there are 720 different combinations of 6 numbers so 1/10,068,347,520 should be divided by 720. This means that there is a 1/ 13,983816 chance of winning the UK lottery.<sup>100</sup> These odds against winning the lottery have been one of the causes attributed to the slump in ticket sales over recent years but it's not the only reason.

Denis Campbell has reported on a move, which has been approved by Culture Secretary Tessa Jowell. It will attempt to banish the bad publicity, which has followed some recent awards of Lottery cash, such as the £340,000 grant to the National Coalition of Anti-Deportation Campaigns. A new Lottery promotional board will attempt to restore respect for the game by emphasizing

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<sup>99</sup> Raphael, *Moral Philosophy*, op. cit. p. 74

<sup>100</sup> Web Maths <http://www.webmath.com/> (Accessed 22/7/2005)

how many people benefit from the good causes. They will highlight that it has funded popular attractions such as the Eden Project in Cornwall, the Baltic art gallery in Gates-head and Tate Modern in London, and many thousands of useful facilities in local communities across Britain.

*The objective is to make people feel better about buying their Lottery ticket by presenting the Lottery itself, rather than its individual good causes, as "a good thing". The message will be that they aren't just buying it to win £5 million but because it's helping arts events, sports clubs and hospitals,' said one official.<sup>101</sup>*

Evidence relating to the odds against winning and the need to promote good causes are directly related to the issue of risk and social justice. Firstly because there is much evidence to show that the poor gamble more on the lottery than do the well off and secondly, but related to the first, because the good causes that are funded by the poor go to benefit the rich. In their study Herring and Bledsoe found that *'Attitudes favorable to lottery play are concentrated disproportionately among less advantaged groups, particularly the least educated.'*<sup>102</sup> Freund and Morris conducted a study collecting cross-sectional time-series data to evaluate the effect of lotteries. They found that *'...states with lotteries have higher levels of income inequality than the ones without.'* They also found a correlation between increase in income inequality and the increasing prevalence and popularity of state lotteries.<sup>103</sup> Pirog-Good and Mikesell found that an increasing proportion of lottery revenues come from low-income players and heavy bettors.<sup>104</sup> In addition, Freund & Morris have found *'..clear evidence that lotteries foster inequality.'*<sup>105</sup> It follows from this that if the low income people are gambling more then they are not only funding state revenue, in the form of tax, but are also funding the good causes which seem to benefit those from higher incomes.

Stranahan and Borg found that those with the lowest education attainment

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<sup>101</sup> Denis Campbell, *The Observer*, Sunday January 19, 2003

<sup>102</sup> Mary Herring, & Timothy Bledsoe, 'A Model of Lottery Participation,' *Policy Studies Journal*, 22, 2 (1994): 245-257. doi: 10.1111/j.1541-0072.1994.tb01466.x

<sup>103</sup> Elizabeth Freund & Irwin Morris, 'The Lottery and Income Inequality in the States,' *Social Science Quarterly*, 86 (s1) (2005): 996-1012. doi: 10.1111/j.0038-4941.2005.00333.x

<sup>104</sup> Maureen Pirog-Good & John Mikesell, 'Longitudinal Evidence of the Changing Socio-Economic Profile of a State Lottery Market,' *Policy Studies Journal*, 23, 3 (1995): 451-465

<sup>105</sup> Elizabeth Freund & Irwin Morris, 'Gambling and Income Inequality in the States,' *Policy Studies Journal*, 34, 2 (2006): 265-276. doi: 10.1111/j.1541-0072.2006.00169.x

were also those who bore a significantly higher lottery tax burden.<sup>106</sup> In an analysis of the UK's National Lottery scheme and the effects of EGM's in Queensland, Australia Pickernell found that gambling taxes were relatively high and far more regressive than ordinary sales taxes '*...because low socio-economic groups are more likely to gamble than high income groups.*'<sup>107</sup> In the same paper they argue that funds for good causes coming from this revenue tend to benefit better-off groups and there is further evidence that supports this claim. Rubenstein and Scafidi found that ethnic minorities in Georgia spent far more on the lottery and that higher income households receive more benefits than lower income households.<sup>108</sup> According to Bailey, one in seven middle class people wanted more spending on arts and culture whereas this was the preference of one in twenty working class respondents.<sup>109</sup>

The lottery good causes money is intended to be for 'additional' government spending. According to Pickernell, however, it can encroach on areas such as health and education.<sup>110</sup> In addition, Moore pointed out that during the second reading of the Act, which created the UK's national lottery, members of the House of Lords expressed fears that lottery funds would be distributed disproportionately to projects in London and other prosperous places instead of evenly across the UK as a whole.<sup>111</sup> And there is mounting evidence to suggest that lottery funds, which only respond to applications, tend to be awarded to applicants from '*...eloquent, organized middle-class groups rather than poorer groups and area.*'<sup>112</sup> While this evidence supports the argument that low-income people tend to gamble more than high-income people, and that the latter receive the benefits, it could also be argued that gambling is not just the preserve of the poor. Evidence shows that those from higher incomes take a risk

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<sup>106</sup> H. Stranahan and M.O. Borg, 1998, 'Horizontal Equity Implications of the Lottery Tax,' *National Tax Journal*, 51, 1 (1998): 71-82

<sup>107</sup> David Pickernell, Brown, Kerry, Worthington, Andrew & Crawford, Mary, 'Gambling as a Base for Hypothecated Taxation: The UK's National Lottery and Electronic Gaming Machines in Australia,' *Public Money & Management*, 24, 3 (2004): 169

<sup>108</sup> R. Rubenstein & B. Scafidi, 'Who pays and who benefits? Examining the distributional consequences of the Georgia Lottery for education,' *National Tax Journal*, 55, 2 (2002): 223-238

<sup>109</sup> S.J. Bailey, 'The National Lottery: Public Expenditure, Control and Accountability,' *Public Money and Management*, 15, 4 (1995): 43-48

<sup>110</sup> David Pickernell, 'Gambling as a Base for Hypothecated Taxation,' op. cit. p. 173

<sup>111</sup> P.G. Moore, 'A National Lottery in the UK,' *Journal of Applied Statistics*, 21, 6 (1994): 607-662

<sup>112</sup> S.J. Bailey, 'The National Lottery: Public Expenditure, Control and Accountability,' *Public Money & Management*, 15, 4 (1995): 43-48

on the stock market and other forms of investment. For that reason it is important to gain a clearer understanding of the differences between gambling and investing in order to further explore the anti-risk or non-gambling critique levelled at Rawls' theory.

### ***E. The rationality of risk-taking***

Rawls argued that risk-aversion would be the rational choice. However, imagine that while strolling down a street in London, say Shaftesbury Avenue for example, Rawls receives a call on his mobile. It is from the hospital and they inform him that a close relative is going to die shortly and that he should try to get to the hospital within an hour. Suppose also that the hospital is in Reading, which is about an hour away via taxi but two hours away by bus. Now, in this thought experiment, Rawls realizes that he only has enough money for the bus but not the taxi. He looks around and sees the Golden Nugget casino a few yards away. Would it be rational for him to use the bus fare as a wager in an attempt to win the taxi fare?<sup>113</sup> In other words, could rationality and gambling be compatible? The answer to this question could be either yes or no – unless you are the type of person presupposed in Rawls' original position.

Rawls' tells us that he has '*...assumed throughout that the persons in the original position are rational*'<sup>114</sup> and adds that the choice of his principles would be the rational choice to make.<sup>115</sup> This implies that other principles, including those with an element of risk-taking might not be the rational choice to make. He gives an example of three possible decisions and shows why persons would choose one of them. This is because it would have the best of the worst possible outcomes (Rawls' maximin rule).<sup>116</sup> By drawing on William Fellner's *Probability and Profit* (1965) he outlined three chief reasons why this would be the case.<sup>117</sup> The first was about lack of knowledge concerning outcomes, which he connected to the veil of ignorance, and the other two were tied to risk avoidance. This presupposed that decisions based on rationality are incompatible with taking a risk. Harsanyi, however, would disagree with Rawls.

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<sup>113</sup> Another option would be to ask someone for the money but that would also be a gamble.

<sup>114</sup> Rawls, *A Theory of Justice*, op. cit. p.142

<sup>115</sup> Ibid. 150

<sup>116</sup> Ibid. 154

<sup>117</sup> Ibid. 154-158

Rawls, in the taxi fare example above, had very little to lose and a lot to gain. Harsanyi used a similar example to criticize Rawls and claimed that it would be irrational to use maximin reasoning in the original position.<sup>118</sup> The example he used of a low risk / high payoff was the slight possibility of a plane crash if one was flying to a destination to take up a good job. Following Rawls' argument, according to Harsanyi, one would stay put and take up a less appealing job.

*Conceptually, the basic trouble with the maximin principle is that it violates an important continuity requirement: It is extremely irrational to make your behavior wholly dependent on some highly unlikely unfavourable contingencies regardless of how little probability you are willing to assign to them.*<sup>119</sup>

Contrary to Rawls, in Harsanyi's versions of the veil of ignorance the person would choose Utilitarianism. They would not automatically think that they would end up in the worst position. However, as we will see in chapter three, by referring to empirical data rather than thought experiments, different types of people, young, old, male, female etc., seem to have different types of gambling patterns. And some people are prepared to risk big stakes with the possibility of losing a lot while others are only prepared to risk small stakes with a possibility of a large win. In this sense, then, gambling could be seen on a continuum including size of outlay as a proportion of what they have, and the chances of winning or losing it. So a small wager with the possible large return could be seen towards the lower risk pole while gambling much with a small return closer to the higher pole. Therefore, depending on who was in the original position the choice of principles might differ. Perhaps Harsanyi is more of a risk-taker than Rawls' and this could account for why their conclusions differ.

An important thing to remember is that different people gamble for different reasons. Not everyone gambles to win, so the rationality of the gambler should not just be based on their risk-seeking or risk-avoidance characteristics. For example, some gamble for its entertainment value while others might put up their money to buy fantasy time. Taking £100 to a casino for purchasing

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<sup>118</sup> John Harsanyi, 'Can the Maximin Principle Serve as a Basis for Morality? A Critique of John Rawls' Theory,' *American Political Science Review*, 69 (1975): 599

<sup>119</sup> *Ibid.* 598

entertainment, with the possibility of going home again with the £100 or more, could be seen as more rational than spending £100 on a film and meal without the possibility of retrieving that money. If they enjoy gambling they can get their money's worth and if they prefer a film and meal they can get their money's worth. Also, spending £1 on a lotto ticket Sunday morning can give a person a whole week of dreaming about what they could spend the jackpot on. Wealth is unlikely to result from either spending a pound on the lotto ticket or not spending it on the lotto ticket. However, there is a difference between gambling £1 on a lotto ticket and gambling on one's basic necessities of life – Rawls' primary goods. This could be seen as a case of problem gambling.

One of the important primary goods, according to Rawls, was self-respect. *'On several occasions I have mentioned that perhaps the most important primary good is that of self-respect.'*<sup>120</sup> He divided self-respect between (a) a sense of our own value concerning our plan of life, and (b) confidence in the ability to carry it out. He then went on to inform us that there are two ways to support the first part of self-esteem. Firstly, *by having a rational plan of life, and in particular one that satisfies the Aristotelian Principle.'* And secondly, finding that plan confirmed by others.<sup>121</sup> By Aristotelian Principle Rawls means a basic principle of motivation.<sup>122</sup> *'...other things equal, humans beings enjoy the exercise of their realized capacities (their innate or trained abilities), and this enjoyment increases the more the capacity is realized, or the greater its complexity.'*<sup>123</sup> Rawls justifies this assertion with an example of a board game.

Rawls argued that if someone can play both chess and checkers they would prefer the former to the latter. However, he adds a disclaimer on the following page. *'...it formulates a tendency and not an invariable pattern of choice.'* We will see that this tendency has not been exploited by the gambling industry because, as will be mentioned in chapter three, most of the profits come from gaming machines. Playing games such as blackjack on the casino tables are much less mind numbing than pressing buttons on a machine that have an inbuilt edge for the house. However, machines do cut down on overheads because the casinos do not need to employ a croupier. More croupiers would

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<sup>120</sup> Rawls, *A Theory of Justice*, op. cit. p. 440

<sup>121</sup> Ibid. 440

<sup>122</sup> Ibid. 424

<sup>123</sup> Ibid. 426



add overheads to the industry. However, if making profit, rather than decreasing unemployment in the local area, is the goal then fewer overheads would seem to be the rational thing to do. Yet, as we will see in chapter 2, a key point in obtaining a licence to operate a casino is the generation of employment within the local area.

Whether or not gambling is rational or irrational in terms of the likelihood of winning, entertainment or dreamtime, many people use logic when gambling. They often use logic to try to find an edge. Some study the form guide for horse racing, while others use various strategies in card games. Unfortunately most players lose anyway because either the games, such as machines, roulette or the lotto, have no possibility of an edge or the edge is relative to the other players' skill. This is apparent in poker, sports betting, and other games of skill. Even though the systems many gamblers use do not work in the long term, otherwise the gambling industry would fold, there is considerable logic and strategic thinking employed in coming up with the systems and making the choices during the games.

The rational participants in Rawls' original position also use strategic thinking, like a form of game theory, which is based on rational actor theories of behavior in the choice of principles. In other words, Rawls presupposes that people are looking to gain the most for them once the veil is lifted. By being under the veil it prevents them stacking the deck in their own favor or to the disadvantage of others. This is in opposition to Utilitarianism, which presupposes that people are more society centered in that they are after the greatest good for the greatest number. Rawls' theory can be seen as a form of liberalism, which gives a foundation to something like a welfare state, and it is this that has been criticized by Nozick.

Robert Nozick published a critical reply to Rawls theory in *Anarchy, State and Utopia*.<sup>124</sup> According to him, Rawls' two principles of Liberty and difference actually contradicted each other. He argued that any government, which taxed rich people and redistributed their wealth to help poor, like Robin Hood, was violating the liberty of the rich. Governments have no right, according to Nozick, to take money off some and give it to others. He argued

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<sup>124</sup> Nozick, *Anarchy, State and Utopia*, *op. cit.*

that 'the minimal state is the most extensive state that can be justified. Any state more extensive violates people's rights.'<sup>125</sup> This would suggest that the government has no right to promote the gambling industry. By drawing on the research that suggests the poor spend more on the lotto than the better off, one could argue that the government was taxing the poor and redistributing the money to help the better off.<sup>126</sup>

The UK National lotto prides itself on being fair because of random number generation. It must be pointed out that the generation of numbers is statistically random rather than objectively unpredictable. The former means that there are no recognizable patterns or regularities within the sequence. At this stage it can be assumed that any attempt to produce a real random sequence will have an effect on the result that would prevent true randomness. However, there is one aspect of the Lotto that seems to be more predictable than the sequence of numbers. For example, in Figure 2 below we can see that only 50 pence in each pound waged goes back to the winners. 5 pence in each pound goes to Camelot's profit, 4.5 pence goes into operational costs, 5 pence goes towards commission for sales, and 40 pence goes towards good causes and revenue. 20 Billion pounds have been raised for good causes to date. Last year alone Health, Education, Environment, Community & Charity received 50% of the 28% of good causes money, Sports received 16.67%, Arts 16.67% and Heritage 16.67%. This breakdown is based on sales outlined in Camelot's bid for the second license.<sup>127</sup> From this data one could confidently predict that lucky ticket holders will win less money than will be collected from all lotto participants.

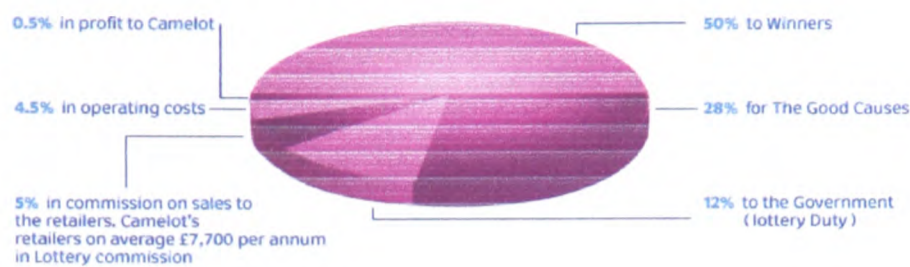
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<sup>125</sup> Cited in R. Solomon, *What is Justice?* Op. cit. p. 301

<sup>126</sup> Unlike taxation, the lottery is voluntary. However, it could be argued that if the lottery participants were addicted to gambling then the voluntary status would be undermined because addiction removes free-will. This is important in relation to the removal of 'unstimulated demand' in the new Gambling Act 2005. See chapter 3 for more details.

<sup>127</sup> All the data and Figure 2 were taken from the official National Lottery website at <http://www.national-lottery.co.uk/player/information.do?info=wheremoneygoes> (Accessed 30/04/07)

**Figure 2: Breakdown of Lotto Distribution**



It might be possible to argue that if the 40 pence in the pound going to good causes and revenue benefited the worst off in society, more so than if there was no lotto, then Rawls' social justice theory could be used to justify the continuation of the national lottery as part of the current economic structure. However, if it did not benefit the worst off then, following Nozick, we could say it was violating the rights of the poor.

At one time these two different views, Rawls and Nozick's, seemed to reflect opposing political parties. For example, in the US, the Democrats pushed for wealth redistribution while the Republicans pushed for tax cuts and less government interference. However, choosing which party to vote for, like choosing principles in the original position, could be as much based on a gamble as on reason. This is because a complex interactive process might determine choices themselves where logic as well as chance plays a part.<sup>128</sup>

There has been a large volume of research in psychology and economics on decision-making. This has been concerned with questions such as why people violate rational decision principles, situational and personal constraints, limited cognitive capacity, decision strategies, regression analyses to determine which factors are most predictive, the possibility of teaching rational decision making techniques, people's inherent information processing behavior and the effect of market experience, etc.<sup>129</sup> And much research has been conducted on the interrelation between rational choice and emotions. For example, at a conference, which addressed the question 'Do emotions help or hinder rational thought'? Damasio, Marni, Nettle, and Evans argued that there were overriding evolutionary evidence to suggest that emotions have adaptive value

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<sup>128</sup> E. Krausz, 'The Elements of Rationality and Chance in the Choice of Human Action,' *Journal for the Theory of Social Behaviour*, 34, 4 (2004): 353

<sup>129</sup> David Hardman & Clare Harries, 'How rational are we?' *The Psychologist*, (Feb. 2002). Available online at <http://www.fortunecity.com/emachines/e11/86/decision.html> (Accessed 17/5/2005)

in relation to human cognition. It was suggested that rational cognition could not have arisen without emotions. However, other speakers such as Stich and Sripada, Goldie and Badcock argued that there are strong reasons to suppose that emotions can at least on occasion be detrimental to, or conflict with, rational cognition.<sup>130</sup> Most of this research seems to have the aim to improve rational decision making but very little research has been given to the ‘... *uncovering of the pervasiveness of chance and its influence on decision making*.<sup>131</sup> So it might be the case that even if the persons in the original position acted as Rawls predicts and chose the maximum rule, that choice itself might include an element of chance. However, in order to examine this notion further we need to find out if taking a chance and taking a risk amount to the same thing.

### ***F. Taking a chance***

There is a huge amount of literature devoted to the topics of chance. It is far too much to engage with here. For that reason the discussion will be confined to the way that the topic has been mentioned in the material related to changes in the UK’s Gambling law. For example, in the Budd Report we find that Bingo had been classified as a game of ‘*chance*.’<sup>132</sup> It is a game where each player receives a set of numbers, which they have not chosen, and they mark off various numbers that are selected at random. The lottery is also categorized as a game of ‘*chance*’ because there is no skill required.<sup>133</sup> Under the Gaming Act 1968 the card game Poker is classified as ‘*gaming*’ because it involves chance

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<sup>130</sup> ‘Emotion, Evolution and Rationality’ An interdisciplinary conference hosted by the Philosophy Department at King’s College London. 27-28 April 2002. Papers presented by Antonio R. Damasio (Department of Neurology, University of Iowa College of Medicine and The Salk Institute for Biological Studies) ‘A neurobiology for emotion and feeling’; Matteo Mameli (Department of Philosophy, Logic and Scientific Method, London School of Economics) ‘*The Rationality of Emotions from an Evolutionary Point of View*’; Daniel Nettle (Departments of Biological Sciences and Psychology, The Open University) ‘*Optimism, contentment, and other illusions: Evolutionary arguments for erring on the positive side*’; Dylan Evans (Department of Mechanical Engineering, University of Bath) ‘*The search hypothesis of emotion*’; Chandra Sripada & Stephen Stich (Department of Philosophy, Rutgers University) ‘*Evolution, Culture and The Irrationality of the Emotions*’; Peter Goldie (Department of Philosophy, King’s College, London) ‘*The Epistemology of Emotional Feelings*’; Christopher Badcock (London School of Economics) ‘*Emotion versus reason as a genetic conflict*’.

<sup>131</sup> Krausz, ‘The Elements of Rationality and Chance in the Choice of Human Action,’ op. cit. p. 374

<sup>132</sup> The Budd Report, op. cit. Chapter 8, p. 40

<sup>133</sup> Ibid. 56

and skill. Predicting events such as horse races, greyhound races or sports such as football matches comes under 'betting' because it may involve skill or judgment.<sup>134</sup> On-line *gambling* is conducted purely on-line and relies on random number generation, so it should be called on-line chance taking. On-line 'betting', on the other hand, is when entries are received on-line but the event, draw or competition occurs off-line.<sup>135</sup> Fruit machines are called 'gaming' machines. However, games on machines using skill including quiz machines are not classified as gaming machines.<sup>136</sup> According to these classifications, the main differences between a game of *chance*, *gaming*, *gambling* and *betting* has to do with the difference between pure randomness and the possibility of applying some form of choice or judgment or skill to predict the outcome.<sup>137</sup>

The Lotto, as a game of 'chance', is based on pure random number generation so buying things to increase skill such as *Winning lottery strategies*<sup>138</sup> would seem a waste of time. However, the Government seems to encourage this type of purchase as the official lotto page analyses the frequencies of each number.<sup>139</sup> They do offer a disclaimer, but it is difficult to know what they mean by the exclamation mark.

*Find out which numbers have been drawn the most frequently, and which have been drawn the least. Despite the draws being totally random, some numbers have a habit of cropping up more than others, while others hardly appear at all!*<sup>140</sup>

Regardless of the connotation, lotto is called a game of chance and this randomness is reinforced by the way the draw is conducted on TV. Yet, they spend little time making players aware of their chance of winning. Yes, 'it could be you' but the chance, as we saw in a previous section, is 1 out of 13,983,816. However, the risk is minimal - you could lose only £1. So while the chance of

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<sup>134</sup> Ibid. 46

<sup>135</sup> Ibid. 65

<sup>136</sup> Ibid. 24

<sup>137</sup> According to Reith 'the analytical distinction between games of chance and games of skill is somewhat artificial.....all games, even those most amenable to the skilful prediction of the player, contains an element of chance.' Gerda Reith, *The Age of Chance*, op. cit. p. 94

<sup>138</sup> Ion Saliu <http://www.saliu.com/LottoWin.htm> (Accessed 11/3/2005)

<sup>139</sup> <http://www.national-lottery.co.uk/player/p/results/numberfrequency/frequencyAll.do?homefreqchecker> (Accessed 23/3/2007)

<sup>140</sup> From the official National Lotto <http://www.national-lottery.co.uk> (Accessed 23/3/2007)

winning is an extremely low probability the risk of losing is a very high probability but the amount of possible loss is minimal.

Some people are willing to take more risks than others and economists usually express this difference through a utility function of money.<sup>141</sup> However, it has been argued that other theories such as the Prospect Theory give clearer results than the Utility theory.<sup>142</sup> Nevertheless, both theories acknowledge that some people are risk averse, others are risk seeking, and others risk neutral. And it may be the case that a person could be risk seeking one day and risk averse the next. Friedman Savage argued that there might be levels of wealth when a person is a risk-lover and levels of wealth when they are risk-neutral. This argument has been used to explain why people may take low probability, high-payoff risks, such as buying a lotto ticket, while at the same insuring against mild risks with mild payoffs such as flight insurance.<sup>143</sup> We noted in the last section that Harsanyi could be an example of the latter. We can also see that those findings might have consequences for the choice of Rawls' principles.

Regardless of whether the chosen gambling activity is understood as a game of chance or not there is an element of risk involved. One risks losing one's wager, unless, as discussed above, one is just purchasing entertainment or dreamtime. The notion of pure chance seems to rule out determinism and this allows for freedom. If things are purely random then they are unpredictable. However, only unpredictable to some, in a sense that uncertainty is considered a state of mind rather than a state of reality. For example, Spinoza tells us that '*In the universe there exists nothing contingent (contingens), but all things are determined by the necessity of the divine nature to exist and operate in a certain way.*'<sup>144</sup> Within the present subject matter we could say that the Government and Camelot have taken up the place of Spinoza's God. While the lotto player may be playing a game of chance, the return is determined by the way that the

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<sup>141</sup> <http://www.gametheory.net/Mike/applets/Risk/> (Accessed 23/3/2007)

<sup>142</sup> Daniel Kahneman & Amos Tversky, 'Prospect Theory: An Analysis of Decision under Risk,' *Econometrica*, 47, 2 (March 1979): 263-292

<sup>143</sup> M. Friedman and L.P. Savage, 'The Utility Analysis of Choices involving Risk,' *Journal of Political Economy*, 56 (1948): 279-304. Available online at <http://cepa.newschool.edu/het/schools/synthesis.htm> (Accessed 19/03/2005)

<sup>144</sup> B. Spinoza, *Ethics*. London: J. M. Dent & Sons Ltd., 1989, p. 25. Cited in Gerda Reith, *The Age of Chance*, op. cit. p. 30

game is conducted. For example, the lotto only pays out 50 pence in the pound. In this way the lotto shares similarities with the insurance industry.

Insurance premiums are paid to cover the event of a chance accident, but just as the odds are in the lotto's favor these premiums are also worked out in such a way that insurance companies make a profit. However, unlike the lotto wager the insurance premium is a wager to cover for bad luck. Not everyone who drives will have a car accident yet we all must purchase insurance – it's the law. This is not dissimilar to average utilitarianism and Nozick's criticism of Rawls. Why should we all pay when only some will collect on the premium? That is because in order for the insurance company to make a profit it has to collect more than it pays out. Both the lotto and insurance companies work on the same principle. This is not the only thing that the gambling and insurance industries have in common. In a following section we will see how they share a common history in the expansion of probabilistic theory from the eighteenth century. But in addition to that, the new gambling law may well have consequences for insurance law.

According to Davey *'Recent government proposals seeking to the reform of the law of gambling are likely to have unintended consequences for the law of insurance.'*<sup>145</sup> He tells us that the similarities between gaming and insurance, as contracts based on chance, was what originally led insurance law to develop their doctrine of *'insurable interest'*. Insurance contracts move the element of risk from the insured to the underwriter. This is different from gambling, which is understood as the creation of new risks. At that time insurance was viewed as a necessary element of trade, while gambling was dismissed as immoral or sinful and unproductive. The distinction made between insurance contracts and gambling wagers focused in on the relationship between the insured and the subject matter of the agreement, according to Davey. The common law definitions of insurance and wagering refer to the presence or absence of interest in the subject matter. Insurance law requires that these relationships exist because without them the policy is made void and or illegal. Davey concludes that the difference between gambling and insurance is a problematic area.

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<sup>145</sup> James Davey, 'The reform of gambling and the future of insurance law,' *Legal Studies*, 24, 4 (2004): 507-515. Especially p. 507

*Whilst an attempt to distinguish insurance from wagering was required, the task 'of distinguishing legitimate from illegitimate risk, while often taken for granted as definitively settled, is actually a problem for which no satisfying solution has been offered, much less adopted'. The Gambling Bill may therefore remove the need for any formal distinction between insurance and wagering agreements, at least in terms of enforceability.<sup>146</sup>*

This omission, which has an impact on some forms of insurance, was probably unintended by the government, according to Davey. It is more than likely an oversight because the government has altered other areas not directly related to gambling. For example, the repeals and amendments listed in clause 256 which include section 412 of the Financial Services and Markets Act 2000.<sup>147</sup> These ensure the enforceability of certain regulated investment products. And as we will see investment and gambling may also be closely related.

On the 18<sup>th</sup> July, 2006 it was reported that shares in UK-listed online gambling companies went down after the chief executive David Carruthers of gaming firm, Betonsports, was detained in the US on charges of racketeering. He was named in an indictment in Missouri after an investigation into online gaming. Trading in Betonsports shares were suspended. Competitors saw their stocks fall as the gravity of the charges emerged. For example, Partygaming shares closed down 17% and 888 Holdings dropped by 13%, Sportingbet lost 35% of its share value. Betonsport's shares had plunged by 16.6% on the following Monday and were suspended before trading began on the Tuesday. A warrant was also issued for the arrest of Betonsports founder Gary Stephen Kaplan, who was charged with 20 offences including tax evasion and conspiracy. The US has also filed a civil action, ordering the firm to stop taking any further bets from the US and to return money held in betting accounts of US-based customers. US attorney Catherine Hanaway of the Eastern District of Missouri said the indictment was part of a crackdown designed to '*punish and seize the profits*' of those illegally running gaming sites. Betonsports, whose holding company Betonsports plc is listed on London's Alternative Investment

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<sup>146</sup> Ibid. 510

<sup>147</sup> Gambling Act 2005: Elizabeth II. Chapter 19 December 2005. Reprinted January 2007. Available online at <http://www.opsi.gov.uk/ACTS/acts2005/20050019.htm> (Accessed 23/3/2007)



Market, which is based outside of the US because of strict gaming laws there.<sup>148</sup>

Gambling companies and their shareholders, who gamble on gambling, wager, or invest a considerable amount of money in the hope that punters will lose their money in games of chance and other gambling activities. While Carruthers' arrest had a huge impact on shares in the gambling industry it soon recovered. The Dow Jones U.S. Gambling Index, a Dow Jones & Co. industry index of 64 publicly traded casino companies, closed at 547 at the end of August 2006. This was up 4.2 percent from 525 at the end of July. This included Wynn Resorts Ltd., which closed the month of August at \$77.41, up 20.9 percent from \$64.01 a month earlier. Las Vegas Sands closed at \$69.81, up 12.5 percent from \$62.03 at the end of July. The major Las Vegas-based gaming companies, Station Casinos led the national index, closing the month at \$58.25, up 6.2 percent from \$54.86 a month earlier. If punters stopped losing their money to the gambling industry these shares would drop again. Whether or not they would drop as drastically as investments in tulip bulbs did in the 1630's in Holland is outside the remit of this study.

We have already seen the extent to which some people are more prone to take big chances than others. These wagers cover an extensive range of events such as marriages, births and deaths etc. It has even been reported that bets were placed when a man collapsed in a gaming house. The gamble was about whether he would live or die. Apparently some of the punters objected when attempts were made to revive him. They argued that it would influence the outcome of the bet.<sup>149</sup> And as we will see in the next section, influencing chance events is the basis of risk reduction

### ***G. Reducing risk***

As noted previously, Rawls tells us that people in the original position would not 'risk' ending up in a worst off position. And we have already seen that risk, gambling and insurance are closely related. It might be the case that Rawls is not saying so much that they would not take a risk. Rather he might be saying that they would insure in the future. And this could be understood as a

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<sup>148</sup> Data taken from <http://news.bbc.co.uk/1/hi/business/5189906.stm> (Accessed 2/3/2007)

<sup>149</sup> C. Sifakis, *The Encyclopedia of Gambling*, New York, facts on file 1990. 314. Cited in Gerda Reith, *The Age of Chance*, op. cit.

type of risk management procedure. In order to explore this notion further we need to distinguish more closely between gambling and risk taking. A common denominator between the two, which is also closely related to investment, is the area of risk management. That is because today's risk management industry can be traced back to early games of chance. It was the study of those games that led to the development of probability theory, which forms the basis of risk management today.<sup>150</sup>

Rawls tells us that '*considerations of probabilities are bound to enter in given the way in which the initial situation is defined. The veil of ignorance leads directly to the problem of choice under uncertainty.*'<sup>151</sup> However, he adds that the veil of ignorance will cover the person's knowledge of their attitude towards risk. They will not know if they have a preference for taking chances or not. And drawing on Laplace's argument (which will be discussed in more detail in a later chapter) Rawls tells us that the lack of information, due to the veil, does not pose any theoretical problems.<sup>152</sup> Laplace's Principle of *Insufficient Reason* means that when one has no evidence at all, one assigns equal probability to each possible case. Because of the veil of ignorance the choice is made in quite specific conditions of considerable uncertainty. In other words, the veil of ignorance makes probability calculations essentially impossible, according to Rawls. This point will be examined more fully below after tracing some of the links between games of chance, insurance, investment, and risk management.

In 1711 de Moivre, who was studying probability, had an article published by the Royal Society entitled *De Mensura Sortis (On the Movement of Lots)*. In the following year he published an expanded English edition called *The Doctrine of Chance*, which he dedicated to his friend Isaac Newton. This work is, according to Bernstein, probably the first to define risk as chance of loss. '*...the risk of losing any sum is the reverse of expectation; and the true measure of it, the product of the sum adventured multiplied by the probability of loss.*'<sup>153</sup> De Moivre understood probability as the degree of certainty and it

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<sup>150</sup> Reith, *The Age of Chance*, op. cit. pp. 24-33; Bernstein, *Against the Gods*, op. cit. pp. 58-67

<sup>151</sup> Rawls, *A Theory of Justice*, op. cit. p.172

<sup>152</sup> Ibid. 169

<sup>153</sup> Bernstein, *Against the Gods: The Remarkable Story of Risk*, op. cit. p. 126.

differs from absolute certainty as part differs from whole.<sup>154</sup> In order to gain an understanding of how closely a part differs from the whole de Moivre drew on, and developed, the work of Bernoulli.

Gottfried von Leibniz had said to Bernoulli that '*nature has established patterns originating in the return of events, but only for the most part.*'<sup>155</sup> Without '*but only for the most part*' everything would be predictable and we wouldn't need probability theory. It was this statement, according to Bernstein, which prompted Bernoulli to invent the 'law of large numbers' and various methods of statistical sampling. These formed the basis of our modern activities such as opinion polling, testing new drugs, marking student's essays etc. According to the 'law of large numbers,' the difference between the observed sample and its true value will shrink as the sample gets bigger. So the bigger the part the more closely it will resemble the whole. In order to illustrate his point Jacob suggested that if one was to have a jar containing 3000 white pebbles and 2000 black pebbles (but he insisted we must not know the number) and then drew pebbles from the jar recording their color before returning them, they would find, with a big sample, a 3:2 ratio. He concluded that this would allow the person to determine '*the number of instances a posteriori with almost as great accuracy as if they were known to us a priori.*' He argued that the results after 25,550 drawings would be within 2% of the true ratio.<sup>156</sup> He was referring to this as moral certainty as opposed to true certainty. By moral certainty he meant almost complete certainty. This is similar to Leibnitz's '*infinitely probable.*'<sup>157</sup> This is also similar to today's notion of '*statically significant.*'<sup>158</sup>

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<sup>154</sup> Ibid. 123

<sup>155</sup> Quoted in John Maynard Keynes, *A Treatise on Probability*, London: Macmillan, 1921, chapter xxv111. Cited in P. Bernstein, *Against the Gods*, op. cit. p. 4

<sup>156</sup> Bernstein, *Against the Gods*, op. cit. p. 123

<sup>157</sup> See Ian Hacking, *The Emergence of Probability; A Philosophical Study of Early Ideas About Probability, Induction, and Statistical Inference*, Cambridge; Cambridge University Press, 1975, p. 145. Cited in Bernstein, *Against the Gods*, op. cit. p. 123. See Chapter 7 for more on this.

<sup>158</sup> What is understood as statistically significant is itself a problematic area. For example, what was taken to be statistically significant, for a correlation between passive smoking and lung cancer was extremely lower than other correlations. The American Congress passed the Smoke-free Environment Act on evidence from a very small sample. It was based on thirty studies of which six showed no effects. And only 9 were statistically significant. The test case was only 1.19 times the than the control group. '*The EPA has never claimed that minimal exposure to second hand smoke poses a huge individual cancer risk.*' Environmental Protection Agency (EPA). Office of Research and Development, Office of Health and Environmental Assessment, 1994. *Setting the Record Straight: Secondhand Smoke Is a Preventable Health Risk*, p. 3. Cited in Bernstein, *Against the Gods: The Remarkable Story of Risk*, op. cit. p. 213

This finding was a big step in probability theory because it allowed him to make predictions about an unknown whole, in a similar way, as others were able to make predictions about games of chance.<sup>159</sup>

De Moivre further developed the jar of pebbles idea and argued that a number of random drawings would show them distributed around their average value. For example if one noted the ratio of a hundred pebbles each drawn and returned, and then recorded the average of a number of those drawings, they could work out how many of the ratios are close to the average ratio to the total number, and how they are distributed around the total draws. This distribution is known in today's statistics as the 'normal' curve. This distribution, when shaped out to look like a curve, led to the idea of a standard deviation in statistics. This allows someone to know if a sample is representative or non representative.<sup>160</sup> The deviations are deviations from the mean. This point will be returned to when discussing the notion of 'regression to the mean' in connection with uncertainty in relation to meaning. It is worth suggesting now that 'regression to the mean' presupposes a stable mean to regress to, and this notion came under attack in the field of statistics at around the same time as postmodern critiques began. But first we need to go back to see the bridge between predictions of chance and predictions about the human world because Rawls was concerned with the latter.

The study of probability in relation to chance can be traced back to early games of chance. There is evidence of games of chance been played since the beginning of recorded history. For example, in Numbers 26:55 the allocation of the land of Canaan among the Israelites was decided by lot. Other references can be found in 1 Chronicles 24-26, Acts 1; 24-26 and Leviticus 16:8.<sup>161</sup> Lots were also cast by Pontius Pilate's soldiers for the robe of Christ. Marcus Aurelius's traveling companion was his croupier. The Earl of Sandwich invented the sandwich so he could eat without leaving the gaming tables. George Washington hosted games in his tent during the American

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<sup>159</sup> Ibid. Chapter 7 especially pp. 116-119

<sup>160</sup> A normal distribution usually has 68% within one standard deviation and 95% within two standard deviations.

<sup>161</sup> For more on this see Gerda Reith, *The Age of Chance*, op. cit. p. 16

Revolution.<sup>162</sup> And it could be argued that Kierkegaard's reading of the Abraham story shows that Abraham used his son as a wager while taking the leap of faith.<sup>163</sup>

The earliest known form of gambling game was something like dice but called astragalus or knuckle-bone. These were made from the ankle bones of sheep or deer. They have been found in archeological digs from around the world. They can be seen in Egyptian tomb paintings from about 3,500 BC.<sup>164</sup> Greek mythology drew on games of chance to explain the universe. Three brothers rolled dice for the universe and Zeus won the heavens, Poseidon the seas and Hades ended up master of the underworld.<sup>165</sup> We will see in a later chapter that a great deal happened in mathematics including the introduction of the zero, which allowed a linking between games of chance and probability theory. The zero may have been introduced into Europe from India via the Arabs.<sup>166</sup> We will also be discussing this when looking at political theories, which include negation, nothingness and other forms of negativities.

Another important step on the way to theories about probability was Paccioli's *Summa de Arithmetica, Geometria et Proportionalita* (1494). In this book he asked the following question

*A and B are playing a fair game of balla. They agree to continue until one has won six rounds, the game actually stops when A has won five and B three. How should the stakes be divided?*<sup>167</sup>

The answer to this problem came in many forms during the 16 and 17 century. This problem became known as the 'Problem of Points'. Pascal and Fermat corresponded over the question and the answer they supplied was a big event in

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<sup>162</sup> Darrell Bolen, 'Gambling; Historical Highlights and Trends and their Implications for Contemporary Society,' in W.R. Eadington, *Gambling and Society: Interdisciplinary Studies on the Subject of Gambling*, London: Charles C. Thomas, 1976. Cited in Bernstein, *Against the Gods*, op. cit. p. 12

<sup>163</sup> See S. Kierkegaard, *Fear and Trembling*, London: Penguin, 1985

<sup>164</sup> Bernstein, *Against the Gods*, op. cit. p. 12. Four sided gaming sticks have also been found as far back as 6,000 BC. See Gerda Reith, *The Age of Chance*, op. cit. p. 45

<sup>165</sup> Bernstein, *Against the Gods*, op. cit. p.15. For a fuller account see Reith, Gerda, *The Age of Chance*, op. cit. pp. 14-19

<sup>166</sup> J. Barrow, *The Book of Nothing*. New York: Pantheon Books, 2000, pp 12-47, 45-46; also see R. Kaplan, *The Nothing That Is: A Natural History of Zero*. London: Penguin, 1999, p. 36-49.

<sup>167</sup> Florence Nightingale David, *Games, Gods, and Gambling*, New York: Hafner Publishing Company, 1962, p. 37. Cited in Bernstein, *Against the Gods*, op. cit. p. 43

the probability theory, which is the basis of risk management today.<sup>168</sup> And, as we will see, risk management is about taming risk by reducing uncertainty.<sup>169</sup>

Gambling, risk management, insurance and investing share similarities and differences and they can all be interrelated on some level within Rawls original position. Some persons might lean to one of these parts more so than other parts. The better off may reduce the risk in case they fall below the mean by opting for the difference principle, while others might prefer equality to liberty because equality may bring them closer up to the current mean. So when Rawls argues that persons in the original position would choose his principles he may be presupposing participants who are above the mean. Rather than ridding society of the below mean, which tends to be based on those things that the veil of ignorance is supposed to cover up, Rawls tries to ensure they don't fall any lower towards the tail. In other words, he does not try to eliminate the deviations that divide society, but tries to reduce the standard deviations. A main reason for this is on his notion of economic progress and motivation. However, many, including Adam Smith, have been aware that the human propensity to take a gamble is what propels economic progress because gambling, with risk reducing measures, is the basis of capitalism.<sup>170</sup>

From these observations it would seem, then, that insurance, risk, taking, chance and gambling are not easily distinguished. They also share a common history in probability theory, which means that they are not based on certainty or truth. And as we have seen, while Rawls rules out risk taking, his theory is not based on certainty or truth either. In fact it is based, like the others, on uncertainty. But it is an imposed uncertainty via the veil of ignorance. This uncertainty is reduced with the difference principle as a form of risk management for those above the mean. In other words, while Rawls' veil of ignorance produces the uncertainty his difference principle reduces the risk. And this relationship between the uncertainty and risk management forms the basis of a stable society, which is related to his notion of reflective equilibrium.

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<sup>168</sup> A full English translation of their correspondence can be found in David, Florence Nightingale, 1962. *Games, Gods, and Gambling*, New York: Hafner Publishing Company. Appendix 4. Cited in Bernstein, *Against the Gods*, *op. cit.* p. 63

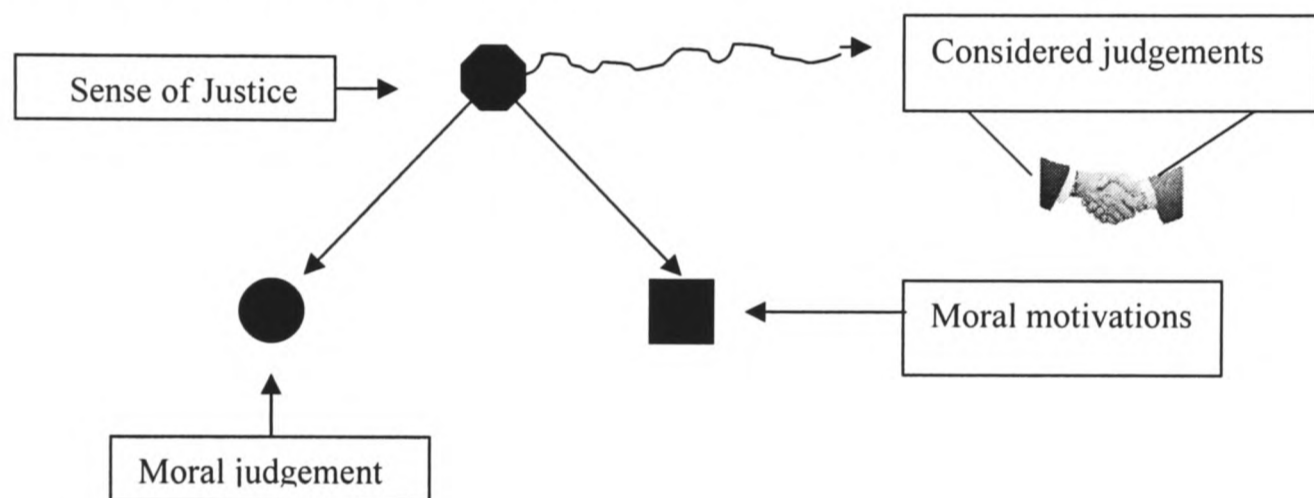
<sup>169</sup> Although more contemporary trends in risk management in terms of investment actually rely on uncertainty in the form of volatility. Examples include derivatives, neural networks and genetic algorithms which are closely related to Chaos theory.

<sup>170</sup> Bernstein, *Against the God*, *op. cit.*, p. 12.

## H. Gambling or playing it safe?

Reflective equilibrium is a type of balance or coherence between different views. The use of reflective equilibrium can lead to the possibility of changes to allow for consensus, or balance, or non-conflict. Rawls argued that human beings have a 'sense of justice', which is a source of their moral judgment as well as moral motivation (see Figure 3 below). Persons in the original position begin with 'considered judgments' that stem from their sense of justice. If the different judgments conflict they can be adjusted until 'equilibrium' or stability is reached. Rawls argued that a set of moral beliefs, in ideal reflective equilibrium, characterizes or reflect the underlying principles of our sense of justice.<sup>171</sup>

**Figure 3: Reflective equilibrium**



As the considered judgments can be changed through the process of reflective equilibrium it follows that the telos is not to arrive at a foundation based on truth or certainty but to arrive at one based on agreement. In this sense it is neither foundationalist nor relative. It is not the former because it can be changed, and it is not the latter because it presupposes a type of a priori unity or coherence within the sense of justice which reflective equilibrium attempts to retrieve.<sup>172</sup> So in a sense it hovers around some mean. This sense of coherence will be examined more fully in a following chapter in relation to Foucault's notion of episteme. And problems related to basing justice on truth will be examined in a later chapter. The remainder of this chapter will focus on the issue of agreement in reflective equilibrium.

<sup>171</sup> Rawls, *A Theory of Justice*, op. cit. pp. 48-51

<sup>172</sup> Rawls did say that there could not really be an ideal reflective equilibrium. Had he not then it could be taken as a form of foundationalism

According to Rawls, the veil of ignorance has the effect of depriving persons in the original position of the knowledge they would need in order to stack the deck in their favour. He places a clear divide between what would and what would not allow them to cheat. On the one side of the divide he places knowledge of their place in society, natural or acquired traits or abilities, their conceptions of the good, their particular goals, the particular political, economic or cultural characteristics of their own society, and which generation they belong to. On the other side he places the knowledge that they are contemporaries, in the circumstances of justice, so that human cooperation is both possible and desirable, that they are capable of a sense of justice, and limitless knowledge of general information such as in political, social, economic and psychological theories. In addition, persons in the original position would not be influenced by affection, envy or rancor. They would not choose to lower their expectations in order to avoid raising the expectations of someone else. He tells us that each would seek to maximize his own expectations even when this required that others have even greater expectations. Yet, reflecting on the data concerning lotto players above, we could say that by placing liberty over equality he expects the worst off to lower their expectations.

The aim of reflective equilibrium, like the original position contract, is stability, but the objective is the justification of the contract. Rawls tells us that the chosen principles, in the original position under the veil of ignorance, must also match our considered judgments about justice within reflective equilibrium. This will then justify those principles. However, if they do not match then we should make revisions until they do. And the contract must itself be in reflective equilibrium with our other beliefs about justice. So while the contract itself helps us arrive at the choice of principles the contract's justification must itself be in reflective equilibrium.

*From the standpoint of moral philosophy, the best account of a person's sense of justice is not the one which fits his judgments prior to his examining any conception of justice, but rather the one which matches his judgment in reflective equilibrium.<sup>173</sup>*

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<sup>173</sup> Rawls, *A Theory of Justice*, op. cit. p. 48.



Rawls' narrow version of reflective equilibrium has been criticized for being too subjective to attain a reliable moral judgment.<sup>174</sup> However, Daniels drew on it and developed it into a wider form of reflective equilibrium in order to overcome that issue.<sup>175</sup> According to Daniels, there is a relationship between three things (a) considered moral judgments, (b) a set of moral principles, and (c) a set of relevant background theories. When persons, according to Daniels, find some discrepancy between (a) and (b), they call on the background theories in (c), which includes general social theory, theory of moral development, theory of the role of morality in society, theory of persons, and theory of procedural justice, in order to decide what to revise.<sup>176</sup>

It has been suggested that Rawls' argument around agreement includes that rather than being neutral it gives primacy to a particular, liberal, individualistic conception of the good on which the project is grounded. Although Kaufman argues against the notion that conception of justice will be designed merely to ensure the stability of political institutions by appealing to the currently held opinions of actual citizens because '*...judgments in reflective equilibrium are grounded in considered judgment, rather than situated opinions.*'<sup>177</sup> Other criticisms include that it does not take important social factors or actual social practices into account. It is not adequate to the challenges of modern society.<sup>178</sup> The focus on agreement over truth has led to criticisms of Rawls' theory in relation to pluralism, multiculturalism, and international politics.

However, Rawls himself recognized the limitations of *A Theory of Justice* and wrote *Political Liberalism* and *Law of the People* to compensate. But in his later work he also included the notion of 'over-lapping consensus', which suffers many of the same problems. The events of 9/11, 7/7 and subsequent war on terrorism highlight the problem associated with groups who

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<sup>174</sup> R.M. Hare, 'Rawls' theory of justice,' *The Philosophical Quarterly*, 23 (1973): in Daniels 1975, 81-107; P. Singer, 'Sidgwick and reflective equilibrium,' *The Monist*, 58 (1975): 490-517

<sup>175</sup> N. Daniels, 'Reflective equilibrium and Archimedean Points,' *Canadian Journal of Philosophy* 10 (1980): 83-103. Especially p. 85-86. Although Daniels noted that Rawls introduced the distinction between narrow and wide reflective equilibrium. N. Daniels, 'Wide reflective equilibrium and theory acceptance in ethics,' *Journal of Philosophy*, 76 (1979): 256-282

<sup>176</sup> Daniels, 'Reflective equilibrium and Archimedean Points,' op. cit. p. 88

<sup>177</sup> Alexander Kaufman, 'Rawls's Practical Conception of Justice: Opinion, Tradition and Objectivity in Political Liberalism,' *Journal of Moral Philosophy*, 3, 1 (2006): 23-43

<sup>178</sup> J. Knight, 'Justice and Fairness,' *Annual Review of Political Science*, 1, (June 1998): 425-449

might have incommensurable ‘considered judgments’ that arise from their sense of justice, which could limit the move towards reflective equilibrium in the direction of agreement. Rawls may have realized this because in his later work he argues that metaphysical beliefs should be put to one side. As we will see in a later chapter what Rawls’ understands to be non-metaphysical could also be considered metaphysical.

Acknowledging the limitations for a multicultural society in his earlier theory, Rawls’ later work such as *Political Liberalism* (1993), *The Law of the Peoples* (1999), and *Justice as Fairness: A Restatement* (2001) seemed to develop in a way that moved the focus, negatively, from conflicts of interest, the main focus in *A Theory of Justice*, to conflicts in moral doctrine.<sup>179</sup> In *Political Liberalism* he suggests that we avoid the moral conflicts by leaving out any foundation in deeper metaphysical premises because they are potentially unresolvable, shaped by conflicting views about the nature of persons and reality itself. In *The Law of the Peoples* he extended this argument outside of the issue of multiculturalism in the nation-state, and towards relations between liberal and non-liberal states. Here he tried to find a way of judging between competing views that would not be prejudice by resolving conflicts in favor of a particular view of persons and reality. However, unlike his first theory, which includes the principle for basic rights and the difference principle, *The Law of the Peoples* did not include the latter.

The difference principle, which means that inequalities of income and wealth are justified only if they help the least advantaged in society, requires a stable, unified state to match the stability in the original position and the stability in reflective equilibrium. If this were included in his later work it would require some form of world government or power to enact it globally.<sup>180</sup> His later theory also requires people from different cultures to place something like a veil of ignorance over their deeper metaphysical premises in order to avoid moral conflicts. Therefore, if the situation arose that would allow Rawls’ difference principle to be applied globally, the world government / power should not be based on any privileged metaphysics. If Rawls was still alive

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<sup>179</sup> C. Kukathas, *The Liberal Archipelago: A Theory of Diversity and Freedom*, New York: Oxford University Press, 2003, p. 36

<sup>180</sup> Rawls, *A Theory of Justice*, op. cit. pp. 75-83. See ‘The Difference Principle’

today in our post 9/11 post 7/7 world he may well have revised his later theories – but it's impossible to know for sure. However, the notion of over-lapping consensus in his later work, presupposes the same possibility of agreement as what we found in his earlier work. In both cases the aim is stability, non-conflict, agreement or coherence based on some form of exclusion.

In his early work, Rawls excluded characteristics such as gender, class, time period etc, and in his later work he excluded metaphysical beliefs. However, if potentially unresolvable conflicting views about deeper metaphysical premises are excluded because they are shaped by conflicting views about the nature of persons and reality itself, rather than the other way around, then this would also include their views about gender, class and time period etc. In this case it should be views about those characteristics which should be excluded rather than the knowledge about what gender, class, time period we would occupy once the veil was lifted. Because, according to Rawls, it is these views that give rise to the deeper metaphysical premises, which are potentially unresolvable.

However, Rawls is as exclusive in what he includes as metaphysical beliefs as he is with characteristics that should be covered by the veil. And it is his choice of characteristics and metaphysical beliefs, which position his theory within a timeframe that he himself may not have excluded. It would follow from this that the type of cohesion reached would also relate to the time period. And in addition to that, the conflicting considered judgments, stemming from the sense of justice, which are balanced in reflective equilibrium, might be less conflicting than what Rawls presupposes. If that is the case then it might be the time period, excluded from the original position, which is the basis of justice – or what we understand to be justice.<sup>181</sup> In the following chapters we will examine the historicity of Rawls' work. In particular, the clear distinction he draws between things that will and will not lead to biased decisions. For example, he argued that risk aversion rather than risk taking would be the rational strategy. However, if risk taking is a gamble then risk evasion is not

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<sup>181</sup> Jack Reynolds examined the relationship between the work of Rawls and Derrida and argued that Derrida, and post-structuralism more generally, offers certain invaluable things to political thought that analytic political philosophy would do well to take account of. In particular, the area which concerns the relation between time and politics. See Jack Reynolds, 'Negotiating the Non-negotiable: Rawls, Derrida, and the Intertwining of Political Calculation and 'Ultra-politics,' *Theory & Event*, 9, 3 (2006)

gambling, yet both are related because risk aversion in terms of risk management stems from studies in gambling.

### ***Conclusion***

This chapter introduced John Rawls and outlined his argument in *A Theory of Justice*. It focused on the choice of principles in the original position under the veil of ignorance. It examined the three main reasons for choosing those principles – self-interest, ignorance and risk-aversion. It looked at some of the arguments for and some against the principles. It noted that the ignorance element will be examined more fully in chapter 4 then it focused in on the risk aversion argument in some detail. After noting Rawls' point that risk aversion would be the rational strategy it argued that there are times when gambling might be the rational strategy. It also noted that not choosing Rawls' principles might be a form of risk aversion depending who was making the choice. For example, those in the worst off position may be risk averse and still not choose Rawls' principles. However, it also found that risk aversion was related to gambling in that risk management, insurance, chance and risk taking share a related history. This suggests that risk taking may be more prevalent in society than Rawls' theory presupposes. If so then it might be more difficult to exclude from the original position. However, within this argument a number of categories were intermingled. For example, the lotto was not distinguished from gambling. Yet, as we will see in chapter 3 the lotto is not covered by the Gambling Act 2005. In order to gain some understanding of why that might be the case the next chapter will draw on the work of Foucault.

## CHAPTER 2: WHAT IS GAMBLING?

*When I was young, people called me a gambler. As the scale of my operations increased I became known as a speculator. Now I am called a banker. But I have been doing the same thing all the time. (Sir Ernest Cassell, banker to Edward VII) <sup>1</sup>*

### **Introduction**

Rawls tells us that truth is to systems of thought what justice is to laws and institutions.<sup>2</sup> When Socrates asked what justice was, truth was then understood to be in the realm of the timeless forms. Unlike Plato Rawls did not base justice on truth and in that respect he shares something in common with Heidegger, Saussure, Barthes and Foucault. However, there are also some striking differences and these will be highlighted in this enquiry into what gambling is. We have already seen that a distinction between past and present gambling is the introduction of the new technologies and that was one of the main reasons given for the need to update the gambling laws.<sup>3</sup> That argument, and its relevance to Rawls, will be investigated more fully in the next chapter, but this chapter will examine a possible common denominator between truth, technology and gambling that, on one level, seems to be more related to Rawls' work than it is to the gambling laws. In order to explore that relationship, section (A) in this chapter will begin with Heidegger's argument around technology and its relationship to truth. This is important because the following section (B) examines some of Foucault's work which seems to have been influenced by Heidegger. Section (C) draws on Foucault's work concerning order and categories and applies it to certain sections of the new gambling laws in section (D). In sections (E) and (F) Foucault's work is applied to the identity of gambling and gamblers.

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<sup>1</sup> Cited in David Itzkowitz, 'Fair Enterprise or Extravagant Speculation: Investment, Speculation, and Gambling in Victorian England,' *Victorian Studies*, 45, 1, (Autumn 2002): 121

<sup>2</sup> See page 1 above

<sup>3</sup> This reason will be examined further in Chapter 3

## ***A. Heidegger's technology and repetition***

Heidegger's argument is important, not because he focused on gambling but because his views can be applied to it and, as we will see, Heidegger's work has influenced later scholars including Foucault.

*Heidegger saw the enframing mind-set as evident not only in science and technology, but in every part of human existence, from atomic physics to the content of glossy magazines. We reveal its influence on our way of thinking in popular expressions such as 'the culture or leisure industry', or in horse racing as 'the racing industry.'*<sup>4</sup>

The first part of this section will therefore examine Heidegger's argument that we need to move away from the focus on technology itself as the problem, to the issue of technological thinking as the problem. In order to accomplish this, according to Heidegger, we need to examine the essence of technology. But before we can examine his argument any further we need to briefly explore Heidegger's departure from Husserl because it was that departure, which launched Heidegger's later influence.

Following Descartes, according to Heidegger, Husserl grounded this science in the subject.<sup>5</sup> In other words, Husserl's phenomenology was about the science of consciousness and its objects.<sup>6</sup> In order for the subject to gain a detached or unbiased understanding of the objects in consciousness Husserl came up with the idea of phenomenological reduction.<sup>7</sup> This involved the bracketing out of prejudices in order to gain access to the consciousness of things as they are in themselves. This bracketing is like the veil of ignorance in Rawls' early work and the dismissal of metaphysical beliefs in his later work. It is a way of gaining a distance. However, there are some major differences also.

One difference between the two projects is that Rawls wanted to leave out irrelevant characteristics in order to prevent a biased social structure. Husserl, on the other hand, wanted to eliminate presuppositions in order to

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<sup>4</sup> M. Watts, *Heidegger: A Beginners Guide*, London: Hodder and Stoughton, 2002, pp. 81-82

<sup>5</sup> See E.F. Kaelin, *Heidegger's Being & Time: A Reading For Readers*, Florida: University Presses of Florida, 1989, p 312. However, this is a debatable issue which we have no time to explore here

<sup>6</sup> See Dermot Moran, *Introduction to Phenomenology*, London: Routledge, 2000, pp. 11-12: E. Husserl, *Logical Investigations*, (Trans J. Findlay), New York: Humanities Press, 1970

<sup>7</sup> Joseph Kockelmans, *Edmund Husserl's Phenomenology*, Indiana: Purdue University Press, 1994, p. 129.

analyze and describe the objects of consciousness as they are encountered. If Husserl's method was applied to our encounters with people now then it might remove the need to apply Rawls' veil. That is because the current basic structure would not necessarily be divided along biased grounds. This would mean that those in the original position might be unable to give themselves an advantage. However, In *Being and Time* Heidegger criticized Husserl's phenomenological method and, as we will see, that criticism (in reverse form) can, up to a point, be applied to Rawls' method.

Heidegger criticized Husserl's method for grounding the encounter in pure consciousness. *'In his Freiburg lecture courses, Heidegger criticized Husserl's notion of the transcendental ego, his prioritizing of theoretical knowledge and cognitive acts over practical living experiences...'*<sup>8</sup> According to Heidegger, we do not encounter the world in this way. Rather than pure consciousness being the ground of the encounter there is something more fundamental, which Heidegger called Dasein. Dasein cannot encounter the world through pure consciousness alone because of its very nature. Its mode of being is more than just pure consciousness so it cannot encounter the world as pure consciousness. And it is this 'more than' which, as we will see, seems to make Rawls' veil problematic.

In *Being and Time* Heidegger tried to work out what this Dasein is that encounters the world. According to him, Dasein, or who we are as human beings that does the encountering, is different to other types of beings because it is the only one that questions its own being.<sup>9</sup> In other words, it is both the site and the disclosure of being. And the Being of Dasein, of this site and disclosure, is fundamentally temporal. By temporal Heidegger did not mean a time period such as that which Rawls' veil attempts to block out. It is much more fundamental than that. Temporality is Dasein's ontological structure. *'...we shall point to temporality as the meaning of the Being of that entity we call "Dasein."'*<sup>10</sup>

Dasein's ontological temporal structure is a unity of the future, past, and

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<sup>8</sup> Moran, *Introduction to Phenomenology*, op. cit. p. 85

<sup>9</sup> Heidegger, *Being and Time*, op. cit. p. 27

<sup>10</sup> Ibid. 38

the present. This is a form of three-dimensional rather than linear time.<sup>11</sup> So time is more basic to Dasein than space.<sup>12</sup> By future Heidegger means that Dasein is future orientated. In Rawls' words it has a plan for its life. For Husserl, it would be intentionality. Heidegger calls this existence. Dasein's existence means it projects its being upon various possibilities. The past part of the temporal structure is referred to by Heidegger as thrownness. By this he means that the possibilities of the existence is limited by the particular cultural environment one lives in. For example, one could exist in a society where being female, male, white, or black and so forth limited ones possibilities. And these limits have their roots in the past. These are the types of characteristics that Rawls wanted us to cover with the veil of ignorance in order to make the procedure fair. And there is a similarity with Rawls view and Heidegger's thrownness.

Rawls tells us that every person's beginning in a society is the result of a social lottery and a natural lottery. The former positions one in a particular political, social and economic place while the latter determines the future potential. These positions, according to him, are the result not dissimilar to a lottery where the outcome is a matter of good or bad fortune or luck.<sup>13</sup> In other words, the life a person lives is the result of the lottery ticket or card that they are dealt. The lottery tickets that Rawls was referring to were characteristics such as one's place in society, class position, social status, natural assets, abilities, intelligence and strength etc.<sup>14</sup> Rawls argued that persons should not be advantaged or disadvantaged by this good or bad luck because it is not acceptable in terms of social justice. That is one of the reasons why he argues against basing justice on merit or desert as one cannot merit or deserve the good luck or bad luck of one's lottery ticket – of one's starting position in life.<sup>15</sup> However, Heidegger's work shows how difficult it would be to veil one of

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<sup>11</sup> Also different from Hegel's notion of now and not now

<sup>12</sup> Heidegger, *Being and Time*, op. cit. Section 66

<sup>13</sup> Rawls, *A Theory of Justice*, op. cit. p. 74, 75

<sup>14</sup> Ibid. 137

<sup>15</sup> Ibid. 7, 104. For more on this point see Robert Nozick, *State, Anarchy, and Utopia*, op. cit. p. 216; R.J. Arneson, 'Luck and Equality,' *Proceedings of Aristotelian Society* 75 (2001): 73-90; T. Nagel, *Equality and Partiality*, New York: Oxford University Press, 1991; E. Rakowski, *Equal Justice*, Oxford: Clarendon Press, 1991; J.E Roemer, 'A Pragmatic Theory of Responsibility for the Egalitarian Planner,' *Philosophy and Public Affairs* 22 (1993): 146-166; Kasper Lippert-Rasmussen, 'Justice and Bad Luck,' *The Stanford Encyclopedia of Philosophy* From <http://plato.stanford.edu/entries/justice-bad-luck/> (Accessed 13/03/07)



Rawls' characteristics – our time in history.

Dasein does not exist in a void but finds itself in the presence of other subjects and objects or Dasein's and non-Daseins. This is the third part of its ontologically temporal structure. And because the past, future and present are an ontological unity they cannot be separated in such a way that is required by Rawls' veil.<sup>16</sup> They cannot be separated because our present existence includes possibilities from the past and options and limits in the future. And as such, according to Heidegger, they are ontologically prior to Husserl's pure consciousness that encounters the world. And for this reason thinking cannot represent the experiences or encounters we have in time. This is because the present does not exist for us as a representation.

Heidegger makes a further distinction based on the ontological temporal structure of Dasein. This distinction is between authentic and inauthentic existence.<sup>17</sup> In particular he refers to authentic existence in terms of a repetition or retrieval of possibilities from the past.<sup>18</sup> And in his later work he discusses the repetition of possibility in relation to our technological age, which he identifies with metaphysics stemming from ancient Greek thought. By metaphysics he means our understanding of the ground of beings minus the ontological difference between Being and being.<sup>19</sup> According to him the lack of that difference and the focus on beings leaves Being out of the equation. That is because it shifts the focus to something like Plato's Ideas or God as the ground of beings. This then leads to the problems of relating the two. One such problem is the relationship between subject and object. Heidegger believes that we need to go back to the past, to when the forgetfulness of Being happened, and retrieve the ontological difference. This was a time before truth was understood as a correspondence.<sup>20</sup> According to Heidegger, our thinking took a wrong turn then

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<sup>16</sup> It has also been argued that one's sex role will have an effect on how one experiences time See Wallace Panides, 'The Perception of the Past, Present, and Future in Preadolescent Asthmatic Children: An exploratory study,' *Sex Roles: A Journal of Research*, 11, 11-12 (December, 1984): 1141

<sup>17</sup> Heidegger, *Being and Time*, op.cit. Section 69

<sup>18</sup> He also refers to the future as a 'being-towards-death'

<sup>19</sup> This is a different notion of metaphysics that Rawls wanted to leave out in the over-lapping consensus mentioned above

<sup>20</sup> See Heidegger's argument about the relationship between subject and object being metaphysical in M. Heidegger, *Identity and Difference*. Being is what makes beings possible for Heidegger. But, since Being itself has to withdraw we can not get a grip on Being without beings. However, Being has been replaced with other things such as Plato's good, Aristotle's

and we need to go back and start a new beginning in order to exit our technological age.

Heidegger's view of technology is related to his ontology and epistemology. In order to explain this Heidegger returns to a pre-Socratic view of technology. According to Heidegger, the word technology derives from the ancient Greek *techne*. However, since the 1830's it began to mean *'the application of scientific knowledge and thinking to manufacturing.'*<sup>21</sup> This was a time when there was still an ontological difference. It was before the closure of the ontological difference and the obliteration of Being which led to metaphysics and nihilism. Nihilism is when Being is forgotten. Being has meaning, according to Heidegger<sup>22</sup> – otherwise he wouldn't be trying to find its meaning - although we don't know what it means. However, it, the 'is' of something, is not meaningless.

Heidegger's understanding of technology is related to the forgetfulness of Being and the view of truth as correspondence. Technology, which has something to do with truth, is only one type of truth, instrumental truth. This type overshadowed another form of truth, which is about disclosure. It is more passive than the former. It allows Being to disclose itself. Instead of technology Heidegger uses the Greek word *techne*, which had several meanings including something like fine arts, art of the mind, skill of craft workers, and *poesis* as bringing into presence or bringing forth. *Techne* as *poesis* touches on a form of truth as *aletheia*. This is truth as unconcealment rather than correspondence. The important point here is that *techne* is not just about making but also about knowing. Extrapolated to our current topic we could say that there is a type of knowledge or belief embedded within the new gambling technologies.

According to Heidegger, art is about making as well as about truth in the form of disclosure. *'There was a time when the bringing-forth of the true into the beautiful was called techne... And art was simply called techne. It was a single, manifold revealing. It was pious, *promos*, i.e., yielding to the holding*

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unmoved mover, Christianity's God, and man himself in the Enlightenment. These, according to Heidegger, are attempts to replace Being as the ground and as such are onto-theology or metaphysics.

<sup>21</sup> Watts, *Heidegger a beginners guide*, op. cit. p. 83

<sup>22</sup> Heidegger, *Being and Time*, op. cit. p. 63

*sway and the safekeeping of truth.*<sup>23</sup> So for Heidegger, the essence of technology is related to a type of truth connected with *aletheia*. However, these meanings of technology have been eroded down to our current restricted understanding of technology and truth – truth based on grounds that have replaced Being. Technology can still disclose truth but in a restricted way that tends to exclude *poesis* and concentrates on beings rather than the Being of things. Some things, however, can still disclose. *‘But where danger is, grows The saving power also.’*<sup>24</sup>

Heidegger’s work has had an impact on a numbers of scholars. For example, it can be seen in the work of Foucault. However, little was written on the relationship between Heidegger and Foucault prior to Foucault’s last interview<sup>25</sup> when he said that

*Heidegger has always been for me the essential philosopher. I started by reading Hegel, then Marx, and I began to read Heidegger in 1951 or 1952; then in 1952 or 1953, I no longer remember, I read Nietzsche. I still have the notes I took while reading Heidegger—I have tons of them!—and they are far more important than the ones I took on Hegel or Marx. My whole philosophical development was determined by my reading of Heidegger. But I recognize that Nietzsche prevailed over him. I don’t know Heidegger well enough: I practically don’t know Being and Time nor the things recently published. My knowledge of Nietzsche is much greater. Nevertheless, these were my two fundamental experiences. I probably wouldn’t have read Nietzsche if I hadn’t read Heidegger. I tried to read Nietzsche in the fifties, but Nietzsche by himself said nothing to me. Whereas Nietzsche and Heidegger—that was the philosophical shock! But I’ve never written anything on Heidegger and only a very short article on Nietzsche. I think it’s important to have a small number of authors with whom one thinks, with whom one works, but on whom one doesn’t write. Perhaps someday I’ll write about them, but at that point they will no longer be instruments of thought for me.*<sup>26</sup>

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<sup>23</sup> M. Heidegger, ‘The Question concerning Technology’ in *Basic Writings*, London: Routledge, 1996, p. 339.

<sup>24</sup> *Ibid.* 333

<sup>25</sup> Alan Milchman and Alan Rosenberg, (Eds.) *Foucault and Heidegger Critical Encounters*, University of Minnesota Press, 2003

<sup>26</sup> Michel Foucault, ‘The Return of Morality,’ (Trans. Thomas Levin and Isabelle Lorenz), *Michel Foucault—Politics, Philosophy, Culture: Interviews and Other Writings 1977-1984*, (ed. L.D. Kritzman) New York: Routledge, 1988, p. 250

Since then a number of scholars have drawn parallels between Heidegger and Foucault. For example, Hubert Dreyfus highlighted a similarity between Heidegger's work on Being and Foucault's work on power. '*At the heart of Heidegger's thought is the notion of being, and the same could be said of power in the works of Foucault.*'<sup>27</sup> In this work he examined the relationship between the history of Being in Heidegger's work and the regimes in the genealogy of power in Foucault's. Before examining that argument in more detail we need to take a brief look at Foucault's ideas.

### ***B. Foucault's epistemes***

Foucault, like Heidegger, placed historicity at the centre of his work. Unlike Heidegger's early Being, but similar to Heidegger's later Language of Being, Foucault focused on discourses in terms of power and knowledge. Unlike Heidegger, Foucault was interested in the power relations that allowed things into the discourse.<sup>28</sup> However, his approach to power and power relations is not the same as those typified by theorists who understand power as a property of agents including individuals and groups.<sup>29</sup> Foucault understood it more like a property of social structures where power is located in a generalized system of beliefs or values. It is like the Being that allows beings to be.<sup>30</sup> This type of power dominates not so much by the direct exchange of power of one individual over another but indirectly at the level of beliefs and values that structure the field of possible identities, behavior and decisions.<sup>31</sup> Different things are possible at different times and Foucault discusses this in terms of regimes of power. These regimes correlate with Heidegger's argument that Being is understood differently at different times. As identities are supposed to be veiled in Rawls' original position, and choices are made on the basis of

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<sup>27</sup> Hubert Dreyfus, *Being and Power: Heidegger and Foucault*

[http://socrates.berkeley.edu/~hdreyfus/html/paper\\_being.html](http://socrates.berkeley.edu/~hdreyfus/html/paper_being.html) (Accessed 13/6/2005)

<sup>28</sup> He did not spell it out in great detail. '*When I think back now*', Foucault tells us, '*I ask myself what else was it I was talking about, in *Madness and Civilization* or *The Birth of the Clinic*, but power? Yet I am perfectly aware that I scarcely ever used the word and never had such a field of analyses at my disposal.*' Foucault, M. *Power/knowledge: Selected Interviews and other writings by Michel Foucault 1972-1977* (Ed. C. Gordon). New York: Pantheon, 1980, P. 115

<sup>29</sup> R.A. Dahl, 'The Concept of Power,' *Behavioral Science*, 2 (1975): 201-215

<sup>30</sup> In a sense being is to Being what truth is to systems of thought and what justice is to institutions and laws

<sup>31</sup> D.R. Hiley, 'Power and Values in Corporate Life,' *Journal of Business Ethics*, 6 (1987): 343-353

agreement rather than truth, it remains to be seen if Foucault's notion of power (or the Being of those entities) can be excluded from the original position. And if participants are there to represent others, the political interpretation, then this could also be problematic.

Rawls tells us that self-interested persons, in the original position, should place a veil of ignorance over certain aspects such as attributes and identities so their choice of principles for the basic structure of society would not be biased. As we have already noted, these aspects include gender, race, class position, natural assets, aversion to risk, conception of the good, circumstances of society, and generation.<sup>32</sup> We have already seen that one's class position and aversion to risk have an impact on one's gambling patterns. We have also seen that gambling patterns change over time. But does the meaning of gambling change over time?

Our examination so far has shown that there is much uncertainty about what gambling actually is. For that reason we can not actually utilize a history of gambling in this examination. We will, instead, draw on Foucault's methodology and examine gambling as an object of study. Foucault did not examine gambling itself but our interest is in his method rather than his topics. Foucault was interested in the way institutions such as asylums, hospitals, and prisons emerged. In particular he focused on the histories of the types of knowledge associated with them such as psychiatry, clinical medicine, and criminology.<sup>33</sup> When Foucault studied madness and other topics he was interested in the discontinuities between different epistemes. By episteme he meant something like Heidegger's horizon or worldview but smaller and they included power relations. For example, whereas Heidegger focused on a large horizon, which goes back to the early Greeks, and he called it technological rationality, Foucault splits time periods such as Renaissance, classical and modern. And each of these time periods has their own episteme. Foucault's epistemes are like Kuhn's paradigms,<sup>34</sup> but Kuhn was examining the paradigms of natural sciences, while Foucault's main focus was on the human sciences. However, as we will see, certain areas of gambling studies blur the difference

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<sup>32</sup> Rawls, *A Theory of Justice*, op. cit. p. 137

<sup>33</sup> P. Patton, 'Foucault' in D. Boucher and P. Kelly, *Political Thinkers*, op. cit. p. 518

<sup>34</sup> Thomas Kuhn, *The Structure of Scientific Revolutions*, op. cit.

between the two.

Rejecting the idea that knowledge and power are only related externally Foucault argued that *'power and knowledge directly imply one another; that there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not at the same time presuppose and constitute power relations.'*<sup>35</sup> This is a similar type of symbiotic relationship that Heidegger had between Being and beings. In relation to the object of criminality Foucault argued that it has not always existed but emerged during the nineteenth century along with penal institutions and a type of disciplinary power. This type of disciplinary power was also applied to different areas in the same period. For example, areas such as schools, factories and armies were included. In the first volume of the *History of Sexuality*<sup>36</sup> Foucault correlated knowledge about sexuality with the regulation of sexual conduct between the 18 and 19th century. In other words he rejects the notion that the truth of sexuality is independent of social and political forces. Heidegger might argue that there is an ontological difference between the being of sexuality and its Being. It remains to be seen if our understanding of gambling shares a similar dependence. In order to investigate that possibility we will draw on more of Foucault's work.

Foucault did not ask what things such as madness, criminality or sexuality were. He asked, instead, how the experiences of madness, criminality and sexuality are put into practice. He did not study the objects themselves but the objects in the discourse. He also studied the object from different discourses and found similarities, which reflected the social structures of different time periods. Hence, the correlation between schools, factories and armies. Foucault's method suits the examination of gambling because this object has been attached to many discourses. It is only recently that it has found its own home in the area of 'gambling studies' even though gambling studies is itself interdisciplinary. Foucault's method also fits well with Rawls' theory of justice because, as we saw above, he also shies away from basing justice on absolute truth. However, whereas Rawls' based it on agreement Foucault's work would see this type of agreement as the central issue. In order to explain this we need

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<sup>35</sup> M. Foucault, *Discipline and Punish*, p. 27. Cited in Boucher, *Political Thinkers*, op. cit. p. 524

<sup>36</sup> Foucault, *The Will to Knowledge*, op. cit.

to return to Dreyfus' argument about the relation between Being and Power.

Dreyfus draws a parallel between regimes of truth in Foucault's genealogy of power with Heidegger's epochs in the history of Being. But he does not do this as an end in itself. He does it to examine the ways that each interpretation of history '*...criticizes our current cultural conditions*'<sup>37</sup> and the different ways that they understand the current dangers and ways out, bearing in mind their different political stances. The former's earlier support for National Socialism followed by political passivity, and the latter's emphases on social freedom and political activism.

Dreyfus tells us that Heidegger's history of Being is a history of '*...misunderstandings of the clearing*'. In Heidegger's early work, such as *Being and Time*, he sees Dasein itself as the clearing. This is because the entities that Dasein encounters are disclosed (unlike Husserl). This means that Dasein is the site or clearing where this happens because, according to Heidegger, '*...there is no truth without Dasein*'.<sup>38</sup> However, because of Dasein's fallenness the truth that is disclosed changes over time. So the disclosures contain truth and untruth. The latter being unconcealed. In Heidegger's later work, according to Dreyfus, Being rather than Dasein becomes the main focus for clearing. And this idea of clearing is similar to Foucault's notion of power. However, we must remember that neither Being nor power makes any sense without beings and identities – nor vice versa. And it is the latter, beings without Being and identities without power, that both take issue with.

Heidegger's Being, as clearing, and Foucault's power, are similar in that they can produce and delimit what gets unconcealed (Heidegger) or become subjects or objects of knowledge (Foucault). Dreyfus tells us that both Heidegger and Foucault identified theory among the Greeks as '*the great turning point in our history*'. But he adds that Foucault has more to say about the self, and less to say about Greek philosophy than did Heidegger. And both focus on Kant's interpretation of man and the issue of representation as another important landmark. Dreyfus then compares Heidegger's notion of the origin of man in his *The Age of the World Picture* with Foucault's in *The Order of Things*. And both end up seeing an end to one version of man but not the

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<sup>37</sup> Dreyfus, *Being and Power*, op. cit. p. 1.

<sup>38</sup> Watts, *Heidegger a Beginners Guide*, op. cit. p. 83

emergence of a liberated form. However, both have views on how to resist technological thinking (Heidegger) and Bio-power (Foucault).

Heidegger did not think that we could resist the technological worldview by focusing on technology itself. And Foucault did not think that we could resist bio-power by focusing on particular strategies. Both suggested that we focus on the '*...tendency in the practices towards ever greater order and flexibility that produces and sustains them*,'<sup>39</sup> However, it is important to remember that Heidegger was primarily concerned with what was happening with things while Foucault's concern was with people. But what is endangered with both is also the source of the resistance. Both, in different ways, argued that an understanding of our present condition gives us a distance on it.<sup>40</sup> And both, in different ways, point to earlier notions of art. Foucault grounded resistance on a number of things including 'practices of creativity', while Heidegger listened to the voice of Being or focused on the creative arts because they, even though different to technology, share the same roots in *techne*. Heidegger thought that art might be capable of revealing or unconcealing a more poetic form of technology than we have now. However, one must ask if creativity and the voice of Being come to us over time or in an instant? If the latter, then their ideas are not that dissimilar to Husserl or Bergson's, even though they do add another dimension.

Heidegger's critique of Husserl was centered on his bracketing and the grounding of the encounter in consciousness. However, Husserl's bracketing was only part of the story – the other was intuitive knowing after the reductions. His intuition was apodictic evidence. Husserl's notion of intuitive knowledge was not just in the present but could extend over time. In recent years there has been growing criticism of the way that Husserl's Phenomenology has been represented in the past.

*...the "Standard Interpretation," shared by analytic and deconstructionist readers alike, in which Husserl is a neo-Cartesian wedded to epistemological immanentism, methodological solipsism, and ontological idealism. That a very different Husserl is found in his vast Nachlass has long been known, but because of its sheer volume and*

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<sup>39</sup> Dreyfus, *Being and Power*, op. cit. p. 9

<sup>40</sup> This is not like Rawls' veil



*relative inaccessibility it has had little impact on the Husserl-reception beyond a small circle of specialists. Hence in recovering the "Other" Husserl, Welton's aim is not the usual historical one of stripping away anachronistic readings to arrive at an original reception, but one of negating this Rezeptionsgeschichte to reveal a philosophy that has, in a certain sense, never been present.*<sup>41</sup>

It has been argued that the standard interpretation of Husserl's work is a result of Kant's critique of intuition. '*A distorted interpretation of the Husserlian foundational project may be partially due to a generalized resistance in philosophical circles with regards to his concept of intuition.*'<sup>42</sup> Derrida's *Introduction to the Origin of Geometry* could be seen as one example of presupposing the standard interpretation. However, as well as Kant it could be due to Heidegger's later influence. Rawls, following Kant, also rejected intuitionism in his *A Theory of Justice*.<sup>43</sup> In fact, Fishkin argued that intuitionism is the '*...doctrine Rawls is most concerned to argue against.*'<sup>44</sup> Yet, in a later work Rawls did not argue that independent moral facts do not exist, but that if they did exist, we have been unable to agree on what they are.<sup>45</sup> And, as we have seen, agreement is important to Rawls. Perhaps it is time to return to Heidegger's departure from Husserl – but with the emphases on Husserl this time.

Husserl's notion of apodictic evidence and intuition shares similarities with Bergson's work. Bergson argued that the essential characteristic of time is its fluidity because it is permanently changing.<sup>46</sup> This means that time is in a permanent state of flux. It follows from this that it can have no essential character beyond its constant change, and therefore any attempts to define it leads to contradictions. However, Bergson also tells us that everyone can have an original intuition like an immediate awareness of the world, which is located

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<sup>41</sup> Steven Galt Crowell, 'The Other Husserl: The Horizons of Transcendental Phenomenology (review)' *Journal of the History of Philosophy*, 40, 1 (January 2002): 132-133

<sup>42</sup> Rosemary Lerner, '*The Intuitive Foundations of Rationality*,' Paper presented at a conference in Prague, Czech Republic, in November 2002 that was entitled 'Issues Confronting the Post-European World.' Available online at <http://www.o-p-o.net/essays/Rizo-PatronArticle.pdf> (Accessed 17/3/2005)

<sup>43</sup> Rawls, *A Theory of justice*, op. cit. pp. 34-40

<sup>44</sup> James Fishkin, *Beyond Subjective Morality: Ethical Reasoning and Political Philosophy*, New Haven: Yale, 1984, p. 17

<sup>45</sup> Rawls, *Political Liberalism*, op. cit. p. 95-9

<sup>46</sup> Henri Bergson, 'The Possible and the Real', in *The Creative Mind: Introduction to Metaphysics* New York: Citadel Press, 1946, p.105.

within time. Because the awareness is within the movement of time it can not be characterized perfectly. He adds that one can more or less describe the intuitions.<sup>47</sup> And he suggests that these descriptions are the basis of metaphysical systems.<sup>48</sup> This is a different understanding of metaphysics to Heidegger's but it shares similarities with Husserl's notion of intuition as he also believed it could happen within the flux of time. And both Husserl and Bergson's idea of intuition shares a similarity with Heidegger's understanding of Being. This is because, as Being cannot be conceptualized, Heidegger must have intuited it on some level.

If we could combine, rather than separate and compare, Husserl's attempt of bracketing out biases with Bergson's notion of intuition (as the starting point for systems of explanation) with Heidegger's notion of art (as a form of knowledge) with Foucault's addition of power, and then transport them to Rawls' original position, we might find that the choice of Rawls' principles could have involved a little cheating. However, before we can do that we need to gain a better understanding of what both gambling and cheating are.

### ***C. The order of gambling***

In the Preface to the *Order of Things: An Archeology of the Human Sciences* Foucault tells us that the inspiration behind his book was his reading of a short story by Borges. It was about a Chinese encyclopedia in which various animals were classified in ways that we would not use today. For example, belonging to the emperor, embalmed, tame, etc.<sup>49</sup> That find led Foucault to ask how we modern westerners order phenomena. The book went into detail about the fundamental cultural codes which impose order on existence. These cultural codes allow phenomena to be seen in different ways at different times. Foucault called these different times epistemes. Epistemes are a priori conceptual strata, which underpin different fields of knowledge. As such they can delimit a field of knowledge by defining the way objects appear '*...and can sustain a discourse about things that is recognized to be true.*'<sup>50</sup> Human thinking, according to

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<sup>47</sup> Bergson, 'The Possible and the Real,' op. cit. p.161

<sup>48</sup> Ibid. 112

<sup>49</sup> M. Foucault, *The Order of Things: An Archaeology of the Human Sciences*, London: Tavistock Publications, 1970, Forward p. xv-xvi

<sup>50</sup> Ibid. xxii

Foucault, which applies to these discursively formed entities, is based on a prior historicity and this means, contrary to Rawls, that rationality cannot be seen as atemporal and universal. Foucault termed his method archeological analysis because it uncovered these deep-level structures. This archeological approach was in opposition to other methods, which presuppose a sovereign subject outside of the discourse. Foucault argued that it was not the subject who originated or gave meaning to a discourse. It was the discourse, or discursive formation, which supplies a number of subject positions, which people can occupy.<sup>51</sup> For example, it was the early discourse of medicine, which allowed doctors and nurses to speak but kept the patients silent.

We have already noted how gambling has been classified in the documents relating to changes in the UK's gambling law. It's divided between gambling, gaming, games of chance, betting and lotteries. Its movement from the home office to the DCMS reflects its inclusion within the entertainment industry. At some stage gambling shifted from an undesirable working class activity to something that is a commodity within western capitalist countries. At the time of the Rothschild's commission it was understood as an undesirable activity but it was not illegal. Those who wanted to gamble could do so, but the demand was not to be stimulated. In today's world of corporate capitalism, gambling, if this signifier includes the lottery, is advertised widely and promoted by the government.

The Rothschild's commission was conducted around the time that Rawls' wrote his *Theory of Justice*. So the perception of gambling has changed since Rawls presupposed that those in the original position would be risk adverse. But just because gambling was understood as an undesirable activity it did not mean that people refrained from gambling. In fact during the 20th century gambling was both condemned and regulated as well as being tolerated and encouraged. The latter gradually eclipsing the former.<sup>52</sup> However, the former can still be seen in the discourses around problem gambling – a possible example of Rawls' worst off. Gambling, along with its precursors, has led this twin status since the beginning of recorded history. And each of the different stages have different notions of what gambling is, different types of gambling,

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<sup>51</sup> Ibid. xiv

<sup>52</sup> Reith, *The Age of Chance*, op. cit. p. 87

and different shady areas such as false prophets, irrational behavior, crime, illness, and the latest incantation of problem gambling. However, there are important changes in emphasis as we move from the notion of divine providence to mathematical probability, and onto the introduction of statistics.

There are examples where forms of divination such as casting lots were used as a legitimate means of determining God's wishes. There are also examples of false prophets. This distinction is similar to today's distinction between normal and problem gambling. In Joshua 7: 14-23, God commands that a thief is found by casting lots, first among the tribes of Israel, then among the families of that tribe, then among the men. Achan, who was the person identified, confessed his guilt, and showed where he had buried the stolen goods. In Jonah 1:7 lots were cast to determine that Jonah was the source of the storm that his crew was enduring. He was cast overboard and the storm calmed down. Alternatively, false prophets are mentioned in Deuteronomy 13:1-5 and 18:20-22. The former refers to a prophet who makes a true prediction, then worships other deities. The latter passage describes a prophet who speaks in God's name without permission, or speaks in the name of another deity. False prophets of this type are distinguished by their failure to make true predictions. The penalty for both types of false prophecy was death. *'But a prophet who presumes to speak in my name anything I have not commanded him to say, or a prophet who speaks in the name of other gods, must be put to death.'*<sup>53</sup>

During the Protestant reformation gambling was seen as a sin because it divorced money from work. Either winning a lot or losing much was seen as out of proportion to physical effort and would upset the social balance in an ideal meritocracy.<sup>54</sup> Winning money by gambling was seen as a sin of theft and therefore would be counted *'..at the last day of judgement if they repent it not.'*<sup>55</sup> While the aristocratic gambler was criticized for wasting money the less well off were attacked for their laziness and for wasting time.<sup>56</sup> Yet while the poor and aristocracy were criticized for gambling the newly rich were focusing on trade and commerce. Wealth was no longer just tied to hereditary and/or plundering someone else's wealth. This required bookkeeping as well as

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<sup>53</sup> Deuteronomy 18:20

<sup>54</sup> Reith, *The Age of Chance*, op. cit. p. 82

<sup>55</sup> Northbrooke 1843, p. 125. Cited in Reith, *The Age of Chance*, op. cit. p. 82

<sup>56</sup> Ibid. 82

forecasting. *'The newly rich were now the smart, the adventuresome, the innovators ...and as 'the growth of trade transformed the principles of gambling into the creation of wealth, the inevitable result was capitalism. The epitome of risk-taking.'*<sup>57</sup>

The Reformation understanding of gambling as a sin was replaced, during the Enlightenment, by the notion that excessive gambling was irrational behavior. This was a time when people were starting to measure uncertainty and tame risk, and while probability theory was growing in importance. When gambling to excess reason *'..was overcome by extremes of emotion, and worse, the social order was disrupted.'*<sup>58</sup> Reason was seen as the new foundation for knowledge. We have already noted that Rawls' argument against risk taking in the original position was based on his belief that gambling was irrational behavior. Yet while gambling to excess was seen as irrational Kant asked us to take a chance by leaving our security and *'dare to know.'*<sup>59</sup> So in a sense Kant was promoting risk taking while focusing on reason.

The irrationality of gambling, while still important, became less so during the industrial revolution as the emphasis on time increased. The working class gambler was seen as someone who *'...refused to acknowledge the importance of time, money or disciplined labour.'*<sup>60</sup> Gambling was blamed for the decline in industrial production when Germany and the USA were on the rise in production.<sup>61</sup> And according to Dixon,<sup>62</sup> it became a scapegoat for military failure during the Boer war as well as for social unrest *'...in short, for no less than the decline of the empire.'*<sup>63</sup> During this time moral reformers and others lead *'...an ideological attack on all forms of working-class gambling'* and during 1890 *'...a coalition of Nonconformist Protestant Churches formed the National Anti-Gambling League.'* It was not long when the playing of games of chance was made illegal. The Gambling Act of 1845 made gambling transactions unenforceable,<sup>64</sup> and other laws such as the Street Betting Acts of

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<sup>57</sup> Bernstein, *Against the Gods*, op. cit. p. 21

<sup>58</sup> Reith, *The Age of Chance*, op. cit. p. 83

<sup>59</sup> I. Kant *'What is Enlightenment'* in P. Rabinow (Ed.) *The Foucault Reader*, op. cit. pp. 32-50

<sup>60</sup> Reith, *The Age of Chance*, op. cit. p. 85

<sup>61</sup> *Ibid.* 85

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.* The Gambling Act 2005 revokes this law. See Chapter 3

1853, 1874 and 1906 prohibited working class gambling by making it a criminal offence to bet in public places. Advertising of gambling was also banned.<sup>65</sup> However, the upper class continued to gamble legally as they played in members clubs, which were not covered by the law.<sup>66</sup> Even if members of the working class were able to join those private members clubs they would be unable to play because the wagers were huge. However this situation begins to change during the latter part of the 19<sup>th</sup> century

During the 19<sup>th</sup> century many changes occurred which changed gambling in ways, which led to later forms of gambling. During the second half of the century casinos moved away from salons and summerhouses and into a collection of public rooms devoted to gambling.<sup>67</sup> In these casinos the wagers were lower than in the private clubs. And as probability theory became more refined the casinos organized games in such a way that a permanent space was provided for a member of staff – now known as the croupier. These always won because ‘...odds were fixed inflexibly in their favour.’<sup>68</sup> As a result of the law of large numbers (see below) punters could not win, overall, as they were ‘...competing against an invisible opponent with a permanent place at every table and unlimited resources.’<sup>69</sup> Gamblers played against the house instead of amongst themselves as they had done in the public spaces. As wagers became smaller participating increased as less wealthy could afford to gamble. As casinos became more commercial the experiences of gamblers changed. Gambling became more about thrills and excitement than winning.<sup>70</sup> The smaller bets lengthened participation. Over this century the previous condemnation of and attempted elimination of poor gambling was overturned.<sup>71</sup> Now it is seen as a way to promote good causes, respectable entertainment and a source of rejuvenation for deprived areas - as long as the youth, vulnerable and

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<sup>65</sup> Ibid. 85. The Gambling Act 2005 revokes this law. See Chapter 3

<sup>66</sup> Ibid. 86

<sup>67</sup> McMillen, (ed.) *Gambling Cultures: Studies in History and Interpretation*. London: Routledge, 1996. Cited in G. Reith, *The Age of Chance*, London: Routledge, 2002, p.74

<sup>68</sup> J. Findlay, *People of Chance: Gambling in American Society from Jamestown to Las Vegas*, Oxford: OUP Press, 1986, p. 91. Cited in Reith, *The Age of Chance*, op. cit. p. 80

<sup>69</sup> Reith, *The Age of Chance*, op. cit. p. 80

<sup>70</sup> Findlay, *People of Chance: Gambling in American Society from Jamestown to Las Vegas*, op. cit. p. 92. Cited in Reith, *The Age of Chance*, op. cit. p. 80.

<sup>71</sup> Reith, *The Age of Chance*, op. cit. p. 81

problem gamblers, Rawls' worst off, are catered for.<sup>72</sup> But it is also a time when gambling, like other previously marginalized activities, is being colonized by the capitalist system.

There has been much research in the relationship between gambling and capitalism.<sup>73</sup> It has been argued that speculative risk is at the heart of capitalism. Although the link is probably not that noticeable until there are large losses such as when Nick Leeson's bets led to the collapse of Barings bank, or black Wednesday in 1987 or the wall street crash back in 1929.<sup>74</sup> Gambling and technology also have a close relationship, which gets highlighted at various times such as now when changes in technology have been used as the cause for updating the gambling laws. Many of the Internet gambling games use virtual cards and dice, the cards and dice which originated from the ancient casting of lots. Lot casting, as a form of divination, was used to tell the future. Gamblers place their wagers on future events. Some rely on probability, which used the past to predict future, but others look for other signs – or just rely on gut feelings. This means that gamblers do not only rely on probability. Rawls thought that placing the veil over probability would prevent risk taking. But, as we can see that is not necessarily the case.

Even though there is a crack in the link between divination and secular gambling there are many things in the grey area such as fortune telling with the use of cards or tealeaves and reading the stars etc. The wager or stake could be seen as one of the additions that caused the crack between divination and gambling (although one's reputation could have been the wager in the past). The latter was a bit more interactive than the former. Baudrillard tells us that '*The stake is a summons, the game a duel: chance is summoned to respond, obliged by the player's wager to declare itself either favourable or hostile.*'<sup>75</sup>

Drawing on Marx, one could argue that profit, in the form of surplus value exploited from the worker, re-invested in the company might be

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<sup>72</sup> This will be elaborated on in the following chapter

<sup>73</sup> G. Caldwell, B. Haig, M. Dickerson, and L. Sylvan, (eds.) *Gambling in Australia*, Sydney: Croom Helm, 1985; J. McMillen, (ed.) *Gambling Cultures: Studies in History and Interpretation*. London: Routledge, 1996; R. Munting, *An Economic and Social History of Gambling in Britain and the USA*. Manchester: Manchester University Press, 1996. All above cited in G. Reith, *The Age of Chance*, op. cit. pp. 90-93

<sup>74</sup> Reith, *The Age of Chance*, op. cit. p. 90

<sup>75</sup> J. Baudrillard, *Cool Memories 1980-1985*, London: Verso, 1990, p. 143. Cited in Reith, *The Age of Chance*, op. cit. p. 45

understood as a wager on future profits. The money spent on buying the Dome could be seen as a wager that North Greenwich will get the casino. (Inviting Prescott for a visit could be seen as a form of risk management!) And even the expansion of democracy into non-democratic countries could be seen as a wager for the expansion of capitalism. In fact, it is becoming more and more difficult to find any aspect of our western world that does not involve some level of gambling. This may be because our current episteme or horizon or clearing allows chance and uncertainty to rise – whereas in the past it was stability. It could be argued that it is this, rather than the new technology, which is behind the changes in the gambling laws. But as we will see in the next section, there is also an order to this version of chance and uncertainty.

#### ***D. Cheating***

There is another objective within the gambling act that is not covered by Rawls' principles. Rawls reason for the veil of ignorance was to remove the possibility of rigging the basic structure of society in such a way that would give one an advantage. Cheating is usually defined as gaining some unfair advantage over other participants. So what would prevent someone in the original position from cheating? In an attempt to answer that question this section will examine cheating in relation to the new gambling laws.

Prior to the commercialisation of gambling during the 18<sup>th</sup> century, punters played against each other and if they lost their opponent won. There were many cheats and card sharks at that time. As this was when it was illegal for working class people to gamble they had to go to illegal taverns to try their luck.<sup>76</sup> However, later on when the casinos had their own players and the house had the odds in its favour it needed to rid the casinos of cheats because they could take from the house instead of other players. '*...it was not in the gaming houses' interest to allow cheating.*'<sup>77</sup> At this time there was a concerted effort to eliminate irregular practices by imposing harsher penalties on cheats. The law is still on the side of the casino owners when it comes to cheating.

Staff from at the casino under the Ritz (on Piccadilly in London) called

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<sup>76</sup> Reith, *The Age of Chance*, op. cit. pp. 71-72

<sup>77</sup> Ibid. 72



the police after reviewing their security tapes. Detectives investigated a gang who used a laser scanner hidden in a mobile phone and linked to a computer to help beat the roulette wheel. Those arrested had won a huge sum of money by placing their bets in the area the computer had pinpointed as the ball's most likely resting place. Scotland Yard sources described the case as 'extremely complex'. The laws which cover gaming date back to the mid 19th century - when the possibility of such sophisticated scams were undreamed of. Section 17 of the Gaming Act 1845 forbids 'unlawful devices'. However in previous cases suspects have been able to argue that they had not interfered with a game simply used a system to win. Professor Mark Griffiths said that '*...roulette mathematical systems have been used for years. When you've got technology involved it improves the chances.*'<sup>78</sup>



**FIGURE 4**

An earlier form of technology was used in 1961. That was a portable type of computer, which was used on a roulette wheel in Las Vegas by Claude Shannon, his wife Betty, and Ed Thorpe.<sup>79</sup> Shannon, widely considered to be the

father of information theory (the science behind the

Internet and all digital media) came up with a fundamental information-theoretic notion.<sup>80</sup> This was developed further by John Kelly into the 'Kelly Criterion' and used by Ed Thorpe who wrote a bestseller, *Beat the Dealer*, which was about how to win at blackjack. Thorpe's system was so successful that casinos had to ban him and change their rules for shuffling cards.<sup>81</sup> Thorpe's card counting strategy altered the odds in favour of the house from 5% to 1-2% in favour of the punters. His work forms the basis of most

<sup>78</sup> Steven Morris, 'The Sting: Did Gang Really Use a Laser, Phone and a Computer to take the Ritz for £1.3m?' *The Guardian* (Tuesday March 23, 2004) Available online at <http://www.guardian.co.uk/life/news/story/0,12976,1175809,00.html> (Accessed 23/3/2007)

<sup>79</sup> Edward O. Thorp, '*The Invention of the First Wearable Computer, Edward O. Thorp & Associates*' Available online at [http://c2000.cc.gatech.edu/classes/cs8113c\\_99\\_spring/readings/thorp.pdf](http://c2000.cc.gatech.edu/classes/cs8113c_99_spring/readings/thorp.pdf) (Accessed 23/3/2007); Figure (4) Ed Thorp is shown here at the Tropicana Hotel in Las Vegas in 1963.

<sup>80</sup> See C.E. Shannon, 'A Mathematical Theory of Communication,' *Bell System Technical Journal*, 27 (October, 1948): 379-423

<sup>81</sup> William Poundstone, *Fortune's Formula: The Untold Story of the Scientific Betting System That Beat the Casinos and Wall Street*, Publisher: Hill and Wang, 2006. Cited in American Scientist online. Available online at <http://www.americanscientist.org/template/BookReviewTypeDetail/assetid/47321;jsessionid=aaa9har2OmrE7K#47646> (Accessed 23/3/2007) Image from *Fortune's Formula*. Cited in American Scientist online. Available online at <http://www.americanscientist.org/template/BookReviewTypeDetail/assetid/47321;jsessionid=aaa9har2OmrE7K#47646> (Accessed 23/3/2007)

other Blackjack strategies, which have forced the casinos to revise their rules even further.

Card counters do not have to count and remember every card in a deck. That would require a photographic memory and a great deal of time and energy. Card counters just rely on a system that keeps track of the type of cards played. This allows them to know when the deck becomes favourable or unfavourable to them. The basis for card counting comes from the following example: Imagine that there is a jar full of 100 marbles. There are 50 black and 50 red marbles. If one were to reach into the jar and pull out 20 red marbles, there would be 30 red marbles and 50 black marbles remaining. If one then randomly selects a marble from the bowl, the odds were higher it would be a black marble. Card counting involves keeping count of the cards played so they can determine the amount of high and low value cards left in the deck. The more large value cards left in a deck the better it is for the player. This will have an impact on the size of their wager.<sup>82</sup>

The new gambling act does not specify what cheating is because this might create loopholes for people devising new and creative ways to alter the odds in favour of the punter. The identity of cheating, as with any identity, also includes what is not cheating. It is better to leave the identity open and flexible so new forms can be included.<sup>83</sup> So, as we will see later, the signifier cheating, like gambling, can be matched to different signifieds as and when required. This is because cheating is not good news for those investors (gamblers) with shares in the gambling industry. Under the new laws, in Section 42, it will be an offence for anyone to cheat, or to enable or assist another to cheat. Any person found guilty of cheating shall be liable to imprisonment for a maximum of two years, and bets may be struck out as void by the Gambling Commission. Section 42 reads as follows:

*(1) A person commits an offence if he- (a) cheats at gambling, or (b) does anything for the purpose of enabling or assisting another person to cheat at gambling. (2) For the purposes of subsection (1) it is immaterial whether a person who cheats- (a) improves his chances of winning anything, or (b) wins anything. (3) Without prejudice to the*

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<sup>82</sup> More will be said about this in chapter 5

<sup>83</sup> For example, only card-counting that involves devices other than memory is illegal. However, as humans become more and more cyborg in nature that distinction may alter.

*generality of subsection (1) cheating at gambling may, in particular, consist of actual or attempted deception or interference in connection with- (a) the process by which gambling is conducted, or (b) a real or virtual game, race or other event or process to which gambling relates. (4) A person guilty of an offence under this section shall be liable- (a) on conviction on indictment, to imprisonment for a term not exceeding two years, to a fine or to both, or (b) on summary conviction, to imprisonment for a term not exceeding 51 weeks, to a fine not exceeding the statutory maximum or to both. (5) In the application of subsection (4) to Scotland the reference to 51 weeks shall have effect as a reference to six months. (6) Section 17 of the Gaming Act 1845 (c. 109) (winning by cheating) shall cease to have effect.*

So when odds are in the casinos favor the gambling is deemed to be fair and legal, but if odds are in the punters favor it is considered to be cheating and a crime. In the next chapter we will see that two of the government's objectives are to look after problem gamblers and keep gambling crime free. The former have treatment supplied while the latter might go to jail. That leaves us with the so-called normal gambler. These gamble for entertainment with the possibility of winning. But the acceptance of the normal gambler is a recent phenomenon. Before the government got involved in the gambling industry they were marginalized. Now the normal gamblers are just out having fun while the cheats are locked up and the problem gamblers are being treated. In the meantime the casinos are making their profits, the shareholders are receiving their dividends, and the Inland Revenue is collecting its tax.

*When I was young, people called me a gambler. As the scale of my operations increased I became known as a speculator. Now I am called a banker. But I have been doing the same thing all the time. (Sir Ernest Cassell, banker to Edward VII) <sup>84</sup>*

While Cassell thought that his activities as a gambler, speculator and banker were the same yet the fact that only gambling is regulated by the DCMS would indicate that there are differences as well. Gambling, betting, and gaming

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<sup>84</sup> Cited in David Itzkowitz, 'Fair Enterprise or Extravagant Speculation: Investment, Speculation, and Gambling in Victorian England', *Victorian Studies*, 45, 1 (Autumn 2002): 121-147 Indiana University Press

are presented as similar within our own time because all three will be regulated by the Gambling Act (2005) but the lottery is seen as different because it's regulated by something else. Even though gambling, betting and gaming are considered similar enough to be included in the Act there are also differences because they are called different things and are regulated differently. Yet we don't see 'problem betters' and 'problem gamers' as all come under the heading of 'problem gamblers'. Nor do we see separate headings for 'cheating in betting' or 'cheating in gaming'. We just have one heading in the Act called cheating. Under that heading we are told that it is a crime to alter the odds yet these odds that we are not allowed to alter are already stacked towards the advantage of the house - and this is not classified as cheating.

Foucault tells us that instead of presuming that our own accepted system of classification represents some type of objective reality we should remember that there are numerous alternative schemes. Classification schemes are just cultural codes of interpretation which Foucault called discursive formations. These are a set of deep rules for ordering the world, which are embedded in our language. Because they are embedded in the language we are not always aware of the ways that our thoughts and behaviour are moulded. Foucault's archaeological method was an attempt to dig down to those rules to find out how a particular culture came to develop a certain system of classification. While many people might regard the classification of animals in the Chinese encyclopaedia (mentioned above) as ridiculous, Foucault used it to help us recognize some of the limitations of our own classificatory system. A system, which may not allow us to consider the Chinese system as a viable alternative. The way that gambling is classified today may also prevent us from seeing viable alternatives. However, in Chapter 5 we will introduce and explore one possible alternative. In the mean time we need to further examine the notion of classificatory systems in relation to gambling by exploring notions of truth and individuality. This will help us better understand the way that gambling and gamblers are understood today. And more importantly, what has been concealed by those understandings.

### *E. Saussure's influence*

In order to gain a better understand of the way that gambling has been, and is being classified, we will explore Foucault's notion of discourse. Discourses, according to Foucault, are '*...practices that systematically form the objects of which we speak.*'<sup>85</sup> By practices he meant ways of thinking and acting which are produced.<sup>86</sup> Rather than being natural they are culturally produced and this production can be seen as a result of something like a three way process of enabling, constraining and constituting. For example, as we saw in chapter 1, and will see in chapter 3, gambling and gamblers have been the objects of a number of different discourses including medicine, leisure industry, politics, economics, law, genetics, mathematics and history. Each of these disciplines have studied gambling and gamblers from different angles. In speaking about gambling and gamblers in particular ways Foucault might argue that each has enabled and constrained what can be said in their particular fields. In so doing they have constituted gambling and gamblers as realities to be further studied. In order to understand this process more clearly this section will draw on the work of Saussure, Barthes, Levi Strauss and Derrida, before returning to Foucault.

In his study of language, represented in the *Course in General Linguistics*, Saussure developed a number of important tools, which will help us in our current investigation. These include the distinctions between signifiers and signifieds, between the syntagmatic axis and paradigmatic axis, between diachronic analysis and synchronic analysis, and between langue and parole. Applied to our current topic we can say that the linguistic sign 'gambling' comprises a signifier and a signified. The former is the material word, written or spoken,<sup>87</sup> while the latter is our mental image or meaning of the word. '*A linguistic sign is not a link between a thing and a name, but between concept*

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<sup>85</sup> M. Foucault, *The Archaeology of Knowledge*, London: Routledge, 1989, p. 49

<sup>86</sup> This is directly relevant to Rawls' point about truth being to systems of thought as justice is to institutions and laws.

<sup>87</sup> Saussure referred to the signifier as a sound system and he privileged the spoken word. Ferdinand de Saussure, *Course in General Linguistics* (Trans. Roy Harris), London: Duckworth, 1983, p. 24-5. For our present purpose that is not important but see J. Derrida, (Trans. Spivak) *Of Grammatology*. London: John Hopkins Press, p. 1976. See especially p. 238

[signified] and a sound pattern [signifier].<sup>88</sup> We have already noted, in chapter 1, that the meaning of ‘gambling’ has changed over time. For example, it may or may not include the lottery, investing, insurance or speculation etc. That is possible because, according to Saussure, the link between the signifier and signified is arbitrary.<sup>89</sup>

The signifier can mean one thing at one time and something else at another time or another place.<sup>90</sup> This means that the meaning of ‘gambling’ is not the result of some essential correspondence between the word and the reality but the result of difference and relationship. For example, the word ‘gambling’ has meaning in relation to ‘non-gambling’ within a certain structure. To highlight the significance of linguistic structures, Saussure suggested a comparison between the system of language and the game of chess. Historical changes in the material substance of pieces do not affect their meaning. Rather, it is the role that the piece plays and how they are related structurally to the other pieces on the board that determine their meaning. For example the Knight could be represented in any number of ways as long as it was different to the other pieces.

So we can say that the meaning of ‘gambling’ depends on and is related to the meaning of ‘non-gambling’. At some times and places the lottery has been included within the meaning of gambling and at other times and places it has been understood as part of the ‘other’ of gambling. For example in Spain, most people denied they were gambling when playing in the state run El Gardo but agreed that they were gambling when taking part in the lottery.<sup>91</sup> Yet many lotto players in the UK do not consider themselves gamblers.<sup>92</sup> This may be because we are usually told that people participate (rather than gamble) in the lottery. This brings us to one of Saussure’s other distinctions, which was the difference between the paradigmatic and syntagmatic axis.

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<sup>88</sup> Saussure, *Course in General Linguistics*, op. cit. p. 66

<sup>89</sup> Ibid. 67

<sup>90</sup> Saussure was not the first to posit the arbitrary nature of the sign. According to Aristotle ‘there can be no natural connection between the sound of any language and the things signified’ Cited in Daniel Chandler, *Semiotics: The Basics*, London: Routledge, 2004, p. 26

<sup>91</sup> *The Guardian* (31 October 1994): 3. Cited in G. Reith, *The Age of Chance*, London: Routledge, 2002, p. 103

<sup>92</sup> Reith, *The Age of Chance*, op. cit. p. 103

Saussure tells us that meaning is also produced with processes of horizontal combinations and vertical selections of linguistic signs. He calls the former a syntagmatic axis and the latter a paradigmatic axis. An example of the syntagmatic axis is ‘She is going to the shop so that she can buy a lottery ticket.’ Meaning here is accumulated by through the different parts. However, this meaning can be changed along the paradigmatic axis by substituting different parts. For example, ‘She is going to the shop so she can participate in the lotto and its good causes,’ or ‘she is going to the shop to gamble.’ The changing meanings are possible because our language is a system of signs based on difference rather than being a reflection of reality. ‘...in language there are only differences without positive terms. Language has neither ideas nor sounds that existed before the linguistic system, but only conceptual and phonic differences that have issued from the system.’<sup>93</sup> And this brings us to another of Saussure’s distinctions.

Saussure made a distinction in language between *langue* and *parole*. The former is the system of language itself and this includes the rules and conventions that organize it. The latter is the individual uses of that language. In order to clarify the differences Saussure referred to the game of chess mentioned above, but a card game like poker or blackjack can bring out the same point.<sup>94</sup> In the game of Blackjack, like *langue*, there is the structure that includes the rules and conventions.<sup>95</sup> Each actual game played, like *parole*, is the particular performance of that structure. Without the structure there could be no game because no one would know what any of the cards meant. If a player was dealt an Ace and King they would not know that it was a winning hand. Like most organizing systems, the homogeneous structure of the game (*langue*) is that which allows the heterogeneous individual hands to take place (*parole*).<sup>96</sup> However, these rules and conventions can change over time and place.<sup>97</sup> And this brings us to the two different types of analysis referred to by Saussure. He

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<sup>93</sup> Saussure, *Course in General Linguistics*, op. cit. p. 120

<sup>94</sup> Drawing on Saussure’s work Levi-Strauss applied it to cultural and social practices. See Claude Levi Strauss, *Structural Anthropology*. London: Allen Lane, 1968. He argued that myths provide a logical model which can overcome contradictions.

<sup>95</sup> See chapter 5 for more details

<sup>96</sup> Again, this is directly relevant to Rawls’ point about truth being to systems of thought as justice is to institutions and laws. For example truth could be the *parole* while systems of thought could be the *langue*.

<sup>97</sup> See Chapter 5 for more details

distinguished between the diachronic and synchronic approaches to the analysis of language. The former studies the historical development of a language over time while the latter describes the language at one particular time.

We saw in chapter 1 how the meaning of gambling has changed over time and we have also noted the way it is divided up now. Saussure preferred the synchronic analysis of language because he thought that was required in order to have a science of language. He has been criticized for this and, in relation to gambling this author is inclined to agree. Just studying the way gambling has been presented in the current discourses allows little critical analysis because the terms of reference are also situated within the current system. That would not suit this present thesis because Rawls' wrote his *Theory of Justice* in the late 60's. Rawls did not allow risk-taking in his original position, yet the past two decades have seen an extraordinary growth in regulated casino gambling, state-run lotteries, gaming machines and internet betting/gaming/gambling, all of which have had an impact on our contemporary significations of 'gambling'. And, as we will see later, unlike the games of chance, not all the significations have been randomly chosen.

Saussure realized that his approach could be applied to other areas. *'Language is a system of signs that express ideas, and is therefore comparable to a system of writing, the alphabet of deaf mutes, symbolic rites, polite formulas, military signals, etc...A science that studies the life of signs within society is conceivable... I shall call it semiology.'*<sup>98</sup> Drawing on Saussure's work Levi-Strauss applied the ideas about language and parole to cultural and social practices. One of his areas of study was myths. He examined different individual myths, like parables, tied to an underlying structure, like language, and argued that myths provide a type of logical model that can overcome contradictions.<sup>99</sup> (This point will be returned to when discussing grand narratives in Chapter 5).

Commenting on Saussure's language Barthes wrote that *'...it is essentially a collective contract which one must accept in its entirety if one wishes to communicate.'*<sup>100</sup> Like Saussure, Barthes was interested in the way that

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<sup>98</sup> Saussure, *Course in General Linguistics*, op. cit. p. 16

<sup>99</sup> Levi Strauss, *Structural Anthropology*, op. cit. p. 229

<sup>100</sup> Barthes, *Elements of Semiology*, op. cit. p. 14



meanings are produced, but in addition he was also interested in the way that they were put into circulation. He called this the process of signification. In relation to Saussure's double sided sign Barthes argued that there is a second level of signification. He called the denotation the primary signification and connotation the secondary signification. He tells us that the first signification, where the sign equals the signified plus signified,<sup>101</sup> becomes a signifier itself. *'The signifiers of connotation '... are made up of signs (signifiers and signifieds united) of the denotative system.'*<sup>102</sup> And it is at the secondary level, according to Barthes, that myth is produced for consumption by being put into circulation. His understanding of myth is, not unlike Marx's ideology or Foucault's power, a body of ideas and practices, which sustain the current system of power by promoting values and interests of the dominant group. Or perhaps promote values and interests, which camouflage the values and interests of the dominant group.

A good example of the way that values and interests can be used to camouflage the values and interests of the dominant group, can be seen at the garage where green and red plastic covers on petrol pumps distinguish between unleaded and leaded petrol. Most were led to believe that unleaded petrol has less pollution than leaded petrol (hence the green cover). However, the visible smog in cities was the main concern at the time. In order to get rid of the smog they had two options. Either refine the petrol more to get rid of the impurities, which caused the smog, or put filters on the vehicles. The first option was very expensive so they opted for the second. They placed catalytic converters on the vehicles. Catalytic converters work as filters to prevent the smog. The problem was that catalytic converters were incompatible with leaded petrol but not with unleaded petrol. So they used unleaded petrol with catalytic converters to reduce the smog. But lead was in the petrol for a reason so they had to use something else to replace the lead. They used benzene but benzene has many health related problems also. However, that did not prevent the use of green plastic covers.

*The main concern arises from the simplest aromatic compound, benzene, which is a minor component of most*

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<sup>101</sup> I will return to this when discussing Adorno's criticism of Hegel's identity thinking.

<sup>102</sup> Barthes, *Elements of Semiology*, op. cit. pp. 89-91. See also 'Myth Today' in Roland Barthes, *Mythologies*, London: Paladin, 1973, the last essay.

*gasoline but is also produced by other aromatics during combustion. Benzene is a human carcinogen and is most clearly associated with acute myelocytic leukemia in exposed workers. Although exposure data are incomplete, benzene air pollution from gasoline may pose a cancer risk to taxi drivers, gasoline pump attendants, and refinery workers.*<sup>103</sup>

One of Barthes' famous examples of how the second order of signification works was in his analysis of the cover of the French magazine *Paris Match* 1955.<sup>104</sup> According to Barthes, connotations are not just produced but are activated from the already existing possibilities. Therefore, connotations draw from and add to the cultural repertoire. For example, in order to distinguish between leaded and unleaded petrol yellow and blue plastic covers could have been used instead of red (danger) and green (environmentally friendly). At any rate, just as there are polysemic signs which can signify multiple meanings, there are numerous possible connotations.<sup>105</sup> Applied to our current topic an example of connotation can be seen in the earlier image used to advertise the lotto.



**FIGURE 5**

and fingers but they connote random luck instead of providence. Promoting the lotto as being about good as we saw above, also has different connotations word gambling. Derrida's notion of difference can on to examine the issue further.

This was a hand with a pointing finger similar to Figure 5. It drew on the notion of god's hand reaching out to Adam similar to Michelangelo's painting. Rather than drawing on that these days we see in Figure 6 a hand



**FIGURE 6**

divine causes, than the be called

Derrida added the element of time to Saussure's divided sign based on location within the system. Rather than one sign being different to another

103 D. Menkes and P. Fawcett, 'Too Easily Lead? Health Effects of Gasoline Additives,' *Environmental Health Perspectives*, 105, 3 (March 1997). See also WHO/United Nations Environmental Programme. Environmental health criteria 150--benzene. International Programme on Chemical Safety. Geneva: World Health Organization (1993): 120-143

104 See Roland Barthes, 'Myth Today' in John Storey, (ed.) *Cultural Theory and Popular Culture: A Reader*, 3<sup>rd</sup> edition, London: Pearson Education, 2006, p. 297

105 See Roland Barthes, 'The Photographic Message' in *Image-music-text*, London: Fontana, 1977, p. 26

Derrida argued that the relationship was based on difference. They not only differ but also defer.<sup>106</sup> Only when it's located in a particular discourse or read in a certain context does the deferring cease its endless movement from signifier to signifier.<sup>107</sup> In addition to the spatial and temporal differences Derrida added that there is also an element of power which privileges one part of a binary over the other while the former is dependent on the latter. Reversing the hierarchy just keeps the assumption of binary oppositions in place but, according to him, there are no pure opposites in the first place.<sup>108</sup> We have already noted the mobile line dividing gambling from non-gambling. And while not presented as binaries Derrida's notion of difference could also be applied to the various different ways that gambling, gaming, betting, lottery, investing and insurance have been represented in the documents. For example, in the context of problem gambling the movement from signifier to signifier momentarily ceases at 'gambling' that includes betting and Lotto. Yet, in the context of the Gambling Act 2005, the movement of 'gambling' ceases in such a way that excludes the others.

We have seen how the ideas of Levi Strauss, Barthes and Derrida drew on the work of Saussure. In fact his *Course in General Linguistics*, which was taken from his students' lecture notes and published posthumously, has influenced many theories of the second half of the twentieth century that are focused on language. Contrary to many of the linguistic theories of his day, which focused on diachronic linguistics or the changes in languages over time, Saussure's theory focused on synchronic language, how language works at one time. As we will see, Michel Foucault's analysis of discourse also owes a lot to Saussure's study of language and his insights about the construction of meaning. However, he was also, like Heidegger, interested in how some meanings make more sense than others at different times. And even though Foucault was known as a theorist of the present his method could be described as one that lent more towards the diachronic approach than did Saussure's.

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<sup>106</sup> See Jacques Derrida, *Speech and Phenomena*. Evanston: North Western University Press, 1973

<sup>107</sup> Jacques Derrida, *Writing and Difference*, London: Routledge and Kegan Paul, 1978, p. 25

<sup>108</sup> See Jacques Derrida, *Positions* London: Athlone Press, 1978. See p. 41 for more on his notion of 'violent hierarchy'.

## ***F. Foucault and gambling***

Discourse, according to Foucault, lies somewhere between what Saussure identified as *langue* and *parole* – between the structure and surface of language. Discourses cannot be reduced to either as they do more than just denote or connote. They are also historically specific and determine what can and cannot be said at a particular time.

*Discourses are composed of signs, but what they do is more than use these signs to designate things. It is this move that renders them irreducible to the language and to speech. It is this 'move' that we must reveal and describe.<sup>109</sup>*

The study of that 'move' or extra or more than just denoting and connoting, is central to Foucault's work. It is not unlike some form of mediation. It occupies a similar place in Foucault's work to what *Geist* occupied in Hegel's, the transcendental in Kant's, and the horizon in Heidegger's. But of course there are many differences.

Foucault questioned why it is that at a given time how only certain things can be said '*...how is it that one particular statement appeared rather than another.*'<sup>110</sup> It is this move that allows this to happen. Discourse highlights the social processes that produce meaning because it's structured, or informed or determined by assumptions that the speaker has to engage with in order for what they say to be heard as meaningful at that particular time. For example, condemning gambling as sinful behaviour was considered a meaningful criticism in the past, but its absence within the current debates shows that it is no longer taken seriously. Assumptions in the past, which allowed it to be meaningful, were as much a product of power as of knowledge like assumptions underlying today's criticisms and perhaps assumptions underlying future criticisms. It is power that is within the formation of objects of knowledge such as gambling. According to Foucault '*..there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations.*'<sup>111</sup>

Foucault focused on a number of objects of knowledge in order to explore the move. These included sexuality, criminality, and madness. For example, he

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<sup>109</sup> Foucault, *The Archaeology of Knowledge*, op. cit. p 49

<sup>110</sup> Ibid. 27

<sup>111</sup> Foucault, *Discipline and Punish*, op. cit. p. 27

argued against the humanist assumption that there was some essence to these objects of knowledge because what we take them to be at a given time is the result of the power-knowledge relationship. On one level these topics seem heterogeneous like different forms of parole or card games, but there is also a homogeneous aspect to them like langue and the rules of the card game, which he calls the episteme. Different epistemes have different basic assumptions. And it is the criss-crossing of seemingly heterogeneous discourses within different epistemes that Foucault studied.

For example, arguing against what he calls the repressive hypothesis, which claims that the history of sexuality over the past three hundred years has been a history of repression, Foucault argued that sexuality was constituted rather than repressed during Victorian times.<sup>112</sup> In order to study the discursive formation of sexuality, the way the object of discourse was formed, Foucault examined the way that sexuality was studied within various criss-crossing discourses such as medicine, psychiatry, social work, and criminology etc. His main interest was in the power/knowledge relationship concerning discursive sexuality. The discourses on sexuality were not about some pre-existing sexuality, according to him, because the discourses actually constituted the reality of sexuality. Foucault argued that the Victorians didn't just produce knowledge about sexuality, but in constituting sexuality, they sought to also produce power over it. It was a type of knowledge/power that could categorize and organize behaviour by dividing sexuality into categories of normal and abnormal or unacceptable behaviour.

In his book about sexuality Foucault discussed the change from one type of power to another of which he calls 'bio-power.'<sup>113</sup> Up until the classical age there was a type of juridical power where the sovereign had the power over life and death. *'Power in this instance was essentially a right of seizure: of things, time, bodies, and ultimately life itself; it culminated in the privilege to seize hold of life in order to surpress it.'*<sup>114</sup> This was the type of power that had been generalized in political theory. However, since the classical period power has

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<sup>112</sup> Rather than silence about sexuality Foucault found a political, economic and technical incitement to discuss sex. See Foucault, *The Will to Knowledge*, op. cit. pp. 22-23

<sup>113</sup> Ibid. 'Right to Death and Power over Life' pp. 135-159

<sup>114</sup> Ibid. 136

also been exercised at the level of life itself. The former type of power is just one minor aspect of the later bipolar power.

Since the seventeenth century there have been two poles of power. One disciplines the body (like a particular card hand in a card game) and the other regulates the population (like the card game). *'The old power of death that symbolized sovereign power was now carefully supplanted by the administration of bodies and the calculated management of life.'*<sup>115</sup> The former focuses on what he called an anatomo-politics of the human body. It tries to maximize its forces and integrate it into various efficient systems. The latter is one that controls through regulation. It is a biopolitics of the population. According to Foucault, it focuses on the species body, the body that is permeated with the mechanisms of life. The increasing state concern with the biological well being of the population included things like disease control and prevention, adequate food and water supply, sanitation, shelter, and education. (We could now add anti-smoking, good school lunches and normal gambling to the list). Foucault argued that during the seventeenth century this bipolar technology of power sought to invest life through and through. By the nineteenth century these two poles were joined up within a series of what he calls *'great technologies of power'* of which sexuality was only one, but, according to him, it was the most important.<sup>116</sup> He adds that the development of capitalism would not have been possible without these technologies. *'This biopower was without question an indispensable element in the development of capitalism.'*

We have already noted the close relationships between gambling and capitalism as well as between gambling and probability theory (which underpins the statistical analysis related to what Foucault calls the biopolitics of the population). We can now see that Foucault's notion of biopower, which is central to capitalism, would not be possible without the probability theories and statistics derived from gambling studies discussed above. And, as we will see, there is also a close relationship between the normal curve, regression to the mean, and Foucault's argument around normalization. And this relationship is

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<sup>115</sup> Ibid. 139-140

<sup>116</sup> Ibid. 140

relevant to another of Foucault's main ideas, which concerns contingencies rather than causes.

There are two notions of contingencies that will be referred to here. This section will draw on the work of both Kuhn and Kant to explain the point. Firstly, in *The Structure of Scientific Revolutions*<sup>117</sup> Kuhn argued against the accepted view of the history of science. This view saw it as an accumulation of all that had been learned over history with each new law adding to the whole mass of science. '*Scientific development becomes the piecemeal process by which these items [facts, theories, and methods] have been added, singly and in combination, to the ever growing stockpile that constitutes scientific technique and knowledge.*'<sup>118</sup> For Kuhn, the history of science was not a result of the steady and rational accumulation of facts. It was the result of shifts from one paradigm to another. He understood paradigms to be entire set of beliefs, values, and techniques shared by the various members of a scientific community (like a card game). Kuhn argued that most scientists participate in activity consistent with the existing paradigm. However, eventually inconsistencies arise which the paradigm cannot accommodate. Then someone steps out of the paradigm, and suggests some new principle or law. Einstein's notion of time-space was one such example. If the scientific community accepts the changes, the science experiences a paradigm shift, and science itself moves into a new paradigm. These new paradigms are similar to Foucault's notion of the episteme as outlined above.

Kuhn added that changes are sometimes resisted. According to him, there is a tendency, inherent in human beings, not to recognize the unexpected. In other words, if it does not fit into possible categories in one's paradigm it gets resisted or ignored. Kuhn cited an interesting experiment with anomalous playing cards to prove this tendency. In this experiment he showed a pack of cards to people. Most of the cards were normal, but some were anomalous, e.g. a red six of spades and a black four of hearts. The point of the experiment was to see how people responded to a totally unexpected phenomenon. The results

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<sup>117</sup> Kuhn, *The Structure of Scientific Revolutions*, op. cit.

<sup>118</sup> Ibid. 2

were that ‘. . .the anomalous cards were almost always identified, without apparent hesitation or puzzlement, as normal.’<sup>119</sup>

Kuhn also argued that the paradigms were incommensurable. For example, when Ptolemy popularized the notion of the sun revolving around the earth, his view was defended for centuries even in the face of conflicting evidence.

*Practicing in different worlds, the two groups of scientists see different things when they look from the same point in the same direction. . . it is why, before they can hope to communicate fully, one group or the other must experience the conversion that we have been calling a paradigm shift. Just because it is a transition between incommensurables, the transition between competing paradigms cannot be made a step at a time, forced by logic and neutral experience. Like the gestalt switch, it must occur all at once (though not necessarily in an instant) or not at all.*<sup>120</sup>

Kuhn also argued that a rupture occurred between the two distinct paradigms. He was speaking about the natural sciences but Foucault’s notion of episteme in the human sciences shares similarities in that he understood them as discontinuities. And just as scientists from different paradigms see different things when looking in the same direction, Foucault tells us that objects of knowledge change from one episteme to another. Foucault’s objects of knowledge, like Kuhn’s objects and theories in science, are relative to the epistemes and paradigms. So, in a sense, what we take them to be is contingent on the things that gave birth to the different epistemes and paradigms.

In philosophy, Kant had previously taken Socrates’ questioning of accepted knowledge a stage further by critiquing knowledge itself. In Kant’s more modern view there were limits to what we can know. This was his distinction between the phenomena and noumena. But he didn’t stop there, he also argued that there was something necessary in this limiting of our knowledge which allowed us to access the knowledge that was not limited to us. This was a type of Janus face of limit. For example, space and time, which allows us knowledge of phenomenal objects, also restricts our knowledge of the noumenal reality. So this law like necessity, in a sense, causes both restrictions

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<sup>119</sup> Ibid. 63

<sup>120</sup> Ibid. 150



and access to knowledge (We will examine this point further when discussing Adorno's criticism of Kant's idealism). This was Kant's Copernicus revolution. He ended the debates between Rationalism and Empiricism by synthesizing the two. He showed that the mind, through its innate categories, constructs our experiences. In other words, it is the representation that makes the object possible rather than the object that makes the representation possible.<sup>121</sup> Foucault took this on board and inverted it, as Marx had inverted Hegel's dialectic. Foucault searched for, not what was necessary in the contingent, as Kant had done, but what was contingent about what was considered necessary. *'...in what is given to us as universal, necessary, obligatory, what place is occupied by whatever is singular, contingent, and the product of arbitrary constraints?'*<sup>122</sup> In a sense then, he returned to Socrates' project of questioning accepted knowledge but, as we will see in the next section, he has taken it further by questioning the status of the knower in relation to power. But before examining that we need to say a few words about gambling and contingency in relation to paradigms and epistemes.

Firstly, in our examination of gambling so far we have seen that it has meant different things at different times. For example, we saw that it was understood as irrational behaviour during the age of reason and as idleness during the industrial revolution. Today, it is seen as part of the culture and entertainment industry. Referring to the DCMS response to the Gambling Review Body recommendations, Section 7.1., Jim Orford tell us that *'...preparation for the Bill have made it quite clear that the issue is not now to be marred by any discussion of ethicality or values. .... In the Government's view the law should no longer incorporate or reflect any assumption that gambling is an activity which is objectionable and which people should have no encouragement to pursue.'*<sup>123</sup>

In the Budd Report we were told that the proposed changes in the gambling law are moving towards a more liberal attitude with safeguards to protect the young and vulnerable. In some respects these changes mirror the

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<sup>121</sup> 'See Norwood Hanson, 'Copernicus' Role in Kant's Revolution,' *Journal of the History of Ideas*, 20, 2 (April 1959): 274

<sup>122</sup> M. Foucault, 'What is Enlightenment?' in P. Rabinow, *The Foucault Reader*, op. cit. p. 45

<sup>123</sup> Jim Orford, 'Disabling the public interest: gambling strategies and policies for Britain' *Addiction* 100, 9 (2005): 1219

humanist view of sexuality, which was criticized by Foucault. If we view the changes through Foucault's argument around discursive formations we can see that gambling is being divided into normal and problem gambling. While the former is being seen as harmless fun, with the possibility that *'it could be you,'* the latter is being presented as abnormal behaviour which is undergoing further research. As it was the new technologies which led to the proposed changes in the law, as a camouflage for developing the gambling industry, it could be argued that the meaning of problem gambling is contingent on innovations in technology and industry rather than the new technologies being the cause of a rise in problem gambling which needs to be cured. Therefore, findings in the research of problem gambling, which show it to be genetic, psychological or cultural,<sup>124</sup> could be seen, from a Foucauldian perspective, as a result of studying a contingent object of knowledge rather than some essential nature. However, one can't help but ask what subject positions those normal gamblers would occupy if gambling was still considered to be a sin.



### ***G. Foucault and the gambler***

On the 31st January 2005 the BBC reported that a University of Illinois team, which has screened the entire human genome, argued that there is no one 'gay' gene and they added that environmental factors are also likely to be involved. These findings add to the debate over whether sexual orientation is a matter of choice. Research Dr Mustanski said that *'Our study helps to establish that genes play an important role in determining whether a man is gay or heterosexual,'* he said, but added that other factors were also important. *'Sexual orientation is a complex trait. There is no one 'gay' gene. Our best guess is that multiple genes, potentially interacting with environmental influences, explain differences in sexual orientation.'*<sup>125</sup> Foucault would have argued that these statements could not have been made prior to the 18<sup>th</sup> century. According to

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<sup>124</sup> This will be examined more fully in the next chapter

<sup>125</sup> From the BBC NEWS Available online at <http://news.bbc.co.uk/go/pr/fr/-/1/hi/health/4215427.stm> (Posted 31 January 2005. (Accessed 23 March 2006))

him, there is no essence to sexual identities such as homosexuality as they are the result of the constructive power of discourses. If these identities had not been discursively formed we would not be able to debate whether or not homosexuality was a result of genes, culture or a combination of both. Of course there was not the technology back then to examine genes. So we see again the relationship between techne and knowledge that was discussed with Heidegger.

Foucault was especially interested in forms and operations of power that *'...categorize the individual, mark him by his own individuality, attach him to his own identity, impose a law of truth on him which he must recognize and which others must recognize in him . . . a form of power which makes individuals subjects.'*<sup>126</sup> We have already mentioned Foucault's understanding of power as being productive as well as being restrictive. In its productive state power works by installing limits. It marks of the discursive domain specific to individual subject positions. He calls this 'dividing practices' and tells us that *'The subject is either divided inside himself or divided from others. This process objectivizes him. Examples are the mad and the sane, the sick and the healthy, the criminals and the 'good boys'.'*<sup>127</sup> We have already seen how problem gamblers have been divided off from non-problem gamblers. Unlike Foucault's subjects, there are no institutions like mental institutions, hospitals and prisons where problem gamblers are confined. Some are placed in these institutions for reasons associated with their gambling behavior but there are no large institutions devoted to housing them. This may be because problem gamblers are a topic now whereas the others emerged in the time that Foucault calls the great confinement.<sup>128</sup>

We have already mentioned Foucault's criticism of the repressive hypothesis.<sup>129</sup> His alternative account of the historical shift concerning sexuality has five main components. Rather than placing silence over sexuality Foucault argued that there was a discursive explosion. Talk about sex was policed but people were continually incited to speak about it. Prior to this time sexuality

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<sup>126</sup> M. Foucault, 'The Subject and Power' in H. Dreyfus and P. Rabinow (Eds.) *Michel Foucault: Beyond Structuralism and Hermeneutics*. Second Edition. Chicago: The University of Chicago Press, 1983, p, 212

<sup>127</sup> Ibid. p. 208

<sup>128</sup> Foucault, *Madness and Civilization*, op. cit. Chapter 2

<sup>129</sup> See above for an account of the repressive hypothesis that Foucault disagreed with

was controlled by religious and moral concerns, but Foucault argued that there was a shift from that to control by comparison to a normal sexuality (a change in the rules). Rather than a distinction between good and evil forms of sexual behavior, there grew a distinction between normal and abnormal sexual behavior. Sexuality was then controlled less through laws and morals and more through pedagogy and therapy. In addition, sexuality was less just seen as an act and became associated with an identity. *'The sodomite had been a temporary aberration; the homosexual was now a species.'*<sup>130</sup>

Foucault tells us also that confession played a large part in the construction of these sexual identities. This was unlike the view of sexuality found in China, Japan, India and Rome whereby it was seen as an *ars erotica* and kept secret because it might lose its power and its pleasure if spoken about. *'In the erotic art, truth is drawn from pleasure itself'*<sup>131</sup>. In Western society he tells us that sexuality was *scientia sexualis*, the science of sexuality which is based on a phenomenon diametrically opposed to *ars erotica*. This was the confession or the urge to talk about it. Here we see a fixation with finding out the truth about sexuality - truth that is to be confessed. Foucault writes that *'Since the middle ages at least, western societies have established the confession as one of the main rituals we rely on for the production of truth.'*<sup>132</sup> But this confession is not just tied to sexuality but covers many areas. *'The confession has spread its effects far and wide. It plays a part in justice, medicine, education, family relationships, and love relations'* etc. In addition, there is a power relationship between the confessor and those that are confessed to, and these power relations are formed where there are differences. A major difference in connection with our current topic is the difference between normal gambling and problem gambling. And as we will see the confession has a large role to play here.

Much research in problem gambling has taken place over the last few years. The development of this research reflects a move from gambling as behavior to gambling as a health issue. Gambling has not traditionally been viewed as a public health matter, and research into the health, social, and

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<sup>130</sup> Foucault, *The Will to Knowledge*, op. cit. p. 43

<sup>131</sup> Ibid. 57

<sup>132</sup> Ibid. 58

economic impacts of gambling is still in its infancy.<sup>133</sup> However, the profile of problem gamblers is developing from something like Foucault's notion of confession. Much of the research is based on those who admit to being problem gamblers, and on surveys and experiments. Some of this research has identified a genetic basis.<sup>134</sup> Some have found that the social background factors, other than parental substance misuse, are not related to severity of male adolescence gambling problems. They unexpectedly found impulsiveness is *not* related to gambling but asocial personalities are. They suggested that further research should take these two factors on board. *'The nature of this finding should be further explored, since an asocial personality may point at genetics as well as to early social influences, as may the finding on the relation between gambling and parental drinking.'*<sup>135</sup> It has been argued that various drugs such as 'Carbamazepine, naltrexone, clomipramine, fluvoxamine, and lithium have been used with some effect on problem gamblers.'<sup>136</sup>

It has been argued that twin studies represent an important and powerful approach to estimating the relative contributions of environmental and genetic factors to the expression of psychiatric illnesses such as problem gambling. One study used large populations of monozygotic and dizygotic twin pairs to estimate genetic and environmental contributions to the disorder. Their results were then reviewed from studies of the Vietnam Era Twin Registry that used the same methodology to examine the etiology of pathological gambling problem gambling behaviors. *'The results provide strong evidence for genetic contributions to the development of PG in men and set the foundation for future studies aimed at identifying the manner in which specific genes and environmental factors individually and in conjunction contribute to PG.'*<sup>137</sup>

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<sup>133</sup> M.D. Griffiths, 'Pathological gambling: a review of the literature'. *Journal of Psychiatry Mental Health Nurse*, 3 (1996): 347-53; D.A. Korn, 'Expansion of gambling in Canada: implications for health and social policy'. *CMAJ*, 163 (2000): 61-4; M. McKee and F. Sassi 'Gambling with the nation's health'. *BMJ*, 311 (1995): 521-2.

<sup>134</sup> S. Eisen, N. Lin, M. Lyons, 'Familial influences on gambling behavior: an analysis of 3359 twin pairs'. *Addiction*, 93 (1998): 1375-1384

<sup>135</sup> Arne Gerdner & Krister Svensson, 'Predictors of gambling problems among male adolescents,' *International Journal of Social Welfare* 12, 3 (2003): 182-192

<sup>136</sup> Mariee Mark & Henry Lesieur, 'A feminist critique of problem gambling research'. *Addiction*, 87, 4 (1992): 549-565

<sup>137</sup> R. Kamini, A. Seth, Hong Xian Eisen and Marc N. Potenza, 'Genetic Studies of Pathological Gambling: A Review of Methodology and Analyses of Data from the Vietnam Era Twin Registry', *Journal of Gambling Studies*, 21, 2 (June, 2005), 10.1007/s10899-005-3031-x 179-203

These studies point to a major subdivision in the area of problem gambling called pathological gambling.

Results of a study looking at heredity showed a significantly higher rate of gambling disorders among relatives of the gamblers (up to about 12 percent) than in the relatives of the people who didn't have a gambling problem (up to only about 3.5 percent). Relatives of the pathological gamblers also had higher rates of alcohol abuse, substance abuse, antisocial personality, and other mental disorders when compared to relatives of the people without gambling problems. *'Something is being passed along in these families that increases the persons' likelihood of engaging in impulsive and ultimately self-destructive behavior,'* says study author Donald W. Black, M.D., professor of psychiatry at the University of Iowa Roy J. and Lucille A. Carver College of Medicine in Iowa City. *'In some persons, it manifests as substance abuse, in others as antisocial behavior, and in others, gambling, and often the three are combined.'* One interesting finding in the study was the size of the families involved. *'Overall, pathological gamblers tended to come from larger families than the people who didn't gamble to excess. Pathological gamblers were also more likely to be single, divorced, or widowed.'*<sup>138</sup>

Some research suggests that pathological gambling is a result of a dysfunction in the serotonergic system.<sup>139</sup> Others see it as a noradrenergic dysfunction.<sup>140</sup> Others tie it to Dopamine.<sup>141</sup> Preliminary genetic studies found that male pathological gamblers are more likely to carry a less functional allele variant for a serotonin transport gene.<sup>142</sup> This finding was not replicated in

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<sup>138</sup>From <http://www.hopkinsbayview.org/healthcarenews06/060321gambling.html> Copyright 2006 Ivanhoe Broadcast News, Inc. (published online Feb. 24, 2006. Accessed 15 June 2005)

<sup>139</sup> I. Moreno, J. Sáiz-Ruiz & J. López-Ibor, 'Serotonin and gambling dependence', *Human Psychopharmacology*, 6 (1991): S9-S12; C. Blanco, L. Oresanz-Munez, C. Blanco-Jerez & J. Sáiz-Ruiz, 'Pathological gambling and platelet MAO activity: a psychobiological study'. *American Journal of Psychiatry*, 153 (1996): 119- 121; E. Hollander, C. DeCaria, J.N. Finkell, et al. 'A randomized double-blind fluvoxamine/placebo crossover trial in pathological gambling', *Biological Psychiatry*, 47 (2000): 813-817.

<sup>140</sup> C. Bergh, T. Eklund, P. Sodersten & C. Nordin, 'Altered dopamine function in pathological gambling', *Psychological Medicine*, 27 (1997): 473-475.

<sup>141</sup> M. N. Potenza, M. Steinberg, C. Lacadie, et al. 'Neural activations associated with gambling urges in pathological gamblers.' Paper presented at the American College of Neuropsychopharmacology Annual Conference, San Juan, Puerto Rico. Cited in *The Wager*, 7, 28 (2000). Family Trees and Biological Roots. Available online at <http://www.thewager.org/index.htm> (Accessed 23 March 2007)

<sup>142</sup> D. E. Comings, R. J. Rosenthal, H. R. Lesieur, et al. 'A study of the dopamine D2 receptor gene in pathological gambling,' *Pharmacogenetics*, 6 (1996): 223-234.

female pathological gamblers. However, women are more likely to carry a less functional allele variant for a receptor in the dopaminergic pathway<sup>143</sup> and these findings suggest that genetic contributions might be gender-related. If so, then it undermines criticisms that research has been male dominated. For example, early research concerning the profile of problem gamblers, from personality traits to psychiatric orientation, as well as consequences of the behavior on individuals has been criticized for their biased gender-related content. *'To say that most compulsive gamblers are men and therefore, theorists need to explain them first and only later apply these same explanations to the 'rare' [female] cases is to acquiesce to a patriarchal notion of the world.'*<sup>144</sup>

Drawing on Foucault, we noted above that if different sexual identities had not been discursively formed we would not be able to debate whether or not homosexuality was a result of genes, culture or a combination of both. Within the research into problem gambling one can see a similar emergence. Is problem gambling genetic, cultural or a combination of both? This is the question at the heart of that research. This is an important question because of the fears that the new laws will lead to an increase in problem gambling. However, this suggestion has been criticized. Arguing against the notion that Nevada has proportionately more gambling related problems than other less exposed venues, one study found that Nevada does not show proportionately more gambling related problems than the other states<sup>145</sup>. It has also been argued that Nevada has fewer gambling related problems than less exposed states and has the lowest rates of youth gambling in the USA. In addition, Nevada's youth do not gamble in casinos more than their counterparts from states with far less access to casinos.<sup>146</sup> Nevertheless the research, which indicates a correlation between gambling exposure and gambling problems, as we will see, far out-weighs the contrary arguments.

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<sup>143</sup> I. Perez de Castro, A. Ibáñez, P. Torres, J. Sáiz-Ruiz & J. Fernandez-Piqueras, 'Genetic association study between pathological gambling and a functional DNA polymorphism at the D4 receptor,' *Pharmacogenetics*, 7 (1997): 345-348

<sup>144</sup> Mark, 'A feminist critique of problem gambling', op. cit. pp. 549-565.

<sup>145</sup> H. J. Shaffer, R. LaBrie & D. LaPlante, 'Laying the foundation for quantifying regional exposure to social phenomena: considering the case of legalized gambling as a public health toxin,' *Psychology of Addictive Behaviors*, 18 (2004): 40-48.

<sup>146</sup> R. A. Volberg, *Gambling and Problem Gambling in Nevada*. Northampton, MA: Gemini Research Ltd., 2002. For more on this issue see Howard Shaffer, 'From Disabling to Enabling the public interest: Natural Transitions from gambling exposure to adaptation and self-regulation,' *Addiction*, 100, 9 (2005): 1227-1230. doi: 10.1111/j.1360-0443.2005.01200.x

One of the main arguments against changing the laws on advertising gambling was based on the correlation between a rise in exposure and a rise in problem gambling. Yet, citing two papers referring to future research on gambling and problem gambling which have been commissioned by the government<sup>147</sup> Orford tells us that neither ‘*..departs greatly from the assumption that problem gambling is an aberration, something that lies in the abnormalities of individual people, or that questions the assumption that gambling is mostly to be welcomed as a pleasurable, even responsible, activity.*’<sup>148</sup> And he adds that nothing is mentioned about the addictive nature of the gambling products. He also informs us that the Home Office accepted that gambling was part of the leisure industry and that it would be appropriate for DCMS to sponsor it. However, they wanted to keep control of the regulation of gambling and the prevention of crime and harm to the vulnerable.<sup>149</sup> The Home Office, which was responsible for gambling before it was transferred to the DCSM, was also recommending the retention of the principle of ‘unstimulated demand’ in a consultation paper in 1996. According to Jim Orford this ‘*...goes some way towards explaining why it was relieved of its long-held responsibility as lead government department for gambling.*’<sup>150</sup> Whether or not Orford is right with this assumption one can see that the way gamblers are being split between normal and problem corresponds with Foucault’s findings about sexuality. And the way that research is being guided by funding also reveals a similarity between the two discursive formations. In both cases the focus is on the identity of the individuals – the parole, being, card hand – with less focus on the gambling industry – Langue, Being, Power, rules of the game. However, rather than just aiming for objective truth the focus on individual problem gamblers is being framed within the Government’s criteria as a form of risk-reduction. In this way it may share a similarity with Rawls’ own theory.

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<sup>147</sup> M. Abbott, R. Volberg, M. Bellringer & G. Reith, G. ‘*A Review of Research on Aspects of Problem Gambling: Summary, Conclusions and Recommendations*, Prepared for the Responsibility in Gambling Trust, UK. Auckland, New Zealand: Gambling Research Centre, Auckland University of Technology, (2004); C. May-Chahal, et. al., ‘*Young People and Gambling in Britain: a Systematic and Critical Review of the Research Literature Relating to Gaming Machine, Lottery and Pools Coupons Practice by Children and Young People Under 18*’, Technical Report Paper no. 8. London: Department for Culture, Media and Sport, (2004)

<sup>148</sup> Orford, ‘Disabling the public interest: gambling strategies and policies for Britain,’ op. cit.

<sup>149</sup> Gambling Review Body 2001, GRB Report, para 34.4. (Cited in Jim Orford, ‘Disabling the public interest: gambling strategies and policies for Britain,’ op. cit. 1219-1225.

<sup>150</sup> Orford, ‘Disabling the public interest: gambling strategies and policies for Britain,’ op. cit.



## ***H. Rawls' position***

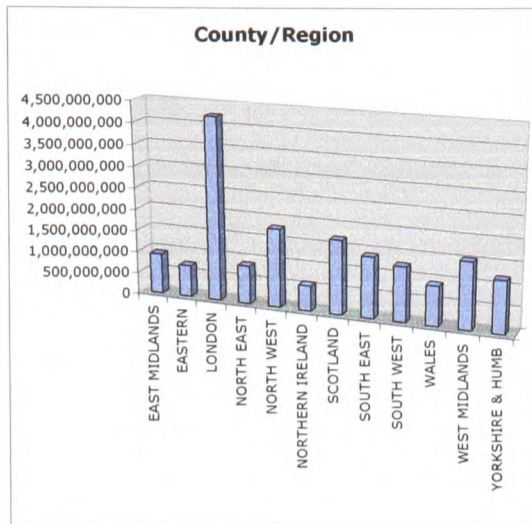
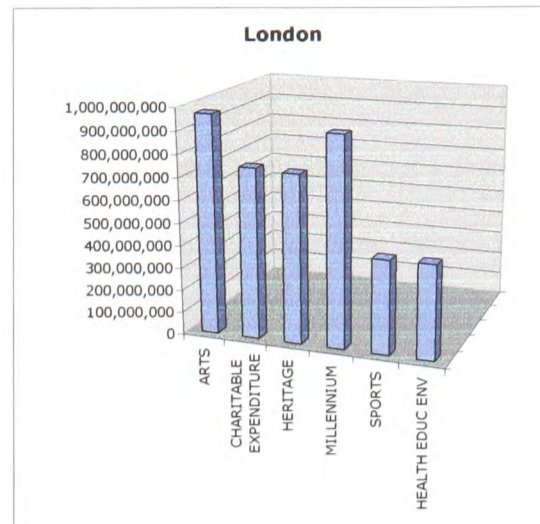
Chapter one outlined Rawls' argument that persons in the original position would choose his two principles over utilitarianism. Rawls understood utilitarianism, as *'The main idea is that society is rightly ordered, and therefore just, when its major institutions are arranged so as to achieve the greatest net balance of satisfaction summed over all the individuals belonging to it.'*<sup>151</sup> His argument against that theory was that utilitarianism could not absolutely rule out such systems as slavery or racial segregation if either led the overall benefit of society. Applied to our current topic we could say that Utilitarianism could justify changes in the gambling law, which led to more problem gamblers if there was an overall benefit to the society. And as we will see there is much research showing how new casinos could increase employment and rejuvenate run down areas. In addition, we saw in chapter 1 that much money has been collected from the lotto towards good causes. And it would not matter, from a Utilitarian perspective, if the good causes were not distributed evenly throughout society – which they are not.

For example, the raw data, taken from the DCMS website represented in Figure 7 below details the total monetary value of the grant(s) awarded since the Lottery began in 1995 until 25/8/06 and in Figure 8 the total monetary value of the grant(s) awarded in London since the Lottery began in 1995 until 25/8/06. Both show a bias in the allocation. The first is biased towards London and the second towards projects, in London, that the worst off in society may not be drawn towards.<sup>152</sup>

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<sup>151</sup> Rawls, *A Theory of Justice*, op. cit. p. 22

<sup>152</sup> See chapter 1 above on good causes

**FIGURE 7****FIGURE 8**

The fact that the Government is addressing problem gambling would indicate that it is (apparently) not taking a Utilitarian perspective with the changes in the gambling law. However, it remains to be seen if the changes, when introduced, do in fact lead towards greater social benefits, as this has not always been the case in other countries.

For example, the University of Illinois economist Earl Ginols calculated that 52% of casino revenues come from active problem and pathological gamblers.<sup>153</sup> Another study showed that 5% of the people who buy lottery tickets account for 50% of lottery sales, and 20% of lottery players account for 90% of the lottery sales.<sup>154</sup> In addition, a study undertaken by the Connecticut Department of Revenue in 1997 found that 47% of those interviewed were problem or pathological gamblers.<sup>155</sup> Research from the University of Minnesota estimated that 2% of gamblers account for 63% of all the money legally gambled in Minnesota.<sup>156</sup> Some research shows that gambling has a socio-economic impact that has contributed greatly to the undermining of some societies. For example, according to one study, crime rates for countries with casinos are 89% higher than the crime rates of countries without casinos.<sup>157</sup>

<sup>153</sup> E.L. Grinols and J.D. Omorov, 'Development or Dreamfield Delusions? Assessing Casino Gambling's Cost and Benefits,' *The Journal of Law and Commerce*, (Fall, 1996): 58-60.

<sup>154</sup> WEFA Group, 'A Study Concerning the Effects of Legalized Gambling on the Citizens of the State of Connecticut,' prepared for the State of Connecticut, Department of Revenue Services, Division of Special Revenue, (June 1997): 8

<sup>155</sup> T. Charles, Clotfelter and P. Cook, *State Lotteries at the Turn of the Century*, Duke University, 1999, 12

<sup>156</sup> D.J. Tice, *Big Spenders*, Saint Paul Pioneer Press, 1993

<sup>157</sup> Marlon Manual, 'New Research Suggests More Crime Near Casinos,' *Las Vegas Sun*, (June 17, 1999)

And, the total number of crimes, within a 30-mile radius of Atlantic City, increased by 107% in the nine years after casinos were introduced into the area.<sup>158</sup> While US crime rates dropped nationally in 1994 by 2%, the 31 localities that introduced casinos in 1993 saw an increase in crime of 7.7% the following year.<sup>159</sup> Also, the violent crime rate in Nevada increased by nearly 40% from 1991 to 1996. This was a period in which the national violent crime rate dropped by about 10%.<sup>160</sup>

Gambling also seems to have an affect on the flow of commerce and free enterprise. This is because it takes money away from other local businesses. For example, Stokowski found that in Atlantic City the number of independent restaurants dropped from 48 the year casinos opened to 16 in 1997. Within four years of the casinos opening, one-third of the city's retail businesses had closed. The number of retail businesses in Gilpin County, Colorado dropped from 31 before gambling to 11 within a couple of years after casinos arrived. Gilpin County houses the majority of the state's casinos.<sup>161</sup> However, there is no way to say for sure that the introduction of American style casinos in UK will have a similar impact.

We noted above that an important part of Rawls's critique of utilitarianism is based on a thought experiment, which he calls the original position. Like Kant, Rawls sees it as purely hypothetical. Individuals in the original position are supposed to be able to choose the principles of justice without prejudice because they are behind the veil of ignorance. Under this veil they do not know their position in society or their identity etc. However, as pointed out previously, Rawls' theory contains two presuppositions about risk-aversion. Firstly, that risk-taking is not rational and secondly, and because of this, persons in the original position would not gamble and would choose his principles over utilitarianism. We have already noted, in chapter 1, that there are situations when risk-taking might be the rational thing to do. We have also seen, in our

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<sup>158</sup> Andrew J. Buck, Simon Hakim and Uriel Spiegel, 'Casinos, Crime and Real Estate Values: Do They Relate?' *Journal of Research in Crime and Delinquency*, (August 1991): 295.

<sup>159</sup> Joseph P. Sharpio, 'America's Gambling Fever,' *U.S. News and World Report*, (January 15, 1996): 58, 60.

<sup>160</sup> Ed Koch, 'Nevada: Most Dangerous?' *Las Vegas Sun*, (July 16, 1997): 1A.

<sup>161</sup> Patricia A. Stokowski, *Riches and Regrets: Betting on Gambling in Two Colorado Mountain Towns*, Niwot, CO: University of Colorado Press, 1996.

research regarding the UK gambling laws, that a great many people do in fact gamble. In addition, there are some problems gamblers who may not have a choice because of their addiction. It is possible, therefore, that persons might not be as risk-adverse as Rawls supposes.

Foucault studied discourse as a system of representation. As we have seen his approach to representation was about the production of knowledge and meaning through discourse. Discourses represent objects of knowledge. We will be looking at Foucault's work in relation to discourse and knowledge, and their relation to power. And we have seen that Foucault was critical of the traditional conception of the subject as an individual, an independent core of the self as an authentic source of action and meaning. For him, it is discourse, not the subject that produces knowledge and meaning. And the production of knowledge and meaning is always related to questions around power and the body. Subject positions are formed through discourse. Subjects might differ as to their class, gender, racial characteristics etc, but they will not be able to make meaning until they have identified with those positions, which are constructed by the discourse. That is, not until they are subjected to the rules and subjects of its power/knowledge.

*So the subject of the statement should not be regarded as identical with the author of the formulation – either in substance, or in function. He is not in fact the cause;... of the written or spoken articulation of a sentence; nor is it that meaningful intention which, silently anticipating words, orders them like the visible body of its intuition ... it is a particular, vacant place that may in fact be filled by different individuals.<sup>162</sup>*

For example, as bearers of subject positions, as specific positions of identity and agency in relation to historical forms of knowledge/power, discourses constructed the identity of the homosexual according to Foucault. There have probably always been homosexual forms of behavior, but 'the homosexual' as a specific kind of social subject was produced within the moral, legal, medical and psychiatric discourses, practices and institutional apparatuses, with their particular theories of sexual perversity during the nineteenth century. *'The sodomite had been a temporary aberration; the*

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<sup>162</sup> Foucault, *Archaeology of Knowledge*, op. cit. p. 95

*homosexual was now a species.*<sup>163</sup> And there has probably always been people that gamble to excess but we are currently witnessing the construction of 'The Problem Gambler'. However, whether or not they internalize those discourses, as part of their *technologies of self*, remains to be seen.

What it means to be rich or poor, male or female, black or white, gay or straight, or Christian, Jew, or Muslim etc is related to discourse according to Foucault, but he says little in terms of how people find their way into those subject positions. Foucault has been criticized for omitting to account for how different persons enter into the various subject positions that have been constructed. '*...there is no explanation of why it may be more difficult for a woman to assume a certain authoritative speaking position than a man*'<sup>164</sup> Foucault's neglect of gender difference in his work falls short of feminist goals, according to some, and even reifies a philosophical blind spot towards women.<sup>165</sup> His philosophy has been accused of being detrimental to emancipatory projects. For example, Linda Alcoff argued that without individual agency it is impossible to resist domination.

*It is difficult to understand how agency can be formulated on this view. Given the enormous productive efficacy Foucault accords to power/knowledge or the dominant discourse, there could be agency only if human beings were given the causal ability to create, affect, and transform power/knowledge or discourses, but Foucault does not concede to us this capacity... if Foucault's analysis of subjectivity is correct, a feminist emancipatory project is in trouble*<sup>166</sup>

Although Foucault would be critical of the emphasis on emancipation or liberation models of freedom from oppression because, as we have seen, it assumes a metaphysical subject constituted independently of power relations. However, there have been attempts to overcome some of these problems. For

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<sup>163</sup> Foucault, *The Will to Knowledge*, op. cit. p. 43

<sup>164</sup> Lois McNay, *Foucault: A Critical Introduction*, Cambridge: Polity Press, 1994 p. 77; See also Brown, B. and Cousins, M. 'The Linguistic Fault: The Case of Foucault's Archaeology', *Economy and Society* 9:3 (1980): 272

<sup>165</sup> E. L. McCallum, 'Technologies of Truth and the Function of Gender,' in S. J. Hekman (Ed.) *Feminist Interpretations of Michel Foucault*, University Park: Penn State University Press, 1996, p. 90

<sup>166</sup> L. Alcoff, 'Feminist Politics and Foucault: The Limits to a Collaboration,' in L. McWhorter, op. cit. p. 75; Also see C. Dean, 'The Productive Hypothesis: Foucault, Gender, and the History of Sexuality,' *History and Theory*, 33, 3 (1994): 275

example Butler, following Foucault, and Spivak who has posited the notion of strategic essentialism, but we will look at these ideas in a later chapter.

Feminists have also been critical of Rawls. He has been criticized for his emphases on individualism. *'Liberal political theory is, with very few exceptions, deceptively individualist. It claims to have as its subject human individuals who can exist independently of each other.'*<sup>167</sup> And he has been criticized for various presupposition of inequalities based on difference which are embedded in his theory. Some take this to mean that his work is incompatible with feminism.<sup>168</sup> Others, such as Okin attempt to bring his work in line with feminism. For example, she criticizes him for not recognizing gender-based inequalities in the distribution of labour within the family setting.<sup>169</sup> Sen also criticized him for not taking problems of disability and chronic debilitating illness into account.<sup>170</sup> Perhaps Rawls was simply speaking from a particular subject position of his time.

### **Conclusion**

In this chapter we have seen that gambling has been a human activity since recorded history. But what we understand gambling and the gambler to be could be a result of its discursive formation as, according to Foucault, it was in the case of homosexuality. The fact that gambling is not understood as sinful in the current discourses reveals as much about the current episteme as it does about what gambling is. So we could say that gambling is to culture what truth is to systems of thought and what justice is to institutions and laws. So in order to better understand gambling today we need to understand the institutions and laws associated with it. In an attempt to do that, the next chapter will examine the lead up to the new Gambling Act 2005.

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<sup>167</sup> Susan Moller Okin 'Forty acres and a mule for women: Rawls and feminism Politics,' *Philosophy & Economics*, 4 (2005): 233–2. Available online at <http://ppe.sagepub.com/cgi/reprint/4/2/233.pdf> (Accessed 23 March 2006)

<sup>168</sup> See Carole Pateman, 'Feminist Critiques of the Public/Private Dichotomy,' in S. I. Benn and G. F. Gaus (Eds.) *Public and Private in Social Life*, Kent: Croom Helm, 1983.

<sup>169</sup> S.M. Okin, *Justice, Gender and the Family*, New York: Basic Books, 1989

<sup>170</sup> A. Sen, *Inequality Reexamined*, Cambridge Mass: Harvard University press, 1992

## CHAPTER 3: THE GAMBLING ACT 2005

*It soon became apparent that gambling is an activity where individual values about such matters as the nature of society and the role of the state quickly becomes paramount. We know where the limits are – complete prohibition or complete deregulation – but there are no widely acceptable principles which tell us where we should stop between the two limits. (The Budd Report)<sup>1</sup>*

### **Introduction**

In order to further examine the risk-aversion in Rawls' theory, this chapter explores the contemporary understanding of gambling by tracing the proposed changes in the UK's gambling law. Section (A) highlights one of the main reasons behind the changes in the gambling law and outlines some of the additional changes being proposed. The second section (B) follows the way that the bill has moved through parliament to become the Gambling Act 2005. Section (C) explores the arguments for and against those changes and related controversies and then in the fourth section (D) it focuses on the criteria underpinning the justification for the changes. These criteria are then examined more fully in the following sections by drawing on findings in the chapter 2. This chapter will argue that there is a correlation between Rawls' principles and the criteria underpinning the changing laws. And in addition it will suggest that not only might people in the original position be less risk averse than Rawls suggested but also that different people may have different gambling patterns and that could have an effect on the choice of principles. The last point will be examined more fully in the following chapter when it examines epistemological issues connected to the veil.

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<sup>1</sup> The Budd Report, op. cit. p. 1. On 8 December 1999 the then Home Secretary, Jack Straw, announced that he would appoint an independent body to conduct a review of the gambling laws.<sup>1</sup> This report, which was chaired by Sir Alan Budd, appeared in July 2001. This Gambling Review Report, Cm 5206 (Known as the Budd Report) was then the most substantial recent consideration of gambling regulations in the UK

## A. Gambling with technology<sup>2</sup>

In *'The Question Concerning Technology'* Heidegger argued that there is a danger and a saving power to the essence of technology. *'But where danger is, grows The saving power also...'*<sup>3</sup> He was not referring to the actual technology itself but to the essence of it – its ability to enframe. *'Technology is not equivalent to the essence of technology.'*<sup>4</sup> The danger is when modern

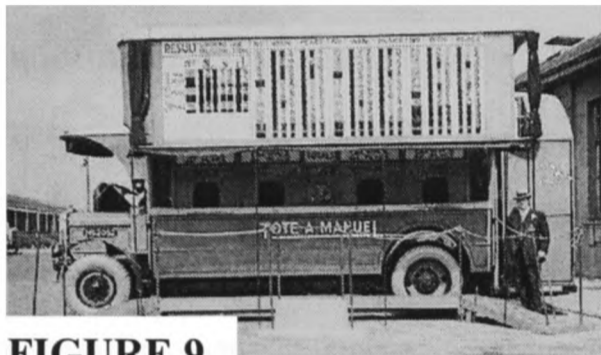


FIGURE 9

technology as enframing leads to standing reserve,<sup>5</sup> the saving power is when it reveals.<sup>6</sup> But both are connected *'Rather, precisely the essence of technology must harbor in itself the growth of the saving power.'*<sup>7</sup> The former discloses Being as standing reserve. In so doing it threatens to obliterate our awareness of the 'truth' of Being – it threatens to prevent other ways of revealing through art and thought.<sup>8</sup> However, because all revealing is through humans we have the potential to bear witness to the unconcealment inherent in seeing the world as standing reserve. We do this by recognizing the dangers of that type of technological disclosure. Heidegger's understanding of the essence of technology will be continued below but this section is primarily concerned with a different understanding of technology and its central place in the new Gambling laws.

Debates continue over whether or not the new technologies will enhance or destroy democracy.<sup>9</sup> Differing answers focus on a variety of topics that include the public sphere,<sup>10</sup> surveillance,<sup>11</sup> participation,<sup>12</sup> campaigning,<sup>13</sup>

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<sup>2</sup> Figure 9 below is The 'Tote-A-Manuel' from 1929. Title: Totalisator. Copyright: Getty Images. From <http://edina.ac.uk/eig/> (Accessed 23 March 2006)

<sup>3</sup> M. Heidegger, 'The Question Concerning Technology' in *Basic Writings*, London: Routledge, 1996, p. 333. Heidegger took this line from Holderin. See p. 340

<sup>4</sup> Ibid. 311-312

<sup>5</sup> Ibid. 324

<sup>6</sup> Ibid. 330

<sup>7</sup> Ibid. 334

<sup>8</sup> Ibid. 338-341

<sup>9</sup> See A. Chadwick, *Internet Politics*, Oxford: OUP, 2006, Part 3, Chapters 10 & 11.

<sup>10</sup> I. Dahlberg, 'The Internet and Democratic Discourse. Exploring the Prospects of Online Deliberative Forums Extending the Public Sphere,' *Information Communication and Society* 4, 1 (2001): 615-33

<sup>11</sup> C. Norris & G. Armstrong, *The Maximum Surveillance Society: the rise of CCTV*, Oxford: Berg Publishers, 1999



electronic voting<sup>14</sup> and more recently, blogging.<sup>15</sup> The introduction of previous developments such as radio and television spawned related debates.<sup>16</sup> It has been argued that in many areas the political processes have not kept pace with the way that the new technologies have affected the way we live.<sup>17</sup> This criticism is very relevant in relation to the contemporary gambling industry in the UK and elsewhere. That is because developments in the new technologies and the accompanying changes in habits have been behind calls to update the gambling laws. However, as we will see, technology is not the only reason as issues concerning tax, advertising, investment and social costs have also fuelled the debates.

The wide spread use of the Internet and the ability to gamble online are the main reasons given for why there have been calls to update gambling laws in the UK. Developments in technologies such as mobile phones, digital TV and the Internet have created borderless environments for playing the new games.<sup>18</sup> However, borders still exist for the UK's gambling industry, which, due to the current law, are prevented from offering online gambling. According to this argument, a reform in the law is required because many of the current gambling laws were written before the widespread use of computers and the Internet. Secretary of State for Culture, Media and Sport Tessa Jowell stated that: *'Internet gambling and roulette machines in bookmakers are just two examples*

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<sup>12</sup> UK Electoral Commission, *The Shape of Elections to Come*, London: UK Electoral Commission, 31 July 2003

<sup>13</sup> B. Bimber and R. Davis, *Campaigning online: The internet in the US elections*, New York: OUP, 2003; S. Ward, R. Gibson, P. Nixon, (Eds.) *Net Gain? Political Parties and the Impact of the Internet*, London: Routledge, 2003

<sup>14</sup> S. Coleman, 'Elections in the 21<sup>st</sup> century: from paper ballot to e-voting. Independent Commission on Alternative voting Methods. London: Electoral Reform Society, 2002; N. Kersting and H. Baldersheim (Eds.) *Electronic Voting and Democracy: A Comparative Analysis*, Palgrave Macmillan, 2005.

<sup>15</sup> Blogging is becoming popular in the USA but is only in its infancy in the UK according to presenters at a recent conference. James Stanyer and Tim Sansom, 'The Hype and Reality of Campaign Blogging: an Analysis of Bloggs during the 2005 British General Election Campaign', A paper presented to the PSA Media and Politics Specialist Group Conference: *Media, Politics and popular Culture*. University of East Anglia, Norwich, 11-12 (November, 2005)

<sup>16</sup> A. Smith (Ed.) *Television and Political Life: Studies in Six European Countries*, London: Macmillan, 1979; Barrie Gunter, Michael Svennevig, and Mallory Wober, *Television Coverage of the 1983 General Election: Audiences, Appreciation, and Public Opinion*, London: Gower, 1986; B. Franklin, *Televising Democracies*, London: Routledge, 1992

<sup>17</sup> A. Painter and B. Wardle, *Viral politics: communication in the new media era*, London: Politico's, 2001

<sup>18</sup> Philip Ward, House of Commons Research Paper 04/79 (28 October 2004) *The Gambling Bill 163 of 2003-04*, House of Commons Library. p.7 Available online at <http://www.parliament.uk/commons/lib/research/rp2004/rp04-079.pdf> (Accessed 25/1/05)

*of where laws introduced nearly 10 years before the first home computer hit the shelves are no longer able to protect children or vulnerable people properly.*'<sup>19</sup>

It is hoped that the new laws will bridge the gap between those technological developments and the current law.

Under section 12 of the Gaming Act 1968, *'gamblers must be present on the premises in order to take part in the gaming. Participation by post or proxy is forbidden.'*<sup>20</sup> This law does not prevent British residents from gambling because the Internet, which transcends the UK nation-state laws, allows them to click on non-UK based gambling websites.<sup>21</sup> However, it does prevent UK based companies from operating Internet gambling sites because under this law *'no licence could be obtained by an operator who wished to offer Internet gaming.'*<sup>22</sup> A simple way to remedy the situation would be the removal of restriction under section 12. However, there are other issues involved that seem to be the driving force behind the more extensive re-writes of the UK's gambling laws. And many of these issues tend to challenge the argument that it is technology itself that is the problem. Whether or not the issues are related to Heidegger's understanding of the essence of technology will be addressed in a later chapter.

The main reasons given for updating the laws are to protect children, the vulnerable and problem gamblers from Internet gambling. However, there is also the need to protect government revenues. And this need is apparent in relation to changes concerning advertising and betting exchanges. This section will not go into any great detail here, as those issues will be dealt with below, but it will just briefly mention two things that will clarify the point. Firstly, in the March 2001 budget Gordon Brown announced that by January 1, 2002, the

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<sup>19</sup> Available online at <http://www.publications.parliament.uk/pa/cm200304/cmbills/163/04163.1-4.html#j400> (Accessed 14/7/05)

<sup>20</sup> Almost all of the relevant British gambling legislation pre-dates the Internet and the existing law impinges on Internet gambling in ways which were unintended and unforeseen. However, bookmakers have for many years been able to accept telephone bets from clients with credit accounts. Therefore, they should be able to accept such bets by e-mail. Football pools have always been able to accept entries by post and could therefore also use e-mail. However, anyone setting up an Internet betting service in Great Britain must currently hold a bookmaking permit from the local licensing magistrates.

<sup>21</sup> *'Internet gambling is already widely available to UK residents, although gaming (as opposed to betting) services cannot legally be provided by UK-based operators'* Budd Report Section 1.34. The issue of the difference between gaming and betting was noted above in the Chapter on Gambling and Foucault

<sup>22</sup> The Department for Culture, Media and Sport. Available online at [http://www.culture.gov.uk/gambling\\_and\\_racing/fact\\_sheets/fact\\_internet\\_gambling.htm](http://www.culture.gov.uk/gambling_and_racing/fact_sheets/fact_internet_gambling.htm) (Accessed 25/7/05)

current tax on betting stakes would be replaced with a tax on bookmakers. The previous General Betting Duty of 6.75 per cent on total stakes would be replaced with a 15 per cent tax on bookmaker's gross profits. The gross profit is the difference between the wagers placed with them by the punters and the winnings that the bookmakers pay out. When a punter places a bet with a bookmaker they are charged an extra 9 per cent. The 6.75 per cent of this is tax and then the bookmaker's charge on top brings it up to a total of 9 per cent. However, most online gambling sites charge no tax at all. They get around the tax problem by basing their business offshore. For example Ladbrokes International is based in Gibraltar, VIP in the Dutch Antilles and William Hill International in Antigua.

The 15% on gross profits, which replaced the 9%, gained such support by the gambling industry that the government decided to introduce it three months earlier. It was also later extended to cover Bingo.<sup>23</sup> The new system was introduced on Saturday, 6 October. Financial Secretary Paul Boateng comments that

*The old tax on punters has been in place almost unchanged since 1966. But we realised it was not going to work in the 21st century and would mean UK-based bookmakers losing out on the global betting market. Our reforms mean punters will get tax-free betting, bookmakers will see increased turnover, and both racing and Government revenues will share in the benefits.*

And these changes were welcomed by the betting industry. For example, John Brown, Chairman of William Hill, said that *'The Government is to be congratulated on the speedy implementation of the Chancellor's initiative. We will be ready on the day for every bet we take worldwide to come back the UK.* According to Bob Scott, the Chief Executive of Coral Eurobet, *'This will be the biggest day in the history of betting... .... This represents a major investment by the Government in the betting industry.'* Alan Ross, the Managing Director of Ladbrokes, added that *'Every betting customer should thank the Government and put the date of October 6th into their diary as this marks the beginning of a*

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<sup>23</sup> See *The Modernization of Gambling Taxes: Consultation on the Abolition of Bingo Duty* From the HM Customs and Excise website ([www.hmce.gov.uk](http://www.hmce.gov.uk)) The Scotland Office supported the Secretary of State for Scotland and the Parliamentary Under Secretary. For more details see <http://www.scotlandoffice.gov.uk/our-communications/release.php?id=3298> (Accessed 23 March 2006)

*new era for the industry.*’ And Warwick Bartlett, the Chairman of the British Betting Offices Association, said that

*The onus is now on the betting industry to deliver and make the UK a centre for global gambling. We have already received enquiries from the US, Canada, Australia, Japan, the Netherlands and Sweden from bookmakers interested in coming to the UK as a result of the introduction of a gross profits tax.*<sup>24</sup>

Those responses highlighted the issue of offshore gambling locations in relation to advertising and why other changes to the gambling laws are being introduced. Under the law prior to the Gambling Act 2005 online gambling business that do not charge tax are only allowed to advertise their services online. However, Ladbrokes got around that problem by paying the tax on its Bet.co.uk site (which is now located at <http://www.ladbrokes.com/home/en/>)<sup>25</sup> instead of charging the customers. That meant that Ladbrokes was able to promote the service by advertising in daily newspapers and the underground etc. (See Figure 10).<sup>26</sup> However, when punters went to the Bet.co.uk home page they found a link to the international Ladbrokes site at [www.ladbrokes.com](http://www.ladbrokes.com). Now it just takes them directly to the offshore site at [www.ladbrokes.com/home/en/](http://www.ladbrokes.com/home/en/).<sup>27</sup> On that page they can read how, according to Ladbrokes, they can influence public policy.

*Ladbrokes.com is part of Ladbrokes plc. Ladbrokes plc also operates: 2200 betting shops in the UK, Ireland and Belgium. Ladbrokes has led the way in not only meeting the most stringent licensing criteria for these various legal jurisdictions, but also influencing the guidelines to promote higher standards for consumers. No name delivers you greater reassurance than Ladbrokes.*

Hill offered a similar deal at [www.williamhill.co.uk](http://www.williamhill.co.uk). As soon as the punter hit the home page an audio message told them how to get to the international site at [www.willhill.com](http://www.willhill.com) where they could engage in permanent tax-free betting. The change in the tax law will mean that those companies can

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<sup>24</sup>The above quotes come from the HM Treasury web site at [http://www.hm-treasury.gov.uk/newsroom\\_and\\_speeches/press/2001/press\\_81\\_01.cfm](http://www.hm-treasury.gov.uk/newsroom_and_speeches/press/2001/press_81_01.cfm) (Published 13 July 2001. (Accessed 24 April 2003)

<sup>25</sup> Accessed 23/7/06

<sup>26</sup> Figure 10. The writing reads [Ladbrokespoker.com](http://Ladbrokespoker.com).

<sup>27</sup> Accessed 23/7/06

**FIGURE 10**



advertise those new tax laws did not cover Internet casino type gambling. As the gambling industry is expanding more and more into these new types of games they might need to be located offshore. Hence the need to update the laws in order to keep them at home so the government can collect its revenue in return for allowing them to advertise the new products.

The other issue has to do with exchange betting which would not be possible without the Internet. Mr Griffiths described how betting exchanges operate in paragraph 7, of a court case between The Queen on the Application of Sporting Options plc. and The Horserace Betting Levy Board.<sup>28</sup>

*In the past three years, a completely new form of betting business has been developed known as "bet brokers" or "betting exchanges". With a betting exchange, the business does not enter into the bet with the better at all, but merely facilitates the better to enter into a bet with another person, unrelated to the business. When a better seeks to enter into a bet, he can do so either as a "backer", that is betting that a particular outcome will occur, or as a "layer", that is betting that a particular outcome will not occur. In this way, the backer enters into the traditional role of the gambler and the layer enters into the traditional role of the bookmaker. Accordingly, the betting exchange business takes no risk in the bet. The risk lies between the backer and the layer. The betting exchange makes its money solely by charging commission on the winner of the bet [whether backer or layer] for having brokered the transaction by introducing the backer and the layer to each other.*

The issue of exchange betting was highlighted in a recent case concerning the former champion jockey Kieren Fallon. He was charged as part of a criminal inquiry into alleged race-fixing. He and other jockeys Fergal Lynch and Darren Williams were accused of conspiring to defraud customers of online betting exchange Betfair.<sup>29</sup>

In this chapter we will see how advertising, exchange betting and other innovation are related to changes in the gambling law. We will also examine other related issues around tourism, rejuvenation, problem gambling and how

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<sup>28</sup> Available online at <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2003/1943.html&query=sporting+options&method=any> the exchange betting case (Accessed 7/7/2006)

<sup>29</sup> Story from BBC NEWS:<http://news.bbc.co.uk/go/pr/fr/-/1/hi/business/5144856.stm> (Accessed 4/7/2006)

they relate to Rawls' theory. However, in order to place these issues in context the next section will briefly outline some of the main stages as the gambling bill has wound its way through parliament to become The Gambling Act 2005.

### ***B. Trailing the Bill***

On the 8<sup>th</sup> December 1999 the then Home Secretary, Jack Straw, announced that he would appoint an independent body to conduct a review of the gambling laws.<sup>30</sup> This report, which was chaired by Sir Alan Budd, appeared in July 2001. This Gambling Review Report Cm 5206 (known as the Budd Report) was then the most substantial recent consideration of gambling regulations in the UK. The last major review of the gambling laws in the UK, prior to the Budd Report, took place in 1977-78 and was led by Lord Rothschild.<sup>31</sup> Other reviews and Acts include those of 1976, 1968, 1963, and 1960.

A main focus of the 1960 Betting and Gaming Act was to increase individual liberty by attempting to liberalise the law on gambling so that those wanting to indulge could do so. That Act attempted to prohibit commercial exploitation of gaming by preventing levies being taken from the stakes. Part of that Act also provided for the establishment of licensed cash betting offices. However, there was a loophole in the law that allowed clubs to recover the costs of the facilities they provided (not dissimilar to the charges in exchange betting). This loophole was being exploited and within five years the development of commercial gaming was out of control. The Gambling Review report stated, '*unscrupulous operators were taking advantage of customers, and criminal involvement in gambling was rife. The Gaming Act 1968 was passed to restore order*'.<sup>32</sup> At that time gambling was seen as a sin to be tolerated but not encouraged.<sup>33</sup> The Royal Commission under the leadership of Lord Rothschild conducted a later review between 1976 and 1978.<sup>34</sup> In this review gambling was

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<sup>30</sup> HC Debs 8 December 1999 volume col 534W

<sup>31</sup> Rothschild Commission (July 1978) Royal Commission on Gambling: Final Report, Cmnd, 7200, London: Stationary Office.

<sup>32</sup> The Budd Report, op. cit. p. 69

<sup>33</sup> Carl Rohsler and Shannon Yavorsky, 'Draft Gambling Bill: Overview,' *Entertainment Law Review* (July 2004):195

<sup>34</sup> Rothschild Commission, op. cit.

no longer considered to be a sin but there was an emphasis on limiting unstimulated demand.

*To support broadly the principle that the facilities offered should respond only to 'unstimulated demand' ..... People should not be pestered: they should not be distracted from their real work, even if betting at appropriate times boosts the morale of those engaged in repetitive or otherwise uncongenial tasks (as the late Ernest Bevin is said to have believed)<sup>35</sup>*

The Budd report recommended 176 changes to the gambling law and regulations. However, following the transfer of responsibility for gambling from the Home Office to the Department for Culture, Media and Sport, a response was not given until March 2002 when the Government published its response to this report in '*A Safe Bet for Success*'.<sup>36</sup> In its response the government accepted 157 of the review body's recommendations; 10 were felt to require further consideration, and 9 were rejected. Of particular importance was that the recommendation relating to 'unstimulated demand' was not rejected.

As well as acknowledging the limits of the law in relation to new technologies, the Budd Report made recommendations such as having an independent Trust set up and provided with voluntary funding of £3 million per annum by the gambling industry, to research and limit problem gambling.<sup>37</sup> In the later White Paper the government accepted the need for further research into problem gambling, as it needed to be able to estimate the balance between gains and losses for when the new laws are introduced.<sup>38</sup> This recommendation was implemented in January 2002. Originally known as the Gambling Industry Charitable Trust, The Responsibility in Gambling Trust (as it is now known) was established on a voluntary basis by the gambling industry.<sup>39</sup> Professor Jonathan Wolff, a Reader in Philosophy and Head of Department at University College London, is one of the trustees.

Other Draft legislation was published in stages beginning in July 2003

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<sup>35</sup> Ibid

<sup>36</sup> A safe bet for success – modernising Britain's gambling laws, op. cit.

<sup>37</sup> The Budd Report, op. cit. p. 176 para 32.29

<sup>38</sup> A safe bet for success – modernising Britain's gambling laws, op. cit. p.32 para 7.14

<sup>39</sup> Available online at <http://www.rigt.org.uk/about.asp> (Accessed 11/7/05)

with Cm 5878. This was mainly concerned with the new licensing regime. Cm 6014-1 followed in November 2003. In July 2003 a joint committee of both houses was established to submit a draft Bill to a pre-legislative scrutiny. This was the Joint Committee on the Draft Gambling Bill, Report, 3 vols. HL 63/HC 139, 7 April 2004. The Government's response to this joint committee appeared on the 14 June 2004 Cm 625. This report aroused concerns in parliament and the scrutiny committee was reappointed HL Deb 22 June 2004 c1234. They delivered their report on 22 July HL 146-1/HC 843-1. The Joint Committee included members of the House of Commons and House of Lords and was chaired by John Greenway MP. Throughout this time a number of additional clauses were added. For example, on the 5<sup>th</sup> February 2004 extra clauses were included to cover gambling in alcohol licensed premises, gambling in members' clubs, commercial clubs and miners' welfare institutes, gambling commission powers to void unfair bets,<sup>40</sup> provisions allowing for the enforcement of contracts related to gambling and a revised offence of cheating. Clauses added on the 12<sup>th</sup> March were restrictions on the provision of credit and inducements by gambling operators, prohibitions on the use of credit cards in relation to gambling and the prohibition of chain gifting schemes.<sup>41</sup>

On 22 September 2004, the Government published its response to the First Report of the Joint Committee on the draft Gambling Bill (Regional Casinos). The new Bill was introduced into the House of Commons on 18 October 2004 and published on the 19<sup>th</sup>. It had its second reading 1 November 2004. The Gambling Bill was passed to a special committee of lawmakers for further scrutiny before facing a further vote in the Commons. The Gambling Bill went before the House on the 24<sup>th</sup> January 2005 for its Report Stage and its third and final reading. This was the stage that the House looked at the changes made in the committee and then voted to pass the Bill allowing it to begin its journey through the Lords.

The new gambling Bill proposed a reform of the gambling laws that will not only bring the law up to date with the new technologies but will also have a major impact on the way casinos are regulated. Some of the key proposals in the

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<sup>40</sup> This one is related to betting exchanges, mentioned above, and will be discussed in more detail below

<sup>41</sup> Additional information available online at [http://www.culture.gov.uk/gambling\\_and\\_racing/draftgamblingbill.htm](http://www.culture.gov.uk/gambling_and_racing/draftgamblingbill.htm) (Accessed 13/1/06)



Bill included: (a) abolition of the 24-hour membership rule. 'Under the present law casinos have to operate as members clubs so that only members and their guests can enter'.<sup>42</sup> Applications for memberships take at least 24 hours to be processed.<sup>43</sup> (b) The abolition of the 'permitted areas' status,<sup>44</sup> (c) abolition of the 'demand' test for casinos (d) and the potential for 'resort' casinos. These new proposals have fuelled continuing debates. Throughout this process there has been much speculation and commentary in the media.<sup>45</sup> During this research the author was unable to locate any arguments against the need to update the laws in relation to the new technologies. However, there were many other criticisms and these will be discussed below.

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<sup>42</sup> Speech by Minister for Gambling Regulation, Andrew McIntosh to the Casinos and the Future Leisure Market conference, 27 October. Available online at [http://www.culture.gov.uk/global/press\\_notices/archive\\_2004/dcms144\\_04.htm?properties=archive%5F2004%2C%2Fgambling%5Fand%5Ffracing%2Fquicklinks%2Fpress%5Fnotices%2Fdefault%2C&month=](http://www.culture.gov.uk/global/press_notices/archive_2004/dcms144_04.htm?properties=archive%5F2004%2C%2Fgambling%5Fand%5Ffracing%2Fquicklinks%2Fpress%5Fnotices%2Fdefault%2C&month=) (Accessed 21/2/05)

<sup>43</sup> In the past one would have to pick up an application form from the casino, or fill it in there, and then wait 24 hours before being able to play any of the games. They can now become a member of some casinos online. They could join any of the Gala group casinos by going to this address at <http://www.galacasinos.co.uk/join.asp>. After 24 hours they, and up to six guests, would be able to enter the casino. (Due to new EU legislation, guests are allowed one visit to the Casino before ID must be shown). In December 2000, the Gala Group acquired 28 Ladbroke casinos and changed its name to Gala Casinos. On 4th October 2001 it had 1.2 million members. That acquisition made Gala the fastest growing retail gaming company in the UK. It had an annual turnover of £395 million and over 10,000 employees. In addition, Gala is the largest multi-site machine operator in Europe, with over 7,000 fruit machines and approximately 78,000 mechanised cash bingo units. It has 165 bingo clubs around the UK, and 5 million members. Gala casinos are located in Aberdeen, Birmingham, Bournemouth, Bradford, Bristol, Dundee, Edinburgh, Glasgow, Hull, Isle Of Man, Leeds, London, Northampton, Nottingham, Stickport, Sunderland, Teesside, Wolverhampton. Casinos in London include Russell Square, Piccadilly, Baker Street, Queensway, and Tottenham Court Road (Information taken from the Gala website)

<sup>44</sup> The Gaming Act 1968 regulates casinos in Great Britain. There were 126 casinos in England, Scotland and Wales at the end of March 2003. The Government does not restrict the number of licences, but casinos can be located only in certain areas of the country known as 'permitted areas'. The existing permitted areas are London: that area which is within the area specified in the licensing (Metropolitan Special Hours Area) Order 1961 - plus the City of Westminster and the Royal Borough of Kensington and Chelsea. Other areas include Aberdeen, Birkenhead, Birmingham, Blackpool, Bolton, Bournemouth, Bradford, Brighton, Bristol, Cardiff, Coventry, Derby, Dudley, Dundee, Edinburgh, Glasgow, Great Yarmouth, Hove, Huddersfield, Kingston upon Hull, Leeds, Leicester, Liverpool, Luton, Lytham St Annes, Manchester, Margate, Newcastle Upon Tyne, Northampton, Nottingham, Plymouth Porstmouth, Ramsgate, Reading, Ryde, Salford, Sandown/Shanklin, Scarborough, Sheffield, Southampton, Southend-on-Sea, Southport, Stockport, Stoke-on-Trent Sunderland, Swansea, Teesside/Middlesborough Torbay, Walsall, Warley, West Bromwich, Wolverhampton. Further information available online at The Department for Culture, Media and Sport website, op. cit.

<sup>45</sup> 'Gaming plans dealt a blow', *Sunday Times*, 8 February 2004, p32; Michael White, 'Jowell seeks to pacify casino bill critics', *Guardian*, 2 March 2004, p11; 'Hundreds of thousands face gambling addiction if Vegas comes to Britain' *Daily Mail*, 15 October 2004, p19; 'Jackpot curbs hit UK casinos', *Times*, 20 June 2004, p11; E. Johnson, 'British Gambling Bill That Would Permit Las Vegas-Style Casinos Clears Big Parliamentary Hurdle,' *Australian Associated Press*, (Monday November 1) Available online at <http://aap.com.au/>

Labour MP for St Helens South, Shaun Woodward, sat on the committee that scrutinized the Bill from November 2004. On his Blog<sup>46</sup> he has summarised some of the changes that occurred since it had its first reading. These include: Regional, large and small casinos will be limited to eight each; Pilot areas will be decided by government on advice of an independent panel; Local authorities will retain their right to blanket ban any developments in their area; and The Gambling Commission will assess the impact of new casinos not less than three years after first licence is granted; Only following a debate and a vote in both Houses can Parliament increase the number of casinos over and above the initial pilot; Existing casinos can only increase their activities if they are located in a pilot area and their application for a new premises licence has been accepted by the local authority.

He added that the Bill also establishes a number of protectionist measures which include: A new UK-wide Gambling Commission, the removal of over 6,000 fruit machines that children currently have access to, a compulsory age-check for all online sites operating out of the UK, studies to be made by the Gambling Commission every 3 years into problem gambling and high-priced slot machines will only be allowed in the piloted regional casinos. According to him, the changes which have occurred to the Bill, which has been under pre-legislative scrutiny as well as the standard scrutiny offered by the Standing Committee, *'have strengthened the Bill's capacity to protect the public, children and those who fancy a flutter whilst ensuring much needed regeneration for some areas.'*

There have been many debates and controversies since then, and now only one Regional casino will be allowed. Greenwich was one area that was bidding for the licence to run the regional casino. Other venues include Blackpool, Cardiff, Glasgow, Manchester, Newcastle and Sheffield. If it had been successful Greenwich would have housed the so called super casino in the Millennium Dome which has changed name to O2 since being bought by Philip Anschutz. Anschutz is the owner of Anschutz Entertainment Group (AEG).<sup>47</sup>

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<sup>46</sup>Available online at [http://www.shawnwoodward.com/go/Article\\_387.html;jSessionid=aYANRIBoF0nd](http://www.shawnwoodward.com/go/Article_387.html;jSessionid=aYANRIBoF0nd) (Accessed 23 March 2006)

<sup>47</sup> AEG is a major leading sports and entertainment presenter in the world. It is owned by the Anschutz Corporation, which owns or controls a number of companies including STAPLES Center, The Forum (as exclusive booking agent for sports and entertainment programming),

The following quote was taken from the O2 website on the 15<sup>th</sup> of April 2006, which was a few months before the relationship between Anschutz and Prescott was revealed in the news.<sup>48</sup>

*The centerpiece of The O2 is the 23,000 capacity arena which will provide London with the state-of-the-art major venue it deserves. With its comfortable, flexible seating, flawless sightlines, perfect acoustics and impeccable service, the guest experience will be unlike anything previously known in Europe. The O2 arena is guaranteed to attract a similar galaxy of stars to other AEG worldwide venues, including U2, Sir Elton John, Justin Timberlake and Luciano Pavarotti. It will also host both the 2009 Artistic Gymnastics World Championships, and the 2012 Olympic Gymnastics and basketball events. The entertainment District will consist of a sustainable mix of daytime and night time attractions, including a live music club, 1800-seat theatre, flexible exhibition space, deluxe multi-screen cinema, restaurants, cafes and bars, London regional casino. \*Subject to gaming licence.*<sup>49</sup>

John Prescott, the deputy prime minister, faced questions from other MPs about a stay he had at the Colorado ranch of Philip Anschutz. Prescott apparently stayed at the ranch during a trip to America with his officials sometime between July 17 and 26. This was during the time that Anschutz was lobbying the government to allow a super casino in the Dome. Prescott, who denied that there was any conflict of interest, said that he had not discussed government business. He said that the discussions included the abolition of slavery. *'My contact with Philip Anschutz relates solely to the Dome post-sale in terms of the regeneration of the area and Mr. Anschutz's interest in William Wilberforce, a former Hull MP and slavery abolitionist about whom Mr. Anschutz is making a film, as I am personally involved in the 2007 abolition*

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Toyota Sports Center, NOKIA Theatre Times Square, NOKIA Theatre at Grand Prairie and London's Manchester Evening News Arena. It has sports franchises including the Los Angeles Kings (NHL), Los Angeles Riptide (MLL), Manchester Monarchs (AHL), Reading Royals (ECHL), Chicago Fire, DC United, Houston Dynamo, Los Angeles Galaxy and (New York/New Jersey), two hockey franchises operated in Europe, the Hammarby (Sweden) Futbol Club and management of shares of the Los Angeles Lakers (NBA) and Los Angeles Sparks (WNBA) and owned by Philip Anschutz. AEG Marketing, is a sponsorship, sales, naming rights and consulting company; AEG Merchandising is a multi-faceted merchandising company. AEG Creative is a full-service marketing and advertising agency.

<sup>48</sup> That quote was still on their website on the 23<sup>rd</sup> September 2006

<sup>49</sup> Available online at [http://www.theo2.co.uk/vision\\_2.html](http://www.theo2.co.uk/vision_2.html) (Accessed 23 March 2007)

*bicentenary.*<sup>50</sup>

Professor Crow, who is the head of the Casino Advisory Panel, said that John Prescott's stay at Dome owner Philip Anschutz's ranch would not influence his decision. In addition, referring to the news that work had already begun on the Dome, he acknowledged that AEG was building the shell of its proposed super-casino before it had a license to operate it. London mayor Ken Livingstone said that it was understandable that AEG should have begun such preparations during its wider redevelopment of the Dome site, next to the River Thames. *'In building all the stuff that will happen in the Dome with or without a casino, they'd be mad not to put all the shell in.'* Since then, AEG has warned that the building of two hotels and a theatre seating 1,800 people *'will be abandoned if it does not win the right to run the super-casino.'*<sup>51</sup> However, Greenwich did not win the bid as it went to Manchester.

This gambling bill, which was eventually passed in April 2005, will not come fully into force until September 2007.<sup>52</sup> For that reason, an assessment of the impact of the new gambling laws is outside the scope of this present study. However, this thesis will draw on research following changes in the gambling laws of other countries. And, as we will see, new attitudes towards gambling are not restricted to the UK because interest in gambling is spreading throughout the West. And along with that interest there is also opposition.

### ***C. Issues with the Bill and the Dome***

There have been many issues and controversies connected to the proposed changes to the gambling law in the UK. Opponents of the new Bill, from both a secular and religious viewpoint, have argued against it for a number of reasons which include that 'the Bill has been rushed through', 'casinos will appear on every High Street against the will of local people', 'there will be up to 250 new super casinos', 'the Bill is driven by a desire to raise tax', 'the Government hasn't learnt from Australia's failed deregulation', 'the Bill will open a door to organised crime', 'problem gambling will double after the Bill',

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<sup>50</sup> Thomas Jon Ungoed, *The Sunday Times* (July 02, 2006)

<sup>51</sup> BBC NEWS, Available online at [http://news.bbc.co.uk/go/pr/fr/-/1/hi/uk\\_politics/5301072.stm](http://news.bbc.co.uk/go/pr/fr/-/1/hi/uk_politics/5301072.stm) 2006/08/31 (Accessed 5/9/2006)

<sup>52</sup> A copy of the new Gambling Act is available online at <http://www.opsi.gov.uk/acts/acts2005/20050019.htm> (Accessed 23/2/06)

'the Government hasn't listened', 'faith groups, children's charities and groups concerned with problem gambling are against the Bill.'<sup>53</sup> Many of these objections came from correspondence from private individuals, Religious groups, MP's, various companies, and institutions, during the consultation period from 26 November 2003 – 28 February 2004.<sup>54</sup> While these arguments do not criticize the need to reform the Bill, in relation to the new technologies, they do address a number of related key issues in political philosophy. And embedded within these criticisms there is a strong request for more research. And as we will see, there is some interesting correspondence about the possibility of a casino at the Dome. It is interesting because it was dated from the 11<sup>th</sup> of July 2003.<sup>55</sup>

Tom Kelly chief executive ABB (Association of British Bookmakers), in his response to the invitation of the Joint Committee to comment on the draft

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<sup>53</sup>Department for Culture, Media and Sport

[http://www.culture.gov.uk/global/press\\_notices/archive\\_2004/Lord\\_McIntosh\\_Speech\\_27\\_October\\_2004.htm?properties=archive%5F2004%2C%2Fgambling%5Fand%5Ffracing%2FQuickLinks%2Fpress%5Fnotices%2Fdefault%2C&month=](http://www.culture.gov.uk/global/press_notices/archive_2004/Lord_McIntosh_Speech_27_October_2004.htm?properties=archive%5F2004%2C%2Fgambling%5Fand%5Ffracing%2FQuickLinks%2Fpress%5Fnotices%2Fdefault%2C&month=) (Accessed 13/5/05)

<sup>54</sup> Copies of these letters and others can be found linked to the following website.

[http://www.culture.gov.uk/draft\\_gambling\\_bill/draft\\_gambling\\_bill\\_consresponses.html](http://www.culture.gov.uk/draft_gambling_bill/draft_gambling_bill_consresponses.html) (Accessed 15/5/05). Correspondence from individuals and companies include: W. Ball, W. Bliss, M. Byrne, E. Clements, P. Conway, J. Cosgrove, R. Cranston QC MP, W. Crofts, J. Cruse, B. Cullis, I. Davies, Sylvia Eden, E. Etches, J. Frost, M. Hancock CBE MP, M. Harper, J. Harris, C. Heal, S. Hoyle, H. Hughes, J. Hughes, P. Hughes, A. Hunt, D. Jelfs, F. Johnson, L. Kamm, J. Kilburn, B. Knowles, M. Koldijk, E. Llywd MP, I. Mardle, D. Meneer, D. Middleton, D. Moss, P. O'Neil, J. Overton, E. Peak, G. Peak, P. Perrins, A. Poole, J. Ram, K. Reader, K. Roeber, P. Rogers, L. Ross, D. Saunders, A. Shaw, S. Shaw, H. Shipley, R. Simmonite, J. Singh, S. Smith, C. Stewart, D. Stewart, D. Still, M. Taylor, M. Thomas, M. Todd, K. Trehearn, W. Underwood, B. Walker, J. Walker, N. Webster, B. Williams, and B. Williams. Advertising Standards Authority, Alderney Gambling Control Commission, Ameristar casinos, Arun District Council, Association of British Bookmakers (ABB), Association of Chief Police Officers in Scotland (ACPOS), Association of Licensed Multiple Retailers (ALMR), Bell Stores, Big Hearted Scoland, Bingo Association, British Beer & Pub Association (BBPA), British Casino Association, British Horseracing Board, Business In Sport & Leisure (BISL), Camelot Foundation, Camelot Group, Carlton Clubs, Casino Machine Manufacturers Group, Casino Operators Association of the UK, Celador Productions Limited, Cherwell District Council, Christian Institute, CIBC, City of Westminster, Denbighshire County Council, Everton Football Club Company LTD, GAMCARE, Hospice of St Mary of Furness, Institute of Licensing, Institute of Sales Promotion Ltd, Interactive Gaming Gambling and Betting Association, Jockey Club, Kerzner International UK Gaming Division, Ladbrokes Worldwide, Law Society of Scotland, LCI Plc, Leisure Link, London Borough of Newham, London First Centre. LOROS Lotteries Ltd, Lotteries Council, Mac Autos, MGM Mirage, Mid-Beds District Council, Mobile Broadband Group, Morning Noon Night, News International Ltd, Newspaper Society, Northwest Development Agency, Oxford City Council, Paddy Power Plc, Periodical Publishers Association, Quaker Action on Alcohol and Drugs, Rank Group Plc, Reading FC Lottery, Rural Shops Alliance (ViRSA), Salvation Army, Salvation Army, Stockton-on-tees Borough Council, Tenpin Bowling Proprietors Association GB (TBPA), Technical Systems Testing, Justices Clerks Society, TLC Lottery, T-HP Leisure, and World Bet Exchange.

<sup>55</sup> There is a copy of this correspondence in the Appendix

Gambling Bill said that he *'Supports the Government's aim of modernising gambling legislation in a manner that will facilitate quick and appropriate responses to technological advances'* but he argued that there is a need to distinguish between gaming and gambling.<sup>56</sup> During the Examination of Witnesses Questions 20-39, with Mr. Paul Bellringer OBE, Ms Rachel Lampard, Professor Orford, Mr Peter Collins and Bishop of Blackburn on Tuesday 11 June 2002, in the Consultation period Mr. Peter Collins said that *'the most striking thing about problem gambling, as emphasized in the Budd Report, is how little we know about it, how inadequate the research is and how much more research needs to be done. .... I think one of the things that research needs to do is to understand normal gambling, or non-problematic gambling, much better.'*<sup>57</sup>

Section 42 of the UK Gaming Act 1978, which covers advertising, does not prevent gambling companies based offshore from advertising their products providing that the advertisements are not generated in the UK. But advertisements for offshore operations that are generated in the UK are illegal. In opposition to the 1978 Act the Budd Report of 2001 recommend that advertising should be permitted (22.24).<sup>58</sup> However, they recommended that only on-line gambling sites licensed by the Gambling Commission should be allowed to advertise their products in Great Britain (30.40).<sup>59</sup> This would give UK based companies a competitive edge over non-British based companies. (This is also why the gambling industry was pleased about the changes in the 2001 Budget Report mentioned above). However, there are indications that the law preventing advertising in the past is very ambiguous has not been enforced. This might be addressed because in a speech to the British Casino Association AGM on November 10 2005, Tessa Jowell acknowledged concerns over the increase in potentially illegal advertising by online gambling operators and said

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<sup>56</sup> Available online at [http://www.culture.gov.uk/draft\\_gambling\\_bill/draft\\_gambling\\_bill\\_Organisations\\_association\\_of\\_British\\_Bookmakers\(ABB\).pdf](http://www.culture.gov.uk/draft_gambling_bill/draft_gambling_bill_Organisations_association_of_British_Bookmakers(ABB).pdf) (Accessed 15/5/05)

<sup>57</sup> Available online at <http://www.publications.parliament.uk/pa/cm200102/cmselect/cmcomeds/827/2061108.htm> (Accessed 22/7/05)

<sup>58</sup> See above where the Rothschild Commission argued for 'unstimulated demand'

<sup>59</sup> This recommendation was accepted in the response to the Budd Report under section 25 in *A safe bet for success*, Department for Culture, Media and Sport, Cm 5397, March 2002 and PN 22, 26 March 2002. 'Advertising of gambling products and services will be allowed under a code of practice to ensure advertising is honest and fair. It is not yet clear whether this code will be statutory.' Available online at <http://www.publications.parliament.uk/pa/cm200102/cmselect/cmcomeds/827/82703.htm> (Assessed 18/11/05)

*It's clear that some adverts have been breaking the existing law. I am not willing to turn a blind eye to this and have agreed with the Gambling Commission that we should crack down on advertisers and publishers who knowingly break the law. We will issue them with new guidance and I am putting them on notice that we won't hesitate to ask the Crown Prosecution Service to act.<sup>60</sup>*

Within the new arrangements then it would seem that an incentive for gambling companies to be based in the UK, come under UK gambling regulations, and therefore pay tax and contribute to the economy, is the ability to advertise legally. If gambling companies opt to base their businesses in the UK and pay tax, instead of basing their businesses off shore and escape this extra financial burden, then one would assume that they believe that advertising would increase their patronage. And, with the extra cliental, according to research (see below), problem gambling and related issues would increase. It was for this reason that the Budd Report recommended extra funds being put aside to help with this unfortunate side effect.<sup>61</sup> It also recommended that problem gambling be recognized as a health problem.

*In relation to treatment we recommend increased funding be made available by the NHS for the treatment of problem gambling; problem gambling be recognized as a health problem by the Department of Health; that Health Authorities develop strategies for dealing with problem gambling,<sup>62</sup>*

The potential increase in problem gambling was a key area in many of the debates and in various types of correspondence. For example, on the 19<sup>th</sup> January 2004 (File Ref 03/18213)<sup>63</sup> Richard Beston, a senior official within the Culture Department's gambling and national lottery licensing division, wrote to Lord McIntosh, Minister for Gambling Regulation, in order to brief him for a meeting on 22<sup>nd</sup> January with Sol Kerzner, Tobin Prior and Jerry Hosea, who

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<sup>60</sup> From PublicTechnology.net Available online at <http://www.publictechnology.net/modules.php?op=modload&name=News&file=article&sid=3959> (Assessed 18/11/05)

<sup>61</sup> 'Our terms of reference require us to consider the wider social impact of our proposals. We take this as referring not only to the risk of increased problem gambling but also to the broader effect on communities.' The Budd Report, op. cit. Chapter 1.26

<sup>62</sup> Ibid. Chapter 1.32

<sup>63</sup> The following documents are available online at <http://www.culture.gov.uk/NR/rdonlyres/A9919181-C9E1-41FA-9AA4-1BE14F720114/0/Responseletter33602.pdf> (Accessed 23 March 2007) They have also been included in the Appendix. This correspondence was released as a result of Freedom of Information

were three top level representatives from Kerzners International. In this letter he recommended that McIntosh *'use this meeting as an opportunity to learn more about Kerzner's plans to capitalize on gambling de-regulation in the UK'*.<sup>64</sup> He also wrote that *'You should be aware that John Prescott recently met Phil Anschutz, the owner of the Anschutz Entertainment Group (AEG), which is going to build a new arena inside the Dome. There are plans for a hotel and casino inside the Dome.....The Dome deal is not contingent on a casino being built, but the casino is a key plank in AEG's long term strategy'*. He sent three papers to McIntosh. In Annex A: Background brief and lines to take he suggested placing *'a great deal of importance in problem gambling.'* However, it does not seem that looking after problem gamblers was a central issue at this and other meetings.

Richard Beston, a senior official within the Culture Department's Gambling and National Lottery licensing division, had previously written to Lord McIntosh on the 20<sup>th</sup> November 2003 (Ref 03/15257). This letter was in connection with an email sent by Tobin Prior, Chief Executive (UK) Kerzner International, who wanted a meeting with McIntosh to discuss Kernzer's expansion plans in the UK. In this letter he tells McIntosh that *'Kerzners has expressed a keen interest in operating a 'resort' casino next to the Millennium Dome.'*<sup>65</sup> In addition, minutes of a meeting between Chris Bone, Graham Catt, Derek Aldridge, Andy Swyer, Chris Stendall and Richard Beston on 12<sup>th</sup> September 2003 states that *'AEG had worked up its business plan and a casino was now a central feature. A high profit casino would underline all the other facilities.'*<sup>66</sup>

On the 11<sup>th</sup> of July Martin Niblett, the Commonwealth Sports Adviser, Commonwealth Secretariat, sent a letter to Dave Bawden at DCSM concerning a meeting that he was in with Rt. Hon. Richard Caborn MP and Detlef Kornett, the Managing Director of the Anschutz Group, on the 7<sup>th</sup> July. That meeting was a follow up from a previous meeting they had in June with the Deputy Prime Minister, Chris Bone, Greg Chalmers and Robert Raine. Referring to the 7<sup>th</sup> of July meeting Niblett wrote that Detlef Kornett's *'intention was to have a casino*

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<sup>64</sup> Appendix 4

<sup>65</sup> Appendix 6

<sup>66</sup> Appendix 3



*adjacent to the Dome.*<sup>67</sup> Detlef Kornett had been interested in opening a casino under the existing laws but Chris Bone said that the application would not cover changes such as *'regulation in terms of membership, advertising and the slots per table rule.'*

On the 20<sup>th</sup> August Chris Bone, from Gambling and National Lottery Licensing, had sent an email to Alistair Macdonald, the assistant private secretary in Andrew McIntosh's office, titled 'Dome and Greenwich Peninsula – casino'.<sup>68</sup> In the message he reveals that Greenwich is not in one of the permitted areas so probably would not get a casino under the current law. He added that if it was moved into permitted area status it *'would be no use to a prospective dome casino operator without the other major changes to the casino law we plan'*. These changes include the membership rule, advertising, betting and bingo, and *'allowing them to have the linked, no-limit gaming machines which are the main profit driver for international casinos of the kind planned for Greenwich'*. Chris Bone had previously met with Nick Shattock who discussed Quintain's plans for developing casinos in Wembley and the Dome. (Quintain Estates & Development PLC is a property and investment company).

In a letter dated 8<sup>th</sup> of August 2003 Chris Bone sent a letter to Andrew McIntosh copied to Tessa Jowell, stating that AEG are keen to have a casino at the Dome<sup>69</sup> and adds that *'The important thing that AEG need to hear is high-level confirmation of the government's continued commitment to the gambling reform programme'*. He lists the major changes that the casinos are concerned with as being permitted area status, member's clubs, advertising, betting and bingo, and *'most important of all casinos will be allowed to have linked, unlimited gaming machines – 'casino slots' - which are the main revenue driver for casinos in virtually every other country. These are currently banned in the UK'*. He adds that without these changes Anschutz would not be interested because *'all they would get would be an old-style British casino.'*

We have already mentioned the letter that Richard Beston wrote to Lord McIntosh on the 20<sup>th</sup> November 2003 about a meeting with top-level representatives from Kerzners. In that letter he also stated that even though the

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<sup>67</sup> Appendix 1

<sup>68</sup> Appendix 8

<sup>69</sup> Appendix 2

links between AEG and Kerzners have not been formally declared this may change once the *'commercial deal on the Dome and the Greenwich Peninsula is confirmed.'*<sup>70</sup> In its submission to the Joint Committee on the Draft Gambling Bill in December 2003, Kerzner International wrote that they *'are in full support of a well regulated environment that encompasses stringent licensing criteria, effective protection of the vulnerable.'*<sup>71</sup> Yet in section 4, with reference to gaming machines in item 4.13 and 5.13 in the policy and clause 140 in the draft bill, they complained that *'allowing large 'resort' casinos with over 40 tables to have unlimited machine numbers is essential in facilitating the extensive investment envisaged .... And 'any limits placed on large casinos with regard to machine numbers will have a direct impact on the levels of investment affordable'.*<sup>72</sup>

It would seem from this correspondence then that problem gamblers are not the main issue because nearly all research into the area, as pointed out by the Budd Report and other sources which will be discussed in the next section, conclude that gaming machines are the most addictive form of gambling.

#### ***D. The objectives***

Members of the Budd report were unable to draw on any absolute guidelines as how to draw the line between complete deregulation and complete prohibition.

*It soon became apparent that gambling is an activity where individual values about such matters as the nature of society and the role of the state quickly becomes paramount. We know where the limits are – complete prohibition or complete deregulation – but there are no widely acceptable principles which tell us where we should stop between the two limits.*<sup>73</sup>

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<sup>70</sup> Appendix 6.

<sup>71</sup> A copy of that letter is available online at [http://www.culture.gov.uk/draft\\_gambling\\_bill/Organisations/Kerzner\\_International\\_UK\\_Gaming\\_Division.pdf](http://www.culture.gov.uk/draft_gambling_bill/Organisations/Kerzner_International_UK_Gaming_Division.pdf) (Accessed 23 March 2007)

<sup>72</sup> A copy of that letter is available online at [http://www.culture.gov.uk/draft\\_gambling\\_bill/Organisations/Kerzner\\_International\\_UK\\_Gaming\\_Division.pdf](http://www.culture.gov.uk/draft_gambling_bill/Organisations/Kerzner_International_UK_Gaming_Division.pdf) (Accessed 23 March 2007)

<sup>73</sup> Op. Cit. The Budd Report, p. 1. On 8 December 1999 the then Home Secretary, Jack Straw, announced that he would appoint an independent body to conduct a review of the gambling laws.<sup>73</sup> This report, which was chaired by Sir Alan Budd, appeared in July 2001. This Gambling Review Report, Cm 5206 (Known as the Budd Report) was then the most substantial recent consideration of gambling regulations in the UK

Without this clear line they lent towards the liberty of individuals but this was balanced with tighter controls. Section 3.1 - 3.28 justified regulation on 3 objectives. Permitted forms of gambling should be crime free; players should know what to expect and not be exploited; some protection for children and the vulnerable. These principles underpinned most of their 176 recommendations. Out of these 176, 15 were dedicated to on-line gambling but over twice that amount were dedicated to another area that has seen vast developments in technology – gaming machines.<sup>74</sup>



**FIGURE 11** Members of the Budd report found that gambling machines were one of the most difficult areas of the review. This was due to four main reasons. Firstly, there are many different types of machines. Secondly, there are a number of different types of regulations (or none). The third reason is that Britain is unique in Europe in that it allows children to play on machines. This is mainly because of the machines in seaside amusements areas. And fourthly, there is a lack of research in Great Britain.<sup>75</sup> The research that has been undertaken indicates that gambling machines are more addictive than other forms of gambling.<sup>76</sup> Dr Paul Davies, chair of the Faculty of Addiction for the British Psychological Society has reported that *'Gambling is as much an addictive behaviour as heroin addiction'*. And Mr Rayner, Chairman of the UK Public Health Association *'wants the government to limit the size of casinos so they can't have thousands of machines.'*<sup>77</sup>

The number of machines is on the increase because at the time of this report there were about 250,000 legal machines in Great Britain.<sup>78</sup> This could become a serious problem if figures from Australia, during the decade following the legalization of machines in Queensland, are anything to go by. Increases in Queensland gambling expenditure in the period of 1993-4 to 2003-4 contributed

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<sup>74</sup> There were 32 recommendations concerning gaming machines. See Budd Report chapter 37, sections 58-89. Slot machines in Figure 91 below from [http://www.bbc.co.uk/radio4/today/reports/misc/gambling\\_20040420.shtml](http://www.bbc.co.uk/radio4/today/reports/misc/gambling_20040420.shtml) slot\_machines.jpg (Accessed 13/11/05)

<sup>75</sup> The Budd Report, op. cit. Chapter 22.3 - 23.1

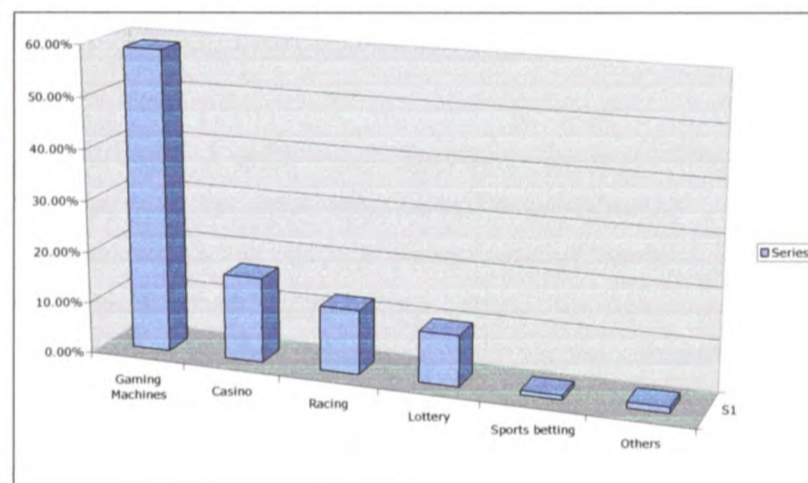
<sup>76</sup> Game Care reported that 50% of their calls concern gaming machines. The Budd Report, op. cit. Chapter 23.8

<sup>77</sup> Available online at [http://www.bbc.co.uk/radio4/today/reports/misc/gambling\\_20040420.shtml](http://www.bbc.co.uk/radio4/today/reports/misc/gambling_20040420.shtml) (Accessed 13/11/05)

<sup>78</sup> The Budd Report, op. cit. Chapter 23.2

to a total real (adjusted for effects of inflation over time) tax revenue from gambling of \$719.92 Million. This is made up of \$688.63 million from gambling; 30.58 from Tab races; \$0.709 million from sports betting. Gaming machines took 28.1 as opposed to 19.3 in casinos; and these figures rose to 52.66 and 21.12 respectively in 2003-4. . These figures show that machine gambling rose much faster than casino gambling. From 2003-2004 the total loses to gaming machines Australia wide was \$9.547 billion. The total gambling expenditure from 2003-04 in Australia was \$16.211 billion. If this figure were divided between every Australian over 18 they would each have gambled \$1066.95 between 2003-04 a rise from the figure of \$684.03 from 1993-94. <sup>79</sup> In Figure (12) we can see that the bulk of the 2003-04 gambling activities were on gaming machines. Although these figures could have been much higher as the machines in the casinos were not taken into account.

**FIGURE 12:  
Gambling expenditure by gambling activity, Australia 2003-4<sup>80</sup>**



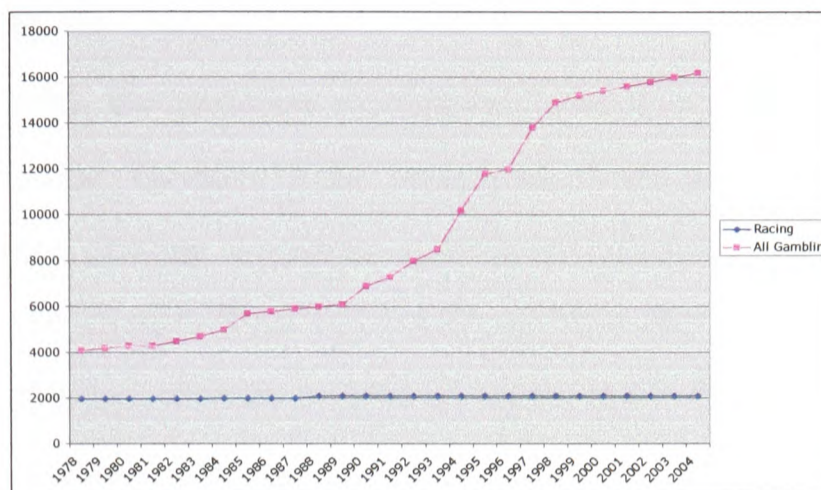
The figures in Figure (13) below show that there has been a huge growth in gambling in Australia from 1978-79 to 2003-04. It seems to rise sharply in early to mid 90's when Queensland, as well as Victoria and South Australia, legalised gaming machines. This rise could have been lower had the casinos not provided free buses for people to cross the borders into gambling friendly states. As you can see, gambling on racing stayed steady. The huge increase in gambling

<sup>79</sup> ANN (Australian National University) Centre for gaming and research Fact-sheets 2005, Available online at <http://gambling.anu.edu.au/menu/PDFs/factsheets2005/FactsheetAUSF&I05-Final.pdf> (Accessed 2 March 2006)

<sup>80</sup> Raw data from ANN (Australian National University) Centre for gaming and research Fact-sheets 2005, Available online at <http://gambling.anu.edu.au/menu/PDFs/factsheets2005/FactsheetAUSF&I05-Final.pdf> (Accessed 23 March 2006)

machines seems to contradict Rawls' assumption that people would prefer chess to checkers.

**FIGURE 13:**  
**Gambling expenditure (in \$Millions) in Australia, 1977-2004.<sup>81</sup>**



Another main area of contention has to do with the relationship between business and the common good.<sup>82</sup> Those against the Bill argue that it will allow large 'Vegas' style casinos to be built in the UK. This, they say, will have an adverse impact on society. For example, in the House of Commons Daily Debate 1 November Mr. Simon Thomas (Ceredigion) (PC) said

*My colleagues and I will vote against Second Reading for the reasons set out in our reasoned amendment.....  
One thing that we have not acknowledged in the debate so far is the harm that gambling does to society and to families throughout the country. We have mentioned the 300,000 problem gamblers as though they were some select group of people whom we can put to one side and treat separately. Gambling pervades society, and it harms society..... It is also deeply dispiriting that the Government's vision of the regeneration of our seaside towns is based on making money from gambling—from a mug's game, by fleecing people. We are considering regeneration not based on education, skills, manufacturing, libraries or culture but built on gambling. What a lack of imagination! What a poor state we are in when the only thing we can offer our decaying seaside towns, including some in my constituency, is regeneration based on gambling and on taking from those who do not have and giving it to those who have plenty.....<sup>83</sup>*

<sup>81</sup> ANN Fact-sheets 2005, op. cit.

<sup>82</sup> See especially Chapter 17

<sup>83</sup> Available online at [http://www.publications.parliament.uk/cgi-bin/ukparl\\_hl?DB=ukparl&](http://www.publications.parliament.uk/cgi-bin/ukparl_hl?DB=ukparl&)

In addition, Ross Cranston QC MP Member for Dudley North wrote to The Rt. Hon. Tessa Jowell MP about concerns over the proposals in the draft Gambling Bill. He appreciated *'that the modernisation of the gambling industry is necessary to deal with the explosion of new gambling technologies'*. But he was *'disappointed by the decision not to take up the recommendations of the Budd review and tackle the problem of children and fruit-machines'*.<sup>84</sup> In a Memorandum submitted by the Right Reverend Alan Chesters, Bishop of Blackburn he endorses casinos if certain conditions are met to take care of the fallout.<sup>85</sup> Gary Streeter (South-West Devon) (Con) said that *'Whether we like it or not, gambling disproportionately affects those with the least disposable incomes'*. Recent research has shown that more than three times as many problems arise for gamblers in households where there is an income of less than £15,000 compared with those in household with an income of £32,000 or more.'<sup>86</sup> According to Professor Orford

*When you consider that under the prevalence study it was determined that 0.8 per cent of the population have a gambling problem—which is about 350,000—you have to multiply that figure by ten because no problem gambler operates in isolation and the average number of people adversely affected is around ten, so we are talking about 3.5 million people being adversely affected. In relation to the services across the country to deal with it, either done by the voluntary organisations or indeed by the National Health Service, where, as far as I am aware, the only unit operating has shut down through lack of funds, it is, as you say, a pitiful response at a time when gambling is poised to expand. We really need to get the social impact treatment, prevention and research in place before we have this expansion.'*<sup>87</sup>

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STEMMER=en&WORDS=gambl+&COLOUR=Red&STYLE=s&URL=/pa/cm200304/cmhansrd/cm041101/debtext/41101-22.htm#41101-22\_spnew1 (Accessed 12/2/05)

<sup>84</sup> Cranston\_R\_Qc\_MP.pdf

<sup>85</sup> Available online at <http://www.publications.parliament.uk/pa/cm200102/cmselect/cmcumeds/827/2061106.htm> (Accessed 23 March 2006)

<sup>86</sup> November 2004 : Column 104 (Accessed 12/2/05)

<http://www.publications.parliament.uk/pa/cm200304/cmhansrd/cm041101/debtext/41101-27.htm> (Accessed 23 March 2006)

<sup>87</sup> Available online at <http://www.publications.parliament.uk/pa/cm200102/cmselect/cmcumeds/827/2061107.htm> (Accessed 12/2/05)

Gamcare also supported that criticism of statistics. In the forward to their 2003 Report the Managing Director wrote

*We are delighted that our annual Reports are of considerable help to industry, the academic community, the general public and government but at the same time, we must emphasise that the Reports must not be seen as a complete picture of gambling problems in UK. Our reports are essentially a reflection of the circumstances connected with people who contact us for help and information. There are undoubtedly many others who may be still hiding their problems, simply not choosing to seek help or do not know who they can talk to.*<sup>88</sup>

GamCare is a UK group that protects gamblers and offers support to players who need help. According to them, addictions such as drugs, alcohol and smoking are comprehensively covered throughout childhood and youth. However, gambling is nowhere to be seen. Gambling opportunities continue to grow, not least through growth in new media, including the Internet and interactive television. Awareness amongst the youth is vital because: Problem gambling is much harder to detect than other addictions. Young people are especially prone to excessive gambling. Problem gambling can lead to poor school performance, debt and crime. There are increasingly more gambling opportunities available. Evidence shows that gambling does take place in schools and teachers need to be aware of the risks and signs of excessive gambling.<sup>89</sup>

The new Bill addresses many of the arguments in its attempt to balance the issue of the relationship between business and the good of individuals and society. It does not deal with the moral arguments but does attempt to address the possibility of protecting society, and individuals within it, from freedoms exercised by others. While there are no widely acceptable principles, which inform the government where they should draw the line between complete probation and complete deregulation, according to the Budd report, there are some criteria that have been given priority. The Gambling Bill rests on the Gaming Board's objectives of being crime free, protecting the vulnerable and

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<sup>88</sup> Gamcare Report 2003, p. 4. Available online at <http://www.gamcare.org.uk> (Accessed 12/2/04)

<sup>89</sup> Ibid. 4

children, and looking after the British economy. These criteria were outlined by Tessa Jowell in the Forward to the White Paper, '*A Safe Bet for Success*', a response to the previous report of the Independent Gambling Review Body.<sup>90</sup>

*We want gambling to be safe, not only for those who take part in it, but also in the way that it impacts on wider society. Gambling must continue to be conducted fairly, remain free of criminal influence and infiltration, and operate within a regulatory framework that offers protection for children and vulnerable adults. We also, however, want to see a successful British gambling industry; one that is able to respond rapidly and effectively to technological and customer-led developments in both the domestic and global marketplace, building on its existing reputation for quality and integrity, and in the process increasing its already important contribution to the UK economy.*<sup>91</sup>

In this brief outline of the new gambling Bill there are three key issues that stand out. Firstly, gambling is an issue within politics, secondly it is part of the cultural industry, and thirdly, there is a definite need for more research into gambling. The Responsibility in gambling trust (mentioned above) has commissioned research from the Gambling Research Centre at the Auckland University of Technology into problem gambling. That research, entitled *The Auckland Report - A Review of Research on Aspects of Problem Gambling*, was submitted in October 2004<sup>92</sup>. They also sought Consultation on a Research Strategy stemming from this report. The closing date for applications was 14th December 2004.

Further research is needed urgently as the gambling industry is substantial and growing. According to one report, the total amount staked on all gambling in the UK in 2002/03 was £63.8 billion. The gross gaming yield was £7.8 billion, which was 15% more than seven years earlier.<sup>93</sup> At the end of March 2004, according to the Department for Culture, Media and Sport

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<sup>90</sup> A safe bet for success – modernising Britain’s gambling laws, op. cit.

In this paper the Government also announced that it would bring forward legislation to consolidate all gambling law into a single Act of Parliament covering all categories of gambling activity. It was a response to the Budd Report.

<sup>91</sup> A safe bet for success – modernising Britain’s gambling laws, op. cit.

<sup>92</sup> A copy is available from <http://www.rigt.org.uk/research.asp> (Accessed 17/3/04)

<sup>93</sup> Ernst and Young, *A Winning Hand - The Modernization of UK Gambling*, (November 2003)



*...there were 131 casinos open in Great Britain. With the exception of France this is more than any other European Country. London has 24 casinos which is more than any other capital city. During 2003/4 the 'drop' or money exchanged for gaming chips was £4.1 billion. Of this amount, operators retained about 17% or £674 million. In 2003/4 around 13,000 staff are estimated to be employed by British casinos, and around 11.9 million separate visits to casinos were made by members and their guests.<sup>94</sup>*

A major centre for research into gambling in the UK is in the Centre for the Study of Gambling at Salford University in Manchester.<sup>95</sup> This unit was founded in 1994 with the objectives of undertaking research relating to the gambling industry, providing teaching for people interested in developing a career within the industry, and increasing understanding of the industry by the wider public. They have published widely in the field of gambling.<sup>96</sup> Much of the current research is related to three areas of the gambling Board's objectives. Other countries such as Australia also focus their priorities and research in similar areas to the UK. The Queensland Government in Australia was offering research grants (closing date for applications 23 August 2004) in the following three areas: *Early Intervention and Prevention Program* (to ensure that Queensland individuals and communities have resources and information available to them to make responsible informed decisions in relation to gambling issues), *Consumer Protection Program* (to ensure that gambling products and environments are conducive to responsible gambling), *Problem Gambling Management Program* (to ensure that people have access to appropriate help for gambling-related problems). Previous research grants have been offered in the areas of: *Efficacy of Responsible Gambling Strategies; Young People's Gambling Experiences; Ethical Governance in the Gambling Industry; Gambling Treatment Programs; Cognitive-Behavioural Therapy;*

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<sup>94</sup> Department for Culture, Media and Sport. Report of the Gaming Board for Great Britain 2003-04. HC 866 2003-04, p. 9

<sup>95</sup> Available online at <http://www.gamblingstudies.salford.ac.uk/Research> (Accessed 19/6/04)

<sup>96</sup> G. Arnold, P. Collins, W. Eadington, R. Remmers, P. Ricketts (2003), 'Towards a Strategy for Addressing Problem Gambling in the UK', report to the *Gambling Industry Charitable Trust*. [www.gict.org.uk](http://www.gict.org.uk). See their research webpage for further details. Available online at <http://www.gamblingstudies.salford.ac.uk/Research> (Accessed 11/4/2005)

*Costs and Benefits of Gambling in Socio-economically Disadvantaged Areas; and Mental Health and Gambling: A Longitudinal Study of Youth.*<sup>97</sup>

*The study* of gambling is a growing academic discipline. Much of this research has tended to be empirically based and has focused on problem gambling and related issues. On one level most of the research mentioned seems to follow a pre-set agenda – the principles and criteria underpinning the Government’s justification of the new laws.<sup>98</sup> Those criteria may well be a foundation for social justice. On the other hand, however, by focusing on those it closes off other possibilities of research. That could be seen as a danger of something not that dissimilar to enframing. Firstly, because this focus prevents other ways of understanding gambling in terms of social justice. And secondly, because as well as the changes in a law possibly leading to more problem gambling, the gamblers themselves are being used as standing reserve to justify the changes that will increase their number. Recall Beston’s advice to Lord McIntosh: ‘...place a great deal of emphasis on problem gambling.’

***E. Deregulation in the UK***

Until recently, the gambling laws in both the UK and the US predated the introduction of the World Wide Web. We have already noted that the UK gambling laws required punters to be present, as gambling by post or proxy was not allowed. In the US the Federal Wire Wager Act prohibited gambling over telephone lines. However, there is some uncertainty with regards to Internet gambling because not all web traffic travels over phone lines.<sup>99</sup> Both countries are changing laws to address the development in Internet gambling. The UK is allowing Internet gambling with certain regulations. The US is effectively banning Internet gambling by preventing the transfer of money to gambling companies.<sup>100</sup> As previously noted, the Budd Report mentioned that there were

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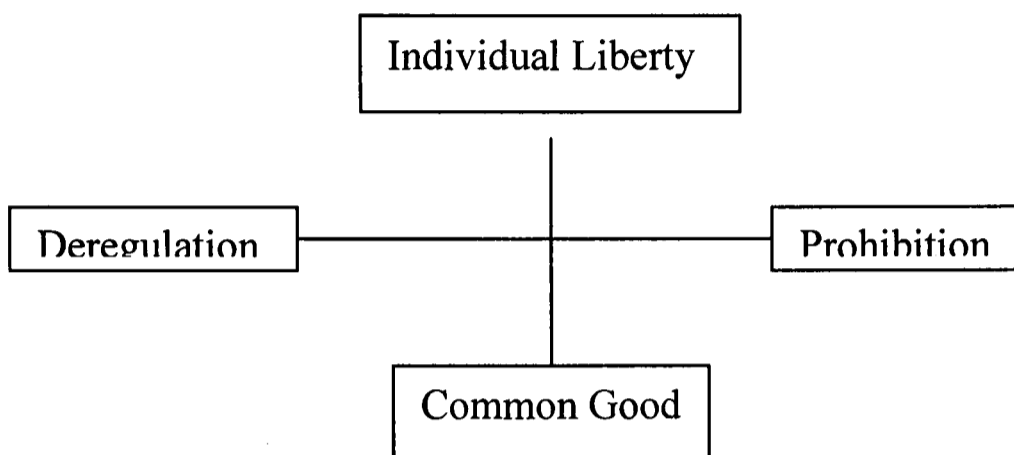
<sup>97</sup> Available online at <http://www.responsiblegambling.qld.gov.au/research/grants.html> (Accessed 17/3/05)

<sup>98</sup> There is other research but I am referring to research where most of the funding seems to be available.

<sup>99</sup> See article by Frank Ahrens, *Washington Post*, (May 25, 2006) D01; See also Andrea M. Lessani, ‘*The UCLA Online Institute for Cyberspace Law and Policy*,’ Available online at <http://www.gseis.ucla.edu/iclp/alessani.html> (Accessed 13 July 2006)

<sup>100</sup> On 30 September 2006, US Congress approved a ‘Bill that bans most forms of Internet gambling, including poker. The measure has been sent to President Bush to sign into law. It is

no absolute criteria to call on in order to draw the line between complete deregulation and complete prohibition. And as we will see both countries seem to be drawing the line in different places. The remainder of this chapter will examine those intersections, which have been drawn horizontally between complete deregulation and complete prohibition, while bearing in mind the vertical intersections between individual liberty and the common good or public interest. See diagram below.



Internet gambling debates in the UK between deregulation and prohibition, in relation to individual liberty and the public interest, ended on the side of regulation and individual liberty, with certain safe guards for the public interest. As noted, the Budd Report's frames of reference were mirrored by Tessa Jowell's criteria for the new Gambling Bill. She called for the safety for players and society, the gambling itself must be fair and it must be free of crime, it must be regulated so as to protect children and the vulnerable, it must be able to allow the British gambling industry to operate locally and globally, and it must allow the gambling industry to continue contributing to the UK economy and to be able to adapt to new technologies. This section will show that those criteria are embedded within the new Act as objectives and those objectives will then be examined further.

The UK Gambling Act 2005 contains a new regulatory system to govern the provision of all gambling in Great Britain, other than the National Lottery and spread betting. It repeals Chapter 2 of the Betting, Gaming and Lotteries Act 1963, Chapter 65 of the Gaming Act 1968 and Chapter 32 of the Lotteries

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called the 'Unlawful Internet Gambling Enforcement Act of 2006' and is attached to the Safe Port Act as part VIII.

Jowell's criteria can be seen embedded in the Act but the actual objectives listed in section 1 of the Act were reduced to (a) preventing gambling from being a source of crime or disorder, being associated with crime or disorder or being used to support crime, (b) ensuring that gambling is conducted in a fair and open way, and (c) protecting children and other vulnerable persons from being harmed or exploited by gambling.<sup>102</sup>

Those objectives are actually licensing objectives so companies who do not meet those objectives will not gain a licence for commercial gambling<sup>103</sup>. This means that the public interest issues related to gambling will be dealt with via regulation. So the clause in the previous act, '*gamblers must be present on the premises in order to take part in the gaming. Participation by post or proxy is forbidden*', which prevented all UK based companies from offering online gambling will be replaced with a new Act which allows some UK based companies to offer online gambling – but only if they have a license. In order to gain the licence they must conform to the licensing objectives and codes of practice and once they have the licence they will be further regulated.<sup>104</sup>

Regulation will be conducted by a Gambling Commission, which has been set up under the Gambling Act. It is a Non-Departmental Public Body, which is sponsored by the Department for Culture, Media and Sport.<sup>105</sup> It will be funded mainly by licence fees from the gambling industry. The Commission was formally established in October 2005 and moved to Birmingham in early 2006. It will be fully operational by the end of 2007. It has taken over the position previously occupied by the Gaming Board for Great Britain in regulating casinos and gaming machines etc. From 2007 it will have

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<sup>101</sup> See section 3 for a definition of gambling and gaming. See also section 4 for definition of remote gambling

<sup>102</sup> Gambling Bill 2005 Section 1. I will return to these three objectives when I discuss Rawls' three principles.

<sup>103</sup> See section 2 for details about licensing authority. See Part 5 and Schedule 7 where it outlines the different types of licence and the rules relating to them; the conditions which may be attached to them; the required procedure for applying for them; the requirements as to their duration and validity; and a review procedure, including powers to revoke licenses and impose financial penalties.

<sup>104</sup> Gambling Commission: Licence Conditions and Codes of Practice (March 2006) Available online at [http://www.gamblingcommission.gov.uk/UploadDocs/Contents/Documents/GC%20Briefing%20Paper\\_remote.pdf](http://www.gamblingcommission.gov.uk/UploadDocs/Contents/Documents/GC%20Briefing%20Paper_remote.pdf) (Accessed 23 March 2006)

<sup>105</sup> Part 2, and Schedules 4 and 5 of the Act establish the Gambling Commission, define its powers and give effect to the transfer from the Gaming Board of Great Britain.

responsibility for the regulation of betting and remote gambling, as well as helping to protect children and vulnerable people. It is also responsible for advising local and central government on issues related to gambling.

In order to make remote gambling fair and open operators are required to do two things: (a) *'provide clear information about their rules, odds, house edge, average return to players and disputes and complaints procedures'*.<sup>106</sup> In other words the odds can be set against the punter and in favour of the company yet still be called fair. The other requirement (b) is that *'operators must keep records of complaints and disputes and provide them to the Gambling Commission quarterly and on request.'* Yet punters can only make complaints if they know they have been treated unfairly. In order to keep crime away from remote gambling there are a number of requirements. (a) Key staff will need to be licence. (b) There must be procedures in place to prevent money laundering. (c) And the operators must allow unrestricted access to information. And the operators must also provide evidence that they are financially robust – this shouldn't be too difficult, as they will have the odds in their favour. In order to protect children and the vulnerable operators must (a) *'have published policies and procedures for promoting socially responsible gambling'*. Other requirements include; (b) the possibility for customers to exclude themselves; (c) allow customers to know how long they have been online; (d) verify ages; (e) only register two credit cards; (f) do not make products attractive to young people; and (g) they must also train their employees about how to identify problem gamblers. This could be difficult as there is currently no agreement about what gambling and problem gambling are.

The Gambling Commission is appointing the National Centre for Social Research (NatCen) to do a Prevalence Study in collaboration with Professor Jim Orford and other academic advisors. The aims of this Study are (a) to measure the prevalence of gambling and problem gambling in Great Britain and (b) to investigate the socio-demographic factors involved. Fieldwork for the study began in mid-2006, and the Commission will publish the full report in mid-2007. Jenny Williams, Gambling Commission Chief Executive, said: *'This Prevalence Study will provide us with reliable, independent information on the*

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<sup>106</sup> Available online at [http://www.gamblingcommission.gov.uk/UploadDocs/Contents/Documents/GC%20Briefing%20Paper\\_remote.pdf](http://www.gamblingcommission.gov.uk/UploadDocs/Contents/Documents/GC%20Briefing%20Paper_remote.pdf) (Accessed 3 June 2007)

*nature of gambling in Britain.* It will have a *'Study Steering Group, which is made up of representatives from those bodies with responsibility for commissioning gambling research in Britain.'*<sup>107</sup>

The new Gambling Act also aims to provide protection for young people and vulnerable adults from the effects of land-based harmful gambling.<sup>108</sup> The Commission is required to promote socially responsible gambling through licence conditions and codes of practice directed at those providing facilities for gambling. The Act also provides powers for the Commission to void unfair bets such as those that involve cheating. And in addition, the Act introduces a new regime for gaming machines and it gives definitions of the various types.<sup>109</sup>

Part 4 sections 45-64 is the main part of the Act that is dedicated to protecting children (under 16) and young people (under 18). Sections 46 & 47 makes it an offence to invite anyone under the age of 18 to gamble in, or enter the premises of, a commercial gambling space. Sections 48-50 makes it an offence for anyone under the age of 18 to gamble in, or invite another young person into, a commercial gambling space, or to provide facilities for gambling. Sections 51-61 cover offences in connection with employing anyone under 18 in the commercial gambling premises. Provided that the gambling premises did not allow anyone under the age of 18 in then the young person would not be able to commit an offence. Section 64 allows someone under 18 into commercial gambling premises if directed to do so by a constable, enforcement officer or authorised person. With this exception a young person could be used to check if the gambling premises did or did not in fact allow under eighteens on site.

Once the young person reaches the age of 18 they are not only legally allowed to gamble but are also a sort after group to work within the gambling industry. Chris Clarke, regional operational director for Gala Casinos, said: *'Recent and forthcoming legislative change means the industry is changing*

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<sup>107</sup> Available online at [http://www.gamblingcommission.gov.uk/Client/news/news\\_detail.asp?NewsId=17](http://www.gamblingcommission.gov.uk/Client/news/news_detail.asp?NewsId=17)(Accessed 22/12/2005)

<sup>108</sup> See Part 3

<sup>109</sup> Part 10 and Schedule 10 provide a new framework of regulation for gaming machines. There is power for the Secretary of State to prescribe categories of machine, by reference to the levels of charge and prize, the nature of the prize or the gambling, and the premises where the machine is to be located. Part 12 and Schedule 13 make provision for gaming and gaming machines in premises holding an alcohol licence. Part 12 is also concerned with the use of gaming machines at travelling fairs.

*rapidly. Part of that is educating people to work within the industry. He is backing the project in Blackpool and The Fylde College, an associate college of the University of Lancaster, which has built its own training casino. Courses like GCSE and foundation courses for degrees will be taught there. Academy manager Colleen McLaughlin said: 'We want our academy to be a one-stop shop with training for all gaming industry requirements under one roof.'*<sup>110</sup>

Successful completion of a course offered in July 2006 will lead to a DVL Diploma (Advanced Diploma in Casino Operations). The course code is TT1FE69-04/06 and it is located in the Bispham Cleveleys Building. Individual courses will include 'The Gaming Environment', 'Customer Service for the Gaming Industry', 'Game Operations - (American Roulette, Card Games)' and 'Mechanisms and Coin Slot Technology.' The aims of the course, which can be found on the Lancaster University web site, are *'to provide formal qualifications to the Casino/Gambling industry for Croupiers/Dealers. Changing legislation will generate a high demand for qualified croupiers through new developments and a perceived rapid growth in the industry which should provide increased employment prospects.'*<sup>111</sup>

The Course Provision Disclaimer suggests that funding for this diploma comes from the government, via redistribution, rather than the gambling industry. *'Blackpool and The Fylde College have published all information about the courses it intends to offer in good faith based on current government funding advice.'* In addition, redistribution through taxation will also subsidise a number of students who would like to take the course. These include Students aged 16-18 years, studying full or part-time courses. Unemployed person in receipt of Job Seeker's Allowance and their unwaged dependents. Anyone in receipt of income-based benefits such as Council Tax Benefit, Housing Benefit, Income Support, Working Tax Credit, Disabled Tax Credit (income less than £15,050), Pension Guarantee Credit (60 or over), and their unwaged dependants. It also covers anyone studying a Basic Skills Maths, English or ESOL course. Anyone in receipt of incapacity benefit or Disabled Tax Credit (income less

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<sup>110</sup> Available online at <http://news.bbc.co.uk/1/hi/england/lancashire/4659832.stm> (Accessed 29/1/06); See a similar report from Martin Wainwright, *The Guardian* (Monday January 30, 2006) Available online at <http://www.guardian.co.uk/gambling/story/0,,1697809,00.html> (Accessed 2/2/06)

<sup>111</sup> Available online at <http://www.blackpool.ac.uk/search/displaycourseBAZ.php?courseId=17391> (Accessed 2/2/06)

than £15,050) who is studying a Leisure Learning course, which does not lead to a qualification.<sup>112</sup> And after completing the course students are guaranteed the opportunity to help with the redistribution.

*The gaming industry offers employment opportunities in major towns and cities in Britain as well as resorts in Europe, the Far East and the United States. In addition, casinos on Cruise Ships are flourishing in areas such as the Mediterranean, the Caribbean, South Africa and Australasia and offer exciting job prospects. Provided that you pass the course, there will be guaranteed offers of employment around the UK.*<sup>113</sup>

The three listed objectives in the Act are central to the new regulatory regime created by the Act, and there are no requirements for the Act itself to enhance the Gambling industry. However, the Act is full of provisions, which can allow the gambling industry to develop further. We have already seen that it allows advertising to take place, it removes the permitted area status, and it drops the membership rule. In addition to that it allows the gaming industry to respond to further technological developments. In section 4 under 'remote gambling' it lists, in addition to the Internet, telephone, television, and radio, '*any other kind of electronic or other technology for facilitating communication*'. Even without further technological developments the revenue from remote gambling were expected to be in excess of \$9bn in 2005 and it was predicted that this could double by 2008 according to the RGA.<sup>114</sup>

A number of reports have shown that the new gambling laws will have an impact on UK businesses. Mark Tran of the Guardian reported that PartyPoker had a 65% rise in sales which was boosted by a '*record number of new poker players and an explosive growth in blackjack*'.<sup>115</sup> Ryanair hopes to introduce in-flight gambling and computer games on its planes by 2007.<sup>116</sup> Nick

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<sup>112</sup> Available online at <http://www.blackpool.ac.uk/search/displaycourseBAZ.php?courseId=17391> (Accessed 2/2/06)

<sup>113</sup> <http://www.blackpool.ac.uk/search/displaycourseBAZ.php?courseId=17391> (Accessed 2/2/06)

<sup>114</sup> RGA (Remote gambling association) was created by the merger of ARGO (The association of remote gambling operators) and IGGBA (the interactive gaming, Gambling and Betting Association) Available online at <http://www.argo.org.uk/pressreleases.html?PHPSESSID=3375e72fbdbbd9d257cd0090452704ac> (Accessed 2/2/06)

<sup>115</sup> Mark Tran, *Guardian* (Friday January 27, 2006) Available online at [http://www.guardian.co.uk/gambling/story/0,,1696366,00.html#article\\_continue](http://www.guardian.co.uk/gambling/story/0,,1696366,00.html#article_continue) (Accessed 2/2/06)

<sup>116</sup> Available online at <http://news.bbc.co.uk/1/hi/business/4400676.stm> (Accessed 2/2/07)



Fletcher from the Guardian reported that Gala is about to pay £14.5m for the Leo Casino in Liverpool.<sup>117</sup> Shares in gambling companies have risen.<sup>118</sup> Only one large super casino will be built after the government scaled back its original plans to build several large casinos across the UK.<sup>119</sup> The Casino Advisory Panel made its recommendations for the location of the casino in early 2007. In preparation for this Europe Economics had been retained by Manchester City Council, which hoped to build the super casino near the Sport City complex. And Blackpool Council put the casino at the centre of its plans to revive the resort's economy. The plans would have involved building hotels, a conference centre and a regional casino on the Golden Mile.<sup>120</sup>

So, not only could the new laws allow UK based companies to offer online gambling (including casino type games), protect young people and the vulnerable from gambling, limit crime, and increase employment opportunities for the over eighteens, but it could also be advantageous to the UK's gambling industry and the British economy. And the reasons for this can be found in the Act itself as well as other government changes. For example, we have already noted the 2001 budget, which altered the way gambling tax works. Instead of taxing all bets it now only taxes the profit that the industry makes. This allows space in which the company's taxation consultants can operate. Secondly, by getting rid of the ban on advertising (mixed with these taxation changes) in connection with casino type games on the Internet, it should keep the British companies such as Ladbrokes and William Hill etc. from moving overseas. And thirdly, by getting rid of the permitted area statue casinos will be able to operate in other areas currently restricted.

For example, permitted areas in London do not currently include Canary Wharf and Greenwich. And if the East end of London was able to get a licence to operate a casino, which didn't require the current 'membership rule' which places restrictions on tourists and others not prepared to apply for (and wait for) membership, it could rejuvenate the Thames Gateway area. And the same could

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<sup>117</sup> *The Guardian* Available online at <http://www.guardian.co.uk/gambling/story/0,,1708338,00.html> (Accessed 13/2/06)

<sup>118</sup> <http://news.bbc.co.uk/1/hi/business/4601793.stm> (Accessed 13/2/06)

<sup>119</sup> Under pressure from critics of the new proposals the Act imposed a limit of 1 regional casino, and 8 small and 8 large casinos.

<sup>120</sup> Available online at <http://news.bbc.co.uk/1/hi/england/lancashire/4626248.stm>

See also <http://news.bbc.co.uk/1/hi/england/lancashire/4223247.stm> (Accessed 2/2/07)

be said for other areas in the UK. And by allowing linkages between casinos for large cash jackpots it could attract more people to play on the machines. As these are set at the advantage of the house it will increase profits, which could get ploughed back into the industry. We have already noted that most of the profits come from machines. However, machines do not require the trained dealers or croupiers currently being educated at Fyled College.

Prior to the legalisation of gambling, in Brisbane Australia, there were two illegal casinos. One was in Fortitude the Valley and the other one was at Woolloongabba. Both of these housed a number of gaming tables but not one gambling machine. The main legal casino in Brisbane, the Treasury, now has about 80 gaming tables and over 1300 gaming machines.<sup>121</sup> However, not all of the tables are available all of the time. While 80 tables might operate during peak hours many tables, and their croupiers, are not in use during the quieter periods. Gambling machines, on the other hand, stay on from opening to closing. According to the 2005 to 2006 Budget Strategy and Outlook, the Queensland Government is expected to raise \$592 million in revenue from gaming machine tax and levies this financial year alone. Levies and taxes from gambling machines, called pokies there, account for more than 60 per cent of the Government's gambling revenue<sup>122</sup>. And the Queensland Office of Gaming Regulation figures show '*a direct link between the amount of money lost by punters and the number of pokies in their area.*'<sup>123</sup> Dr Matthew Rockloff, a senior lecturer on problem gambling from Central Queensland University, said that '*the link was not 'rocket science*'.<sup>124</sup>

That link between the number of machines and the amount of lost wagers is an important area of research within the gambling debates. It seems to cast doubt over the argument that casinos will radically increase employment. Whether or not the UK Gambling Act 2005, which contains the new regulatory system to govern the provision of all gambling in Great Britain, can fulfil its

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<sup>121</sup> Available online at <http://www.about-australia.com/travel-guides/queensland/brisbane/attractions/building-structure/conrad-treasury-brisbane/> (Accessed 2/2/07)

<sup>122</sup> Tanya Chilcott-Moore 'State wins as gamblers lose' *The Courier Mail*, (February 22, 2006) Available online at [http://www.news.com.au/couriermail/story/0,,1\\_226909-5003180,00.html](http://www.news.com.au/couriermail/story/0,,1_226909-5003180,00.html) (Accessed 2/3/06)

<sup>123</sup> Available online at <http://www.news.com.au/couriermail/story/0,,18226909-5003180,00.html> (Accessed 2/2/07)

<sup>124</sup> Ibid

objectives is outside of the remit of this study. The present concern is with the status of the objectives in terms of social justice. However, before examining these issues in more detail the next section will explore the way that the US has decided to draw the lines between deregulation and prohibition in relation to individual liberty and the public interest.

#### ***F. Prohibition in the US***

In agreement with the UK, the US politicians were also concerned that Internet gambling tends to increase social problems in relation to debt, addiction, problem gambling and criminal activity.<sup>125</sup> However, unlike the UK the US favoured prohibition rather than regulation. On the 30<sup>th</sup> of September 2006 the United States Congress passed a Port security Bill [HR 4411] that carried an amendment. That amendment attempted to ban Internet gambling. Some of the senators who voted for the legislation may not have even known the gambling bill was attached.<sup>126</sup> That is because it did not appear in the officially published version of the Port Bill. On Friday 13 October the US President Bush signed the Unlawful Internet Gambling Act of 2006.<sup>127</sup> This Act makes it illegal for banks or credit card companies to process transactions involving Internet gambling. It has been argued that the absolute prohibitions could be ineffective, but it may at least prevent the industry from expanding its customer base further.<sup>128</sup>

Other attempts prior to the 30<sup>th</sup> September were made to ban Internet gambling in the US. The H.R. 556, 107th Cong. (2002), which was passed by the United States House of Representatives, intended to prevent internet gambling companies taking payments from credit cards.<sup>129</sup> However, the Senate never voted on the proposed legislation before the 107th Congress adjourned. Pressure from state governments prompted credit card companies

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<sup>125</sup> Available online at <http://news.bbc.co.uk/1/hi/business/6046674.stm> (Accessed 2/2/07)

<sup>126</sup> Steve Holland, Available online at [http://reuters.myway.com/article/20061013/2006-10-13T153139Z\\_01\\_N13272332\\_RTRIDST\\_0\\_POLITICS-SECURITY-BUSH-DC.Html](http://reuters.myway.com/article/20061013/2006-10-13T153139Z_01_N13272332_RTRIDST_0_POLITICS-SECURITY-BUSH-DC.Html) See also [http://news.yahoo.com/s/nm/20060930/pl\\_nm/security\\_congress\\_dc](http://news.yahoo.com/s/nm/20060930/pl_nm/security_congress_dc) (Accessed 2/5/07)

<sup>127</sup> Available online at <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:h.r.04411>: (Accessed 5/5/07)

<sup>128</sup> Duke Law and Technology Review 0016. Available online at <http://www.law.duke.edu/journals/dltr/articles/2003dltr0016.html> (Accessed 2/2/06)

<sup>129</sup> 'House Passes Leach Bill,' *Gaming Mag.*, Oct. 2, 2002. Available online at <http://www.gamingmagazine.com/managearticle.asp?c=390&a=693>. (Accessed 2/2/06)

such as American Express, Discover, Citibank, MasterCard, and Visa to prohibit the use of their cards in the US for online gambling purposes. PayPal also announced that it would stop money transfers to online gambling companies.<sup>130</sup> In addition, the decision in *United States v. Cohen* previously indicated that the federal judiciary was willing to use the 1961 Wire Act to prosecute Internet gambling sites, even when they are operated offshore.<sup>131</sup> However, it was argued by the gaming industry leaders that the Department of Justice relies too much on the Wire Act<sup>132</sup>. This is a problem area because new technologies now allow wireless Internet connections. The new law, which prevents banks and other companies from transferring money to gambling companies, is intended to close that loophole. However, it remains to be seen if it is effective. For example, Michael Bolcerek, president of Poker Players Alliance, said outlawing online gambling would just push it underground rather than eliminate it.<sup>133</sup> Never the less the changes in the law may well have an effect on Internet gambling worldwide.

Many UK gambling sites face financial problems stemming from the change in the US law. For example, Partygaming, which has more than 70% of its sales coming from the US, described the ban as a 'significant setback'. It said that it would suspend all of its online gaming sites, such as PartyPoker. But it will develop its casino and poker games in other countries, saying that it will 'realign its cost base'. 888 Holdings said it would stop accepting gaming business from US customers. But it vowed to develop other business activities in the US. Empire Online, which markets online poker and casino sites, said it was immediately ending all business in the US - where it earns 65% of its revenue. Sportingbet's former chairman Peter Dicks was arrested in September in connection with a US anti-racketeering probe centered on online gambling. Sportingbet has recently offloaded its US sports betting and casino businesses to

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<sup>130</sup> Linda Punch, 'Are All Bets Off for Online Gambling?' 15 *Credit Card Mgmt., Merchant Acquiring*, 6, 14.

<sup>131</sup> Available online at <http://www.law.duke.edu/journals/dltr/articles/2003dltr0016.html> (Accessed 2/2/06)

<sup>132</sup> Jeff Simpson, 'Online Gaming Decision Panned: Official Deems Net Bets Illegal In Letter', *Las Vegas Rev.-J.*, (Sept. 4, 2002) Available online at [http://www.lvrj.com/lvrj\\_home/2002/Sep-04-Wed-2002/business/19556668.html](http://www.lvrj.com/lvrj_home/2002/Sep-04-Wed-2002/business/19556668.html). (Accessed 2/12/05)

<sup>133</sup> Richard Clough, *Chicago Tribune* (October 12, 2006) Available online at <http://www.chicagotribune.com> See also <http://www.kansascity.com/mld/kansascity/news/politics/15735149.htm> (Accessed 2/12/06)

Jazette Enterprises for a nominal fee of £1. Betonsports' former chief executive David Carruthers was arrested in July and has been charged with fraud and money laundering. A restraining order has recently been placed on the firm's US business, which is run from Costa Rica, and it is being shut down. The firm said that it would ensure that it does not knowingly accept US wagers and will seek to reimburse existing US customers. World Gaming has called in the administrators after concluding that the forced closure of its US operations will deprive it of the bulk of its sales. The firm's senior directors including chief executive Daniel Moran have all resigned. Neteller, which operates online payment and money transfer systems, says the US ban could have a material adverse effect on its US arm. That firm has three million customers in 160 countries.<sup>134</sup> For these reasons the change in the laws may be challenged.

Hans Kundnani, a reporter for the Guardian, suggested that the UK internet gambling companies, which had £4bn wiped out from the stock market value, might team up with Antigua in their attack on the US's anti-internet gambling laws.<sup>135</sup> In a complaint to the WTO (World Trade Organisation) Antigua had previously challenged the US laws on Internet gambling. The WTO then ruled that US laws on online gambling contravened its rules.<sup>136</sup> Kundnani reported that Antigua would be willing to work with UK companies such as Sportingbet to challenge what they see as US protectionism. According to him, Antiguan officials said that the new law *'puts the United States on a direct collision course with the WTO'*. And according to Mark Mendel, a lawyer who represents Antigua in the WTO, *'the new legislation just makes our case before the WTO that much stronger.'* Several UK companies, including Sportingbet, have indicated they are actively considering a WTO case against the US. Sportingbet chief executive Nigel Payne had previously been in Antigua and is understood to be meeting the Antiguan authorities to discuss the US legislation. Sportingbet has a licence in Antigua, which allows it to operate servers and customer support in Costa Rica for its US customers. However, even in the UK online

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<sup>134</sup> All above details were taken from <http://news.bbc.co.uk/1/hi/business/6044702.stm>

<sup>135</sup> Hans Kundnani 'Gaming firms consider legal challenge to US ban,' *The Guardian Online* (Friday October 6, 2006) Available online at [http://www.guardian.co.uk/gambling/story/0,,1888968,00.html#article\\_continue](http://www.guardian.co.uk/gambling/story/0,,1888968,00.html#article_continue)

<sup>136</sup> Jane Wardell, AP Business Writer, 'Britain attacks U.S. online gambling ban', (Friday October 27) Available online at [http://news.yahoo.com/s/ap/20061027/ap\\_on\\_bi\\_ge/britain\\_online\\_gambling](http://news.yahoo.com/s/ap/20061027/ap_on_bi_ge/britain_online_gambling) (Accessed 28/10/2006)

gambling may now be under threat as a result of the US crackdown. US credit card companies MBNA and Capital One are considering the possibility of blocking the use of their cards for online gambling even from UK customers. Some major credit cards such as American Express already ban such uses.

The UK Culture secretary, Tessa Jowell, said that *'The US crackdown on online gambling is a 'new prohibition', which is likely to fuel a rise in fraud and exploitation.'*<sup>137</sup> Outlining the three ways to respond to the explosion in online gambling she said *'You can prohibit, like the US, do nothing, or regulate, like we have.'*<sup>138</sup> Jowell then added that *'I firmly believe we have chosen the path that will do the most to protect children and vulnerable people and keep out crime.'* Jowell wants to win international support for the government's approach of allowing regulated online casino and poker sites rather than expelling them offshore and out of reach. She added: *'America should have learnt the lessons of prohibition.'* The Volstead Act, which brought in prohibition in 1919, was meant to stop alcohol from causing harm, but in practice it forced customers into the hands of the bootleggers.<sup>139</sup>

Eight months earlier Mark Oliver reported that it was hoped the situation in the US would become clearer by the time the UK summit is convened.<sup>140</sup> And this seems to be the case, as Jowell hosted that summit on online gambling on Tuesday 31st October 2006. Politicians from over 30 countries discussing how to achieve international regulations will attend this. A spokesman for Jowell's department said a US delegation would be welcomed whether the country opts for *'prohibition or regulation'*. This summit will take place a few weeks before The European Online Gambling Summit 2006, which will be held at the Dorchester, Park Lane, London W1 on the 5th December 2006. Registration costing £595 will narrow down those who could attend. However, the aim of the summit is directed at issues related to business opportunities and revenue.

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<sup>137</sup> 'US gambling law flawed – Jowell,' Available online at [http://news.bbc.co.uk/1/hi/uk\\_politics/6090358.stm](http://news.bbc.co.uk/1/hi/uk_politics/6090358.stm) (Accessed Friday, 27 October 2006)

<sup>138</sup> H el ene Mulholland, 'Jowell compares US gambling ban to prohibition,' *Guardian Unlimited*, (Friday October 27, 2006) Available online at <http://politics.guardian.co.uk/homeaffairs/story/0,,1933345,00.html> (Accessed Friday, 27 October 2006)

<sup>139</sup> Available online at [http://www.dailymail.co.uk/pages/live/articles/news/news.html?in\\_article\\_id=412941&in\\_page\\_id=1770](http://www.dailymail.co.uk/pages/live/articles/news/news.html?in_article_id=412941&in_page_id=1770) (Accessed 24/5/ 2007)

<sup>140</sup> Mark Oliver, 'Britain to host online gambling summit', *Guardian*, (January 16, 2006) Available online at <http://technology.guardian.co.uk/news/story/0,16559,1687714,00.html?gusrc=rss> (Accessed 27/4/2007)

*This unique summit has been put together after extensive research with senior industry practitioners to examine the future revenue and business opportunities that exist for European gaming operators.<sup>141</sup>*

In summary, both the UK and US are concerned about the impact of Internet gambling on the public interest. The UK is drawing the line closer towards individual liberty than is the US, but it is making provisions to protect the public interest through regulation. The new UK laws will allow the Internet gambling industry to be based on shore and they will be regulated. This ability to regulate is the main argument against the decision in the US, which effectively bans Internet gambling by placing it out of reach of regulation. Conversely, the banning of Internet gambling in the US seems to shift the balance between individual liberty, which has often been associated with the Internet, and government paternalism. On one hand, Internet gambling allows individuals to make decisions regarding the way they spend their money. However, the recent US law seems to suggest that gambling is still understood as a stigmatized activity. Yet, before the Internet, gambling was a tolerated activity in a highly regulated sector of the US economy.

Technological developments in the Internet have opened up the floodgates on the ability of gambling to thrive as an industry. This was inconsistent with the old US legislation, which was designed to confine gambling activity to a narrow domain. Now the US government seems to be in the process of returning gambling, in relation to the Internet, to its former status. However, its land-based gambling economy is growing. On the other hand, as a result of new UK laws to regulate Internet gambling, there will be a rise of American style casinos in the UK. The main difference between the ways that

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<sup>141</sup> 'Business Forum International' Available online at <http://www.bfi.co.uk/index.php>. (Accessed Friday, 27/5/2006) The Programme includes (a) Trends in online gambling in Europe. This will address: Overview of current and expected industry growth; Forecasting future revenue and business opportunities for gaming operators; Impact of US regulation in light of recent issued arrest warrants and how this will affect European online gambling operators; Can the UK become the world's leading online gaming jurisdiction? Speakers include John Anderson, Chief Executive Officer, 888.com and Peter Collins, Professor of Public Policy Studies and Director Centre for the Study of Gambling, University of Salford. (b) Developing new eGaming brands and products to entertain a mass market audience. This will include How eGaming and online entertainment are converging; Opportunities beyond poker and bingo; When Google, Yahoo! and eBay enter the market. Speakers include Andrew Pegle, Managing Director, GamArena (c) Skill gaming economics: what is "skill gaming", how much are skill game players worth and can they be cross-sold existing eGaming products?

the US and UK have altered their laws in relation to internet gambling is that the former already have a thriving casino industry while the latter currently do not. It is also worth mentioning that Australia, which has a thriving land based gambling industry, also opted to prohibition in relation to online gambling. So it seems that casino gambling, rather than new technologies for gambling, might be an important force behind the changing UK gambling laws. Whether or not the UK's decision can be seen as an example of social justice will form the subject matter of the next two sections. It is worth mentioning at this stage that Gordon Brown's 2007 Budget went against the 2001 Budget by raising the gambling tax. This rise appeared a couple of months after the choice of Regional Casino was announced.<sup>142</sup>

### ***G. Individual Liberty and the public interest online***

Internet gambling is one small part of the issue concerning how technological developments are affecting politics. Yet it is a small part that intertwines with the larger issues. These issues include the debates around technological determinism and social determinism, e-democracy in terms of social capital and the public sphere, e-government in terms of government and democracy, internet regulation, intrastate and interstate surveillance, the blurring of the line between state and corporate surveillance, internet changing the political economy of media and entertainment industry, and the question of whether the internet is reinforcing or threatening established economic inequalities in broader media. This section will elaborate on some of these issues further before returning to Internet gambling.

There has been a huge debate concerning the relationship between technology and social, economic, and political life.<sup>143</sup> These debates have centered on technological determinism and social determinism since about the

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<sup>142</sup> Leisure firm Rank warned that the changes would wipe 20 percent off the annual profits of its casinos. It said profits of its Grosvenor Casinos, which brought in 39.5 million pounds (\$77.31 million) in 2006, would fall by 8 million pounds a year as a result of the higher taxes, news that knocked Rank's shares more than 4 percent. See article by Reuters UK. Available online at [http://investing.reuters.co.uk/news/articleinvesting.aspx?type=allBreakingNews&storyID=2007-03-21T183311Z\\_01\\_L21677831\\_RTRIDST\\_0\\_BRITAIN-BUDGET-GAMBLING-UPDATE-1.XML&pageNumber=1&imageid=&cap=&sz=13&WTModLoc=InvArt-C1-ArticlePage1](http://investing.reuters.co.uk/news/articleinvesting.aspx?type=allBreakingNews&storyID=2007-03-21T183311Z_01_L21677831_RTRIDST_0_BRITAIN-BUDGET-GAMBLING-UPDATE-1.XML&pageNumber=1&imageid=&cap=&sz=13&WTModLoc=InvArt-C1-ArticlePage1) (Accessed Friday, 24/5/2007)

<sup>143</sup> See A. Feenberg, *Questioning Technology*, London: Routledge 1999



nineteenth century.<sup>144</sup> Within this context it has been argued that the new technologies have led to the current information society, which is fundamentally different to past societies.<sup>145</sup> It has also been argued that different types of technologies embody specific norms.<sup>146</sup> For example, it has been suggested that the Internet embodies values such as freedom, community, equality, altruism and democracy. Others have declared that it embodies social control, discipline and hierarchy.<sup>147</sup> On the other hand, those favoring the perspective of social determinism argue that the types of technologies are not important. According to them there is nothing distinctive or new with the Internet that other models of change cannot be used to examine.<sup>148</sup> These debates are important to the present study because of the argument that it is the new technologies which have led to increases in gambling and subsequent changes in the law. Rawls was writing his *A Theory of Justice* before the rise in the new technologies. In other words, he was writing before the new technologies had an impact on gambling attitudes and gambling behavior.

E-democracy covers areas such as the Internet's role in enhancing community cohesion, political deliberations, and participation.<sup>149</sup> Two key points here are social capital and the public sphere. Putnam's concept of social capital, which explains the decline in civic participation,<sup>150</sup> has been called on to examine the likely effects of e-democracy.<sup>151</sup> It has been suggested that many community networks have been driven by social rather than political agendas but the former could lead to the latter.<sup>152</sup> Others have called on Habermas' study of the historical public Sphere<sup>153</sup> to use as a tool in order to examine contemporary communications. For example Dahlgren argued that the Internet, as a communication medium, is well suited to provide space for public debate

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<sup>144</sup> A. Chadwick, *Internet Politics: States, Citizens, and New Communication Technologies*, Oxford: OUP, 2006, p. 18

<sup>145</sup> F. Webster, *Theories of the Information Society* (2<sup>nd</sup> Edition) London: Routledge 2002

<sup>146</sup> C. May, *The Information Society: A sceptical view*, Cambridge: Polity Press, 2002, p. 25.

<sup>147</sup> A. Chadwick, *Internet Politics*, op. cit. p. 18

<sup>148</sup> See D. Mackenzie and J. Wajeman (Eds.) *The social Shaping of Technology* (2<sup>nd</sup> edition), Buckingham: Open University Press, 2000

<sup>149</sup> Chadwick, *Internet Politics*, op. cit. p. 83

<sup>150</sup> R. D. Putnam, 'Bowling Alone America's Declining Social Capital' *Journal of Democracy* 6, 1 (1995): 65-78

<sup>151</sup> L. Weber, Loumakis, and J. Bergman, 'Who Participates and why? An analysis of citizens on the internet and the mass public' *Social Science Computer Review*, 21, 1 (2003): 26-42

<sup>152</sup> See A. Chadwick, *Internet Politics*, pp. 83-113

<sup>153</sup> J. Habermas, *The Structural Transformation of the Public Sphere*, Cambridge: Polity Press, 1999

that is spontaneous, flexible and self-governed.<sup>154</sup> E-government, in Western democracies such as America, Britain, Western Europe and Australia, is one area of e-democracy where there has been much research. According to Jaeger 'e-government offers a new way to facilitate citizen participation in the political process.'<sup>155</sup>

The US federal government has led the way in e-government developments since the 1990's. It was one of the first to link new technologies and administration reform<sup>156</sup> with the aim to 're-engineer the relationship between government and citizen.'<sup>157</sup> This eventually led to the launch of Firstgov in 2000.<sup>158</sup> In 1997 the Blair labor government in the UK also developed its e-government.<sup>159</sup> One of the main debates in this area concerns the question of whether e-government means better government or better democracy.<sup>160</sup> One issue focuses on the interactive natures of government websites. Chadwick and May found that the US government website was more interactive.<sup>161</sup> Others have said it is not so clear-cut when examined more closely.<sup>162</sup> Another important area of e-government concerns information dissemination to citizens.

Prior to the re-design of the DCMS website, which took place around April 2006, information about the UK gambling laws and related documents were very accessible. Many of the important documents were hyperlinked from the homepage. That link disappeared and it became extremely difficult to find gambling related material. Then, a few weeks later it appeared again. Whether or not the redesigned webpage is related to recently released documents as the result of the Freedom of Information law remains to be seen. For example, typing 'greenwich' or 'dome' or 'gambling' into the DCMS search engine will

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<sup>154</sup> P. Dahlgren, 'The internet and the democratization of civic culture,' *Political communication*, 17, 4 (2000): 335-40,

<sup>155</sup> P. T. Jaeger, 'The Endless Wire: e-government as a global phenomenon. *Government Information Quarterly*, 20, 4 (2003): 324

<sup>156</sup> See U.S. National Performance Review 1993 From Red Tape to Results: Creating a Government that works better and costs less: Report of the national performance review GPO, Washington DC

<sup>157</sup> Chadwick, *Internet Politics*, op. cit. p. 181

<sup>158</sup> Available online at <http://www.firstgov.gov/> (Accessed 22/3/2007)

<sup>159</sup> See U.K. Cabinet Office (1999) *Modernizing Government* Cm 4310 (HMSO, London)

<sup>160</sup> Chadwick, *Internet Politics: States*, op. cit. p. 184

<sup>161</sup> Ibid. 197

<sup>162</sup> See D. M. West, 'Global e-government 2004 Centre for Public Policy'. Brown university. Providence, RI Available online at <http://www.insidepolitics.org/egovt04int.pdf> (Accessed 24/5/2007)

not get one to the documents, which have been placed in the Appendix. On the other hand, the passage of the UK Gambling Act through parliament has been much more transparent than the US which attached an amendment to an unrelated bill. However, even though the passage was transparent the foregrounding of the Budd Report's 'frames of reference' and Jowell's 'Criteria' and the Act's 'Objectives' meant that other issues were left out. We have already seen that Rawls' theory was criticized for a similar reason.<sup>163</sup> That will be examined in the next two chapters. The remainder of this chapter will draw on Luck Egalitarianism, Utilitarianism and Rawls in order to explore the different decisions taken by the UK and the US.

### *H. Principles as objectives*

As noted in chapter 1, Luck Egalitarianism draws a distinction between brute luck and option luck.<sup>164</sup> Advantages stemming from inequality are understood to be unjust in the former but not in the latter. Within this context, if two people choose to gamble and one wins while the other loses, then the inequality is not considered to be unjust. However, if we look at the inequality between the casino and the punter the issue of justice is not so clear-cut. Both the casino and the punter choose to take part in the gamble. It is a voluntary act. All things being equal, if one person wins and the other loses then the resulting inequality is not a case of injustice. However, not all things are equal, and the line between brute luck and option luck is not that clear-cut. For example, if someone is addicted to gambling or genetically determined to gamble, then the decision to gamble is not voluntary. It is more like brute luck. In this case, inequality between the casino and punter could be seen as unjust.

There is much evidence to show that the casinos rely on the participation of addicted or so-called problem gamblers. For example, Professor Earl L Grinols, from the University of Illinois, argued that super-casinos actually rely on problem gamblers for up to a half of their revenues.<sup>165</sup> One can not condemn casinos for not banning problem gamblers because they might not know which

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<sup>163</sup> See Chapter 1 above

<sup>164</sup> See Chapter 1, p. 32-34

<sup>165</sup> See the article by Nick Cohen 'Take from the poor to give to the rich... that's New Labour's super-casino plan', *The Observer*, (19/03/06): 11

punter is a problem gambler. That is because there is no absolute definition of a problem gambler. However, if the casino deliberately attracted problem gamblers, then that could be seen as unjust from a Luck Egalitarian perspective. Research shows that more gambling will lead to more problem gambling.<sup>166</sup> So, if the casino tries to attract more gamblers then they would attract more problem gamblers and this could be seen as unjust. For this reason, a Luck Egalitarian might oppose the Government's decision to remove the ban on advertising by getting rid of the 'unstimulated demand' clause. The inability to advertise may deter internet gambling companies from being based in the UK. This would mean that they would not be regulated and would not pay tax. The inability to regulate internet gambling could, but did not, lead to the UK taking the same option as the US and ban Internet gambling.

The US decided to ban internet gambling because it was too difficult to regulate.<sup>167</sup> The US took away the liberty of the normal gamblers in order to safeguard against the social impact of problem gambling. So it took away the liberty of a few for the sake of the many. While Luck Egalitarianism might oppose the inequality between the gambling company and the problem gambler, as a case of brute luck, it might not oppose the inequality between the gambling company and the normal gambler, as a case of option luck. However, in this case the two impact on each other and they are not easily separated. A Utilitarian, on the other hand, might agree with the US decision to take away the liberty of a few in order to protect the many.<sup>168</sup> This was Rawls' main criticism against Utilitarianism. Rawls argued against Utilitarianism because it could sacrifice the few for the good of the many.<sup>169</sup> This notion can be seen reflected in one of the reasons why the UK decided to regulate Internet gambling. This decision also places regulation in the grey area between what Luck

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<sup>166</sup> See p. 7-10 above

<sup>167</sup> See chapter 3 section F above

<sup>168</sup> The US decision to ban Internet gambling would indicate that the inability to regulate internet problem gambling has a negative impact on society. However, their relaxing of the laws related to land-based gambling indicates that regulation, in this case, can control the negative impact of problem gambling on society. However, the evidence shows that this is not the case. See chapter 2 section D, p. 139-144 above. Nevertheless, the argument behind banning Internet gambling and limiting the liberty of a few for the good of society, reflects a Utilitarian argument. The telos, the good of society, grounds and gives meaning to the decision to limit the liberty of a few.

<sup>169</sup> See Chapter 1 section A, p. 16 above

Egalitarianism calls brute luck and option luck. As we will see, Rawls' two principles could be used to justify the UK decision to regulate.

As previously noted, Rawls was interested in justice in relation to the basic structure of society rather than the justness of particular acts. The reason why he wanted certain characteristics veiled is because it would prevent a basic structure being biased. One example of a biased basic structure could be a state that endorsed apartheid. Within this situation, the color of skin could be seen as an example of brute luck. The choices that people make could be seen as an example of option luck. However, the choices open to people with white skin might be more numerous than the choices open to people with black skin. So the brute luck, skin color, can not easily be separated from the option luck.<sup>170</sup> Rawls was different to Luck Egalitarianism because he realized that the basic structure will have an affect on the relationship between brute luck and option luck. Rawls' critique of justice based on desert centered on the notion that a person's background will have an effect on their actions.<sup>171</sup> In this sense, the option luck and brute luck distinction is similar to the distinction between free-will and determinism.<sup>172</sup>

The public interest was a central issue in the UK's decision to regulate Internet gambling and the US's decision to ban it. Even though, according to the Budd Report, there are no guidelines for where to draw the line between complete deregulation and prohibition, the UK leant towards individual liberty and made provisions for the adverse affect on the public interest, while US disregarded the former in favor of the latter. The US took a type of Utilitarian position while the UK's decision, as I will argue, seems to reflect a Rawlsian perspective. The UK leant in the direction of individual liberty but put safeguards in place to protect those who would be aversely affected by the new

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<sup>170</sup> The types of things that Luck Egalitarianism refer to include: whether a person who finds that ordinary tap water tastes 'unbearably sour' should be compensated for purchasing bottled water. See Op. Cit. Dworkin, *Sovereign Virtue*, p. 288; whether people who feel the cold more than others should be compensated for purchasing expensive sweaters. See G. Cohen, 'On the Currency of Egalitarian Justice', *Ethics*, 99, 4 (1989): 917-921. Against these types of inquiries Elizabeth Anderson asked '*What has happened to the concerns of the politically oppressed? What about inequalities of race, gender, class, and caste? Where are the victims of national genocide, slavery, and ethnic subordination?*' Op. Cit. Anderson, 'What is the Point of Equality?' p. 288

<sup>171</sup> Rawls, *A Theory of Justice*, 1999, op. cit. p. 89

<sup>172</sup> This point will be examined in the following chapter, however, it will be examined in relation to agency in the work of Foucault, Deleuze and Lyotard, rather than the literature related to the metaphysical arguments around free-will and determinism.

laws, and, in turn, would affect society. These included children, the vulnerable and problem gamblers. In some respects this is similar to Rawls' theory of justice, outlined in chapter 1, which made safe guards for the worst off.

There has been much controversy over who the worst off are within Rawls' theory but for the purposes of this study we will examine the justness of the Gambling Act from a Rawlsian perspective by identifying children, the venerable and problem gamblers as the worst off. The difference principle will be the main focus here as we examine the re-distribution of money within the gambling industry.<sup>173</sup> If the worst off in this context are children, the vulnerable and problem gamblers, and they end up in a worst position because of changes in the law, then those changes could be considered unjust. Rawls himself argues that the term 'justice as fairness' does not imply that justice and fairness are identical, but that individuals who are in a situation of equality agree to the principles of justice under fair conditions. We will return to this point in the following chapter, when examining the veil of ignorance in relation to the work of Adorno, Foucault, Lyotard and Deleuze. This section is only drawing on the theorists as a framework to gain a better understanding of gambling.

For now, let us imagine a hypothetical society - the gambling industry in its entirety. This would include the companies, investors, workers, punters and their families, and everyone else affected by the change in the law such as the factories that make the gambling equipment, the drivers that deliver it and so on. We know that the new Act (the new rules) would affect the basic structure of our society. In our hypothetical society the worst off could be those that a utilitarian might sacrifice for the greater good, or they could also be those that Rawls would like to protect.<sup>174</sup> In this case, the objectives embedded in the Act, liberty and protection, could be theoretically supported by Rawls liberty principle and difference principle. However, it remains to be seen if those objectives are enough to really protect the worst off. While the examination of the position of the worst off after the laws have been implemented in 2007 is

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<sup>173</sup> Money is not the only thing that can lead to worst off and Rawls, as we saw in Chapter 1, has been criticised for this reductionism.

<sup>174</sup> Utilitarianism was referred to above in relation to the US where the liberty of a few were sacrificed for the greater good of society. Utilitarianism could also be used to sacrifice the children, vulnerable and problem gamblers if it was shown that an increase in gambling actually improved the conditions for the majority.

outside the remit of this thesis, there is other evidence that we have already mentioned which we could use to examine this hypothetical situation.

We saw in the previous chapter that the gambling industry is substantial and growing. We also saw that with this growth the number of problem gamblers has been on the increase. One of the objectives in the new gambling Act is to address the issue of problem gambling. It does this by regulation. It makes sure that companies meet certain standards to obtain a license and that current organizations meet the Act's objectives. It also insures that funds are provided to address gambling problems. So while these moves show recognition that problem gambling is an issue with changes in the law, these gamblers are not just sacrificed for the good of the industry. While the new Act might increase the number of problem gamblers it also makes provisions to keep that number down. If the number of problem gamblers are kept down one might wonder where the money comes from to develop the gambling industry – after all someone has to finance the other areas of our hypothetical society.

Much research suggests that those from poorer backgrounds gamble the most. We have seen that the research also suggests that those from more privileged backgrounds tend to invest in things such as stocks and bonds, which would include shares in the gambling industry. The difference between gambling and investing has already been examined,<sup>175</sup> so for now, we can say that it might be the poorer members of society who may finance the other members of our society. This would include those who invest in the gambling industry and those who offer help to the problem gamblers. It would follow, that as the gambling industry increases so also will the finances from the poorer members of society. This could mean that it is the poorer members of society, rather than the identified problem gamblers, who could be the worst off in our society. They would also be the ones who could be either sacrificed by Utilitarianism or saved by Rawls. Research also suggests that the majority of problem gamblers come from less well off backgrounds. Therefore, it could still be problem gamblers, who have not yet been identified as problem gamblers, who are financing out hypothetical society. More research into problem gambling could help prevent these from gambling more and therefore work as a

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<sup>175</sup> See Chapter 1 sections F and G above

regulator. If that is the case, then Rawls' difference principle could be used to justify the changes in the law in theory. However, in practice it could be a little more complicated.

According to the Difference Principle mentioned above, differences in our hypothetical society could only be justified if they benefited the worst off or did not make their position any worse. The gambling laws could only be changed if those on the bottom of the heap did not become worst off. In other words, the rich could get richer only if the worst off were not left behind. There was some uncertainty over who the worst off were in Rawls' theory but we did see that the Act highlights these as children, the vulnerable and problem gamblers, but does not include those on lower incomes. However, the difference principle was not at the top of the hierarchy – liberty was. Because liberty takes priority, Kymlicka tells us that liberty can only be restrained for the sake of liberty.<sup>176</sup>

We have seen that the main reason for the new law is not primarily intended to increase the liberty of the punter as they can already gamble online. What it does increase, however, is the liberty of the gambling industry. But this liberty is tempered by the licensing objectives that are directed at one possible group of the worst off. The ability to advertise their products should lead to greater expansion. This will also generate more tax revenue and that in turn should help government expenditure. Some of the extra finances may in turn be used to enhance the welfare system and thus help the common good. However, we also saw that much of the profit in the gambling industry comes from our other possible group of the worst off – those on lower incomes. It could be argued then that those on lower incomes are supporting the welfare system. They are also being encouraged to do so by the 'unstimulated demand', which was condemned in the 1978 act and over-ridden by the Budd Report.

Much of the advertising will be directed at online gambling. That was the main reason given for updating the law. Gambling on a computer might be very similar to gambling on a poker machine. Our research suggested that gambling on machines is the most addictive and hence will produce the most problem gamblers. Machines are set to payout a percentage of the takings –

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<sup>176</sup> W. Kymlicka, *Contemporary Political Philosophy: An Introduction*, Oxford: Oxford University Press, 2002, p. 56



usually about 90% - 96%.<sup>177</sup> This means that the provider will keep at least 4%. Some punters might win and some might lose but the provider will make a profit. Just as all are equal before the law, all have equal chance of being the winner or loser but someone has to lose for the provider to take the 4%. So it would seem that liberty does have priority over equality. On the other hand, equality is ensured because gambling, according to the objectives, must be fair. Fairness in this regard means gambling companies must declare that the odds are in their favor. But does this mean that the provider is playing a fair game? If so then how do we account for the fact that the odds are set against the punter? However, that is not what Rawls meant by fairness.

### ***Conclusion***

In conclusion, we have seen how developments in the new technologies have been given as the reason why the gambling laws require change. We have also seen that this will enhance the liberty of the gambling industry as well as the individual punters. With the repeal of the ‘unstimulated demand’ clause more people might become aware of and possibly indulge in Internet gambling – at least in the UK if not the US. And the evidence suggests that this will lead to an increase in problem gamblers. However, the objectives in the Gambling Act will attempt to keep that increase to a minimum. These objectives will also attempt to keep the gambling industry crime free and fair. We can see that Rawls’ theory could be used to justify the new Act because it argued for Liberty over equality with the difference principle as a regulator. The difference principle was there to protect the worst off and the worst off may be effected by the change in the gambling laws. So what seemed emerge was some sort of loose correlation between the Gambling Act’s three objectives and Rawls’ three principles.

If we hold on to the idea that the whole gambling industry – punters and all - is our hypothetical society, then the new laws can be seen to be changing the basic structure of that society. Unable to draw a line between complete prohibition and complete deregulation the Budd report leant in the direction of liberty. This would be compatible with Rawls’ first principle ‘*each person is to*

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<sup>177</sup> Percentages differ and I will return to this point.

*have an equal right to the most extensive basic liberty compatible with a similar liberty for others.*<sup>178</sup> Not only will the punters have the liberty to gamble but all of the gambling companies qualifying to be placed under the same licensing regulations would be at liberty to advertise and expand their business. They would all be regulated to ensure that the gambling was conducted fairly so all of the punters would have an equal chance to increase their financial funds – or not. And those who had the talent to win by altering odds via cheating would not be permitted to play – unless they owned the gambling company. This would be compatible with the second part of the equality principle by being *‘attached to positions and offices open to all.’*<sup>179</sup> And the difference principle that reads *‘reasonably expected to be to everyone’s advantage’* seems to be comparable with the objectives to look after children, venerable and problem gamblers – one possible version of the worst off. Referring to this version as the worst off could be supported by Dworkin’s claim, mentioned in chapter 1. He told us that there are no non arbitrary ways to define the worst off group and whatever arbitrary specification one makes will be consequential for choice of policy.<sup>180</sup> While that argument could be explored in more detail it would take us away from the aim of this thesis, which is primarily concerned with Rawls’ argument about risk-aversion.

In our examination of risk-aversion so far we have explored gambling and related topics from a horizontal and vertical axis. In chapter 2 the vertical axis was explored by looking at the topic through history, while the horizontal axis was explored by drawing on the Budd Report, and related research, to look at the way that the topic has been categorized in recent history. This chapter examined the vertical axis by looking at recent changes in the gambling law while trailing the Bill through parliament. The horizontal axis was explored with a comparative study between the UK and US. In an attempt to better understand that comparison the last section drew on the work of Luck Egalitarianism, Utilitarianism, and Rawls’ own theory. With this research into gambling behind us we are now in a better position to explore Rawls’ argument, that participants under the veil of ignorance would be risk-averse and would chose his two

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<sup>178</sup> Rawls, *A Theory of Justice*, 1973, op. cit. pp. 60, 302

<sup>179</sup> Ibid. 60

<sup>180</sup> Dworkin, *Sovereign Virtue: The theory and Practice of Equity*, op. cit. Chapter 9  
*‘Justice, Insurance, and Luck’*

principles. In other words, we need to examine the veil of ignorance from an epistemological perspective.

## CHAPTER 4: IS THERE ANYONE IN THE HOUSE?

*'I see nobody on the road,' said Alice. 'I only wish I had such eyes,' the King remarked in a fretful tone, 'to be able to see Nobody! And at that distance too! Why, it's as much as I can do to see real people, by this light!'* (Lewis Carroll)

### **Introduction**

The previous chapter examined the background leading up to the UK's Gambling Act (2005). It found that the introduction of new technologies has been given as the main reason for updating the gambling laws. It noted that there were no direct criticisms against that main reason. However, as well as changing the laws in relation to internet gambling it also found that the new gambling Act will have a profound effect on land based gambling. In both cases there will be regulations in place to protect the young, vulnerable and problem gamblers. It then contrasted the UK and US reactions to the development of Internet gambling and showed that both were drawing the line between deregulation and prohibition in different places. It noted that they might have as much to do with the different land based gambling industry as with developments in the new technologies. The 15% gambling tax in Gordon Brown's 2007 budget seemed to foreground that possibility.

The previous Chapter also noted that there have been many criticisms against other changes accompanying the update. The main areas of contention seemed to be (a) the lack of research into gambling and the difference between gambling, gaming, betting and the lottery; (b) the possibility of advertising which is a drastic change from the Rothchild's report that criticised 'unstimulated demand'; and (c) the human cost / benefit correlation. The last one (c) was directly related to social justice issues. In that discussion it suggested that there was a correlation between the Government's objectives and Rawls' principle. These findings suggest that (a) humans might gamble more than Rawls' would have realized; and (b) this may effect his theory; because (c) different people might gamble differently; which (d) might lead to implications for the choice of principles in the original position; but that (e) this would depend on how black the veil of ignorance could be made. Some of these findings and issues will need to be examined more fully in the following chapter

as they have a direct impact on the issue under consideration. This chapter will be primarily concerned with epistemological issues concerning the veil of ignorance.

### *A. The veil of ignorance*

Rawls justified his principles of justice on the basis that persons in the original position not only could choose them but, if the opportunity for cheating were eliminated, would choose them. If those persons in the original position did not know their gender, race, class, intelligence level, natural abilities, political views or religious beliefs, then they would be unable to rig the basic structure of the society in their own favor. So by placing a veil of ignorance over those characteristics it removes the ability for them to cheat. That is what makes the procedure fair. And in addition it is also what makes everyone equal. Those persons are only allowed to know basic general information that will apply to the entire group. That information would be that they are free, rational, equal, self-interested human beings who have similar needs to the rest of the group. This ensures that the principles agreed upon will benefit the group as a whole including, unlike Utilitarianism, provision for those least advantaged.

However, as previously noted, there is no guarantee that those in the original position would not take a risk. And if they did then the level of risk might vary depending on who the people were. For example, we have already seen that different types of people tend to gamble differently. Whether or not that difference stems from something essential or whether it is relative to the time and/or culture will be examined in this chapter. If we find that the nature of that behavior is based on some essential characteristic then it may not be possible to veil one's gambling patterns in the original position. This would mean that gamblers would have to be excluded from the original position.<sup>1</sup> However, if we find that it is in some way relative then there may be either some other way to keep the procedure fair or we might have to base justice on something else.

Rawls believes that the veil of ignorance is necessary to produce a fair

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<sup>1</sup> However, the choice of who would be excluded would be related to the meaning of gambling and this could change from one episteme to another.

set of principles about which there can be a consensus. However, we have seen that the veil of ignorance is also necessary for Rawls' theory of justice as fairness itself. Rawls tells us that for a social contract to be fair it must be conceived by rational people behind this veil of ignorance. So the possibility of rational actors behind a veil is central to the validity of Rawls' theory. And these areas have received criticism on a number of fronts. For example, we have previously noted that Sandel questioned Rawls' view of the unencumbered self that is presented as prior to its ends. We also noted that this comes from Kantian notions of the self and this notion was referred to as Kantian Constructivism. This type of understanding of the self assumes that values can be separated from the person that has them. Sandel took issue with Rawls' notion of a pre-existing person as free and equal and claimed that the good is conceived of as a community and defines and directs the community's way of life.<sup>2</sup> Nagel raises the argument that stripped of personal knowledge people in the original position would be unable to formulate the values needed for a just society. He added that by suppressing morally relevant information, the veil of ignorance is likely to lead to an unfair conception of justice.<sup>3</sup> This chapter will examine the foundations of those types of arguments by looking at the essentialist / anti-essentialist debates.

### ***B. Essentialism, Constructivism and Strategic essentialism***

We have already mentioned the contingent nature of the way gambling has been understood at different times and in different places. In our own time the focus has been on problem gamblers because that is one of the arguments against the expansion of the gambling industry in the UK. Within those debates we have already noted that there are good arguments on both sides of the divide concerning the nature of problem gambling. What we have not yet done in any depth is to examine the theoretical underpinnings of those debates. In order to explore them in more detail this chapter will draw on some of the work previously mentioned and re-cast it within the debates concerning essentialism

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<sup>2</sup> Michael Sandel, "The Procedural Republic and the Unencumbered Self" in *Political Theory*, 12, 1 (1984): 87

<sup>3</sup> Thomas Nagel, "Rawls on Justice", *Philosophical Review*, 82, 2 (April 1973): 220-34

and constructivism.<sup>4</sup> As this is a huge area with a long history, the focus here will be on some of the relevant implications within the debates rather than an attempt to resolve the issue.

The issues around essentialism and constructivism are related to issues around ontology and epistemologies, which are themselves interrelated. The following words from Hubert Dreyfus and Charles Spinosa clarify this point. According to them, essentialists make *'two general interlocking claims, one about the nature of the world and one about the nature of knowledge'*, in other words, they assume that *'the world consists of things that fall into kinds or types,'* and it follows from this that *'knowledge consists of recognizing and relating those types and determining which type each thing is an instance of.'*<sup>5</sup> This might mean that there is something intrinsic to the thing or person itself and which others of the same type might have. Whatever it is could be used to define the group. And whatever it is might be unchanging even if something else about the thing changes. And it could also mean that that essence might be what causes those changes.

For example, Plato made a distinction between the essential universe and the perceived universe. His cave analogy was a way of describing the difference. According to him, true knowledge is knowledge of the essences of things, not of the different individual perceived things themselves. That is because perceived changing things have variations which are the result of accidents or local circumstance rather than the essence. Even Plato's little white lie was based on essentialism. In order to prevent people expressing their dissatisfaction with their roles in society he suggested that they be told that human beings, like the metals gold, silver and bronze, possess different natures that fit each of them to a particular function within the operation of the society as a whole.<sup>6</sup> On the other hand, Aristotle's famous notion about the acorn changing into an oak tree meant that the essence of the oak tree (something about its form) unfolded. In other words, rather than separating the forms from

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<sup>4</sup> Although it has been argued that the two cannot be separated. *'To insist that essentialism is always and everywhere reactionary is, for the constructionist, to buy into essentialism in the very act of making the charge; it is to act as if essentialism has an essence'* Diana Fuss, *Essentially Speaking: Feminism, Nature and Difference*, New York: Routledge, 1989, p 22

<sup>5</sup> Hubert L. Dreyfus and Charles Spinosa, 'Two Kinds of Antiessentialism and Their Consequences,' *Critical Inquiry* 22 (Summer 1996): 738.

<sup>6</sup> Plato, *The Republic*, op. cit. section 415a, p. 182

reality, as Plato had done, Aristotle put forward the notion that the oak tree's form as essence precedes and stays with it as it changes or unfolds into the Oak tree.

Darwin's theory of natural selection criticized the notions of essentialism and teleology. According to him there were no distinct species and things evolved via the accidents. These accidents are known as random mutations, which lead to the variations that Plato assigned to the perceived universe. Evolution is an opportunistic process. This means that the changes are not moving towards a goal or purpose in the way that Aristotle understood. Random mutations happen and the environment changes. When the mutations suit the changed environment, more so than what they changed from, then it is more likely that those with the changes will live longer and pass the changes down to their offspring.

However, essentialist thinking has also been based on genetics. For example, essentialist thinking can be seen with ideas such as the gay or gambling gene. If this was the case then the prevention of gambling might require more than a veil to cover it up. Perhaps in some cases we could use surgery, medication or gene therapy! In other words, the essence of Aristotle's oak tree (or a gambler) could be altered so that it could unfold into a rose bush (or a non-gambler). But for Plato that change would simply be part of the perceived universe anyway and it wouldn't affect the essence. Whether or not there is an ideal form of a gambler or a casino is outside the remit of this research. However, in the UK problem gamblers are being presented as bad copies of the ideal gambler that needs to be fixed, while in the US they are being isolated from water and fertilizer (money transfer cards) in an attempt to prevent their unfolding. In other words, both the UK and US seem to be treating problem gambling as a form of essentialism.

Various forms of prejudices such as racisms, sexism, homophobia and classism etc., have been criticized for being based on essentialism. That is because it can be used to divide people into distinct types with different unchanging characteristics that can cause the character or behavior of the person. And once classified those people can be placed in an order where some types are seen as inferior or superior to other types. Rawls' veil of ignorance over those types was supposed to remedy the situation but, as we have seen, he



was criticized for removing the possibility of tackling prejudice.<sup>7</sup> Other theorists, as we will see, have criticized essential thinking in order to prevent discrimination, but they too have been criticized for undermining the identity, which is required for making a stand. And still others have taken on board the criticism of essentialist thinking but have held onto the notion of types as a strategy for tackling prejudices.

An example of essentialist thinking in terms of subjectivity and gender can be seen in the notion that biology determines destiny. For example, Sojourner Truth's statement that *'Ain't I a woman?'* takes us to the heart of one of the main issues within the essentialist / constructivists debates.<sup>8</sup> If one argues for the sameness of women it obscures important power differentials, but on the other hand, if they argue on a rejection of the category women this results in the inability to make certain political claims. In order to fight for emancipation some feminists need to hold onto the notion of something that all women share, and on the other hand, some prefer the notion of contingent post-gendered subjectivities. Yet, according to Denise Riley *'concentration on and a refusal of the identity of 'women' are essential to feminism'*.<sup>9</sup> Diana Fuss, on the other hand, tells us that the *'deconstruction of essentialism, rather than putting essence to rest, simply raises the discussion to a more sophisticated level.'*<sup>10</sup> And others such as Gayatri Spivak have argued that the most effective political stance open to contingent fluctuating identities is strategic essentialism.<sup>11</sup>

One of the problems associated with a notion of universal womanhood is that it is not universal. Monique Wittig argued that *'by its very existence, lesbian society destroys the artificial (social) fact constituting woman as a natural group.'*<sup>12</sup> And Golding further distinguishes between different groups of

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<sup>7</sup> For a critique of the notion of impartiality see Iris Young, 'The Ideal of Impartiality and the Civic Public,' *Justice and the Politics of Difference*, Princeton: Princeton University Press, 1990, p. 96-121

<sup>8</sup> Bell Hooks, 'Black Women and Feminism,' *Ain't I a Woman* London: Pluto Press, 1982, p. 159. See also Sandra Kemp and Judith Squires, *Feminisms*, Oxford: OUP, 1997, p. 216

<sup>9</sup> Denise Riley, *Am I that name? Feminism and the Category of 'women' in History*, New York: Macmillan, 1988, p. 1

<sup>10</sup> Diana Fuss, *Essentially Speaking: Feminism, Nature and Difference*, New York: Routledge 1989, p. 8.

<sup>11</sup> Donna Landry and Gerald Maclean (Eds.) *The Spivak Reader*, London: Routledge, 1996, p. 214

<sup>12</sup> Monique Wittig, 'One is not born a woman,' *The Straight Mind*, Hemel Hempstead: Harvester Wheatsheaf, 1982, p.9

lesbians.<sup>13</sup> In addition, Liz Stanley, in her criticism of Denise Riley, argued that what is needed *'and indeed must be insisted upon by those of us who are black, lesbian, aged, disabled, working class – is that all difference must be attended to equally.'*<sup>14</sup> As stated above, Sojourner Truth's statement is important because when she stood up at the 1852 second annual convention of the women's rights movement in Akron, Ohio, a white man yelled *'I don't believe you really are a woman'* and white women shouted *'Don't let her speak! Don't let her speak! Don't let her speak!'*<sup>15</sup> Yet in a premature form of strategic essentialism she was allowed to speak after a white male criticized equal rights for women based on the notion that women couldn't perform her share of manual labor because they were *'innately the physical inferior to man'*. Sojourner responded with *'.....Look at me! Look at my arm! ... I have plowed, and planted, and gathered into barns, and no man could head me – ain't I a woman? I could work as much as any man...'* In other words, Sojourner was allowed to speak because what she had to say undermined the criticism against equal rights.

An important question to ask now, in relation to Rawls' veil, is to what extent can one be self-reflective. In other words, how aware are we when making our identifications and exclusions? This is an important point because to place a veil over one's gender requires some knowledge about the gender that one is veiling. We have already noted that gambling involves logic and rationality. We have also noted that men and women gamble differently. Is this because of their different genders or their different ways of thinking in terms of essentialism or constructivism? If women think essentially differently to men, then this may have an effect on the rationality of those persons in the original position who are supposed to be thinking about the principles from a non-gendered or androgynous standpoint.

Developments in feminist critiques of traditional epistemologies, which were seen as specifically male, have led to debates about the existence and nature of female knowledge.<sup>16</sup> For example, Jagger has argued that it is

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<sup>13</sup> S. Golding, 'Knowledge is Power: A few thoughts about lesbian sex, politics and community standards,' *Fireweed* 13, (1982): 80-101

<sup>14</sup> Liz Stanley, 'Recovering Women in History from Feminist Deconstructionism,' *Women's Studies International Forum*, 13, 1-2 (1990): 154

<sup>15</sup> Bell Hooks, 'Black Women and Feminism,' *Ain't I a Woman*, London: Pluto Press, 1982, p. 159. The following quotes come from the same page

<sup>16</sup> S. Kemp and J. Squires, *Feminisms* Oxford: OUP, 1997, p.142

necessary to examine the relationship between knowledge and emotion. And according to her, the *'recognition that emotions play a vital part in developing knowledge enlarges our understanding of women's claimed epistemic advantage'*.<sup>17</sup> And Collins has drawn on the experiences of black African-American women as the basis for an Afrocentric feminist epistemology. She tells us that the *'existence of a self-defined Black woman's standpoint using an Afrocentric feminist epistemology calls into question the content of what currently passes as truth and simultaneously challenges the process of arriving at that truth.'*<sup>18</sup> And Chodorow has argued that experience of mothering shapes male and female psyches differently.<sup>19</sup>

In chapter one we mentioned Susan Moller Okin's critique of Rawls' original position. She criticized him for choosing men as the heads of households. In *Women in Western Political Thought*,<sup>20</sup> Okin outlined the perceptions of women in the history of western political philosophy. And in *Justice, Gender, and the Family*<sup>21</sup> she criticized modern theories of justice such as John Rawls, Robert Nozick, and Michael Walzer for writing from a male perspective, which wrongly assumes that the institution of the family is just. According to Okin, the family promotes gender inequalities throughout society. One way it does this is because children acquire their values and ideas in the family's sexist setting. They then grow up enacting these ideas when they are adults. She argues that in order for a theory of justice to be complete it must include women and it must also address the gender inequalities in modern families because *'without such social and political equality, justice as fairness is as meaningful to women as the unrealized promise of 'Forty acres and a mule' was to the newly freed slaves'*<sup>22</sup>

In her assessment of the essentialist and constructivist debates Stone argued that the Feminists' widespread rejection of essentialism has threatened to

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<sup>17</sup> Alison Jaggar, 'Love and knowledge: Emotion in Feminist Epistemology, *Inquiry* 32, (1989): 172

<sup>18</sup> Patricia Hill Collins, 'Towards an Afrocentric Feminist Epistemology,' in *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment*, London: Routledge, 1991, p. 219

<sup>19</sup> Nancy Chodorow, *Feminism and Psychoanalytic Theory*, Cambridge: Polity Press, 1989, p. 1-19

<sup>20</sup> Susan Moller Okin, *Women in Western Political Thought*, Princeton: Princeton University Press, 1990.

<sup>21</sup> Susan Moller Okin, *Justice, Gender, and the Family*, New York: Basic Books, 1989

<sup>22</sup> Op. Cit. Okin 'Forty acres and a mule for women: Rawls and feminism Politics,' p. 233

undermine feminist politics. In her re-evaluation of the issue she highlighted two responses to this problem. They were ‘strategic’ essentialism and Iris Marion Young’s idea that women are an internally diverse ‘series’. She argued that both were unsatisfactory because they retain essentialism as a descriptive claim about the social reality of women’s lives. She put forward the notion that women have a ‘genealogy’. According to her ‘...women always acquire femininity by appropriating and reworking existing cultural interpretations of femininity, so that all women become situated within a history of overlapping chains of interpretation.’ And as a result of all women being located within a complex history, they are identifiable as belonging to a determinate social group, ‘*despite sharing no common understanding or experience of femininity. The idea that women have a genealogy thus reconciles anti-essentialism with feminist politics.*’<sup>23</sup> Flax has also argued that the rigidity of the categories of being a man or woman varies across cultures and time.<sup>24</sup> Others have argued a similar point in debates about essentialism and constructivism in the area of sexuality.<sup>25</sup> And we have already noted this point in terms of risk-taking and risk-aversion.

We have also already encountered Heidegger’s criticism of Husserl and his argument, that the ontological difference has been filled in with the attempts to unify the subject and object, that stems from metaphysics, which is a result of the forgetfulness of Being. Within his argument, in *Being and Time*, Heidegger found that the one thing, and therefore we can call it the essence that unified the knowers – Daseins – was temporality. Sartre has also drawn on and criticized Husserl’s work<sup>26</sup>. And there are some similarities between Heidegger’s work and Sartre’s existentialist argument that existence precedes essence.<sup>27</sup> However, there are a number of differences. For example, ‘*Heidegger, in Sein and Zeit, attempts to conquer the dualism between being and consciousness by means of*

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<sup>23</sup> Alison Stone, ‘Essentialism and Anti-Essentialism in Feminist Philosophy,’ *Journal of Moral Philosophy*, 1, 2 (2004): 135-153 DOI: 10.1177/174046810400100202

<sup>24</sup> Jane Flax, ‘Postmodernism and Gender Relations in Feminist Theory,’ *Signs: Journal of Women in Culture and Society* 12, 4 (1987): 640-43

<sup>25</sup> See John Boswell, ‘Revolutions, Universals and Sexual Categories’, in Martin Duberman, Martha Vicinus and George Chauncey (eds.), *Hidden from History: Reclaiming the Gay and Lesbian Past*, New York: NAL, 1989, p. 17-36

<sup>26</sup> See Robert Cumming, ‘Role-playing: Sartre’s Transformation of Husserl’s Phenomenology,’ in Christina Howells (Ed), *The Cambridge Companion to Sartre*, Cambridge: CUP, 1995, p. 39-42

<sup>27</sup> Although there are many differences. Heidegger himself refused the label ‘existentialist’ and Sartre did not reject the ego

*'Dasein', while Sartre remains true to the Cartesian tradition of the cogito*'.<sup>28</sup>

Even though Rawls' took an anti-foundational stance towards justice he seems to presuppose an essentialist approach towards the characteristics he places behind the veil. We can detect this because he tells us that the decision is binding for future generations. *'They must also take into account the fact that their choice of principles should seem reasonable to others, in particular their descendents, whose rights will be deeply affected by it.'*<sup>29</sup> Now supposing there were two people in the original position – person A who held an essentialist view of the characteristics and person B who held a constructivist view. Person A might suppose that people with those characteristics could always be in the same situation so that person might be less likely to gamble. Person B, on the other hand, might think that these things change over time. So if they made a bad bet then things might improve further down the track. But in order to be a fair procedure there can be no cheating. Along with gender the persons in the original position must veil gendered thinking – either essentialist or constructivist. In order to explore that possibility the next section will draw on some of Adorno's work.

### ***C. Rawls' veil or Adorno's negative dialectics***

Rawls argued that the veil of ignorance, as a conceptual activity, leads to a form of equality in the original position because the various distinguishing characteristics are removed. This means that he is divorcing the person's current place in society from the way they think and make decisions about the future. This would place him broadly within the realm of essentialism mentioned above, or at the very least not within the realms of constructivism. We have already seen how essentialism has been blamed for its underpinning of various discriminations within society yet Rawls is arguing that the decisions would be unbiased. In addition to that he is also saying that even though persons are self-interested they would not know what their interests were. However, he acknowledges that whatever they were they would need more rather than less means to obtain them.

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<sup>28</sup> Leo Fretz, 'Individuality in Sartre's philosophy' in Howells, Christina (ed), *The Cambridge Companion to Sartre*, Cambridge: CUP, 1995, p. 78

<sup>29</sup> Rawls, *A Theory of Justice*, 1973, op. cit. p. 155

As already noted, Rawls has been criticized for divorcing certain constitutive characteristics such as the gender and age etc. of individuals from their identity in the original position. This meant that his theory of justice, even if it could gain conceptual equality, could not account for real life injustices that arise from the social meaning of those characteristics. By neglecting those relevant social meanings his theory remains ineffective in dealing with discrimination based on those characteristics. Yet, as mentioned, the reason for the veil was to arrive at a basic structure from an unbiased perspective. However, it is one thing to think or reason about oneself outside gender, age, background etc., by placing a veil of ignorance over them and another to actually do it. If it was as easy as Rawls makes out, and some of his critics seem to agree negatively (because they argue his theory is ineffective in dealing with discriminations) there might not be the discrimination that they are referring to. In order to investigate the possibility in more detail this section will draw on the work of Adorno.

In terms of gender identity a number of feminists have drawn on Adorno's work. For example, Iris Marion Young criticized the notion of normative reason as universal and impartial by identifying it with '*what Theodore Adorno's calls the logic of identity that denies and represses difference*'.<sup>30</sup> And it has been suggested that Adorno's work is important to feminists because the scrutiny of thought means '*that feminism must address the limits of the concept*', suggesting that feminist thought, in understanding and regarding thought as a philosophical concept, both provokes a critique and continues an '*elaboration of thought similar to Adorno's*'.<sup>31</sup> Others by contrast have argued that Adorno's work is itself not free of gender bias. For example, referring to *Dialectics of Enlightenment*, Heidi M. Schlipphacke argued that '*Adorno often writes about individuals and art works in terms which privilege "masculinity" as opposed to an emasculating "femininity." Value judgments which employ gendered categories, then, stand in contradiction to the explicitly*

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<sup>30</sup> Iris Marion Young, '*Impartiality and the Civic Public: Some implications of Feminist Critiques of Moral and Political Theory*,' Available online at <http://www.cceol.com/asp/getdocument.aspx?logid=5&id=169BAD7B-23F9-4632-9C6B-B146DC1BF286> (Accessed 24/5/2007)

<sup>31</sup> Wu Yung-Hsing, 'Thinking Feminist Thought Roundtable 5' *Surfaces* VII.115 (v.1.0A - 28/06/1997) ISSN: 1188-2492 Indiana University Bloomington Available online at <http://www.pum.umontreal.ca/revues/surfaces/vol7/wu.html>

*critical project of Dialektik der Aufklärung.*'<sup>32</sup> So, like Rawls, Adorno's work has also been valued and criticized by feminists. Therefore, we need to take a closer look at Adorno.

Adorno's method of Negative Dialectics was, among other things, a critique and development of Hegel's so-called positive dialectics. Adorno believed that the standard mode of human understanding was identity thinking. By this he means that a particular object is understood in terms of a universal concept. In other words, the meaning of an object comes when it has been categorized and subsumed under some general concept. So if you see someone walking along they will either fit into your concept of what it is to be female or what it is to be male. And if they do not fit into either then there is something wrong with them. In opposition to this type of identity thinking, Adorno argued for a negative dialectics, or non-identity thinking. This means that a concept cannot identify its true object because there is more to the object that lies outside of the concept. In other words, instead of assuming that there is something wrong with the person you can assume that there is something wrong with your concept.<sup>33</sup> *'The name of dialectics says no more, to begin with, than that objects do not go into their concepts without leaving a remainder...'*<sup>34</sup> So the concept, which objects are subsumed under, is itself indeterminate.<sup>35</sup> Adorno is not positing this as yet another ground because he tells us that *'We would be hypostatizing the concept of nonconceptuality and thus acting counter to its meaning'*. What he seems to be doing is undermining the notion of identity to keep the system open. A little further down he tells us that, *'Since the basic character of every general concept dissolves in the face of distinct entity, a total philosophy is no longer to be hoped for'*.<sup>36</sup> In other words, you can never fully fix your concept.

In the Introduction to Negative Dialectics Adorno, in agreement with Hegel, rejected Kant's distinction between the noumena and phenomena but, as we will see, not for the same reasons. Hegel rejected Kant's distinction because

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<sup>32</sup> Heidi M. Schlipphacke, 'A Hidden Agenda: Gender in Selected Writings by Theodor Adorno and Max Horkheimer,' *Orbis Litterarum*, 56, 4 (August 2001): 294 doi:10.1034/j.1600-0730.2001.d01-50.x

<sup>33</sup> This is similar to Husserl's notion of empathy

<sup>34</sup> T. Adorno, *Negative Dialectics*, London: Routledge, 1990, p. 5

<sup>35</sup> Adorno, *Negative Dialectics*, op. cit. p. 11

<sup>36</sup> Ibid. 136

as far as he was concerned the real was the rational and the rational the real and there was nothing that couldn't eventually be known. In other words, you could fully fix the concept. Adorno rejected Kant's distinction because he, Adorno, prioritized the object over the concept. We will see in the next chapter that he saw it as a law like necessity which as well as allowing us access to the phenomenal world also restricted access to the noumenal reality. Adorno's notion of the Negative dialectics or the non-identical is not unlike Kant's Thing in itself as it is not total like Hegel's dialectic *'it lies in the definition of negative dialectics that it will not come to rest in itself, as if it were total. This is its form of hope* and he tells us that Kant registered some of *'this in his doctrine of the transcendental thing in itself, beyond the mechanisms of identification'*.<sup>37</sup> However, because the limit of reason is also that which establishes the thing in itself he equates it with the absolute subject and, according to Adorno, Kant *'had bowed to the identity principle after all'*.<sup>38</sup>

Adorno rejected both Hegel's priority of the subject over the object *'identity of identity and non-identity'*,<sup>39</sup> and his notion of absolute spirit: *'...contradiction is not what Hegel's absolute idealism was bound to transfigure it into....It indicates the untruth of identity.'*<sup>40</sup> We have previously mentioned Heidegger's rejection of the subject object issue and Adorno also distinguished his own ideas from Heidegger's fundamental ontology in *Being and Time*. According to Adorno, *'We cannot, by thinking, assume any position in which that separation of subject and object will directly vanish, for the separation is inherent in each thought'*<sup>41</sup> For Adorno, the subject-object relation cannot be eliminated, it can only be reconfigured. For this reason Adorno gave predominance to the object.

Adorno tells us that genuine experience is made possible by that which exceeds the grasp of thought and sensibility (i.e. the object). Rather than seeing this excess at the noumena, as Kant had, or spirit like Hegel, he calls it 'the nonidentical'. Instead of Hegel's identity as a unity of identity and nonidentity, Adorno posits nonidentity, instead of identity, as a non-unity between identity

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<sup>37</sup> Ibid. 406

<sup>38</sup> Ibid. 407

<sup>39</sup> Ibid. 7

<sup>40</sup> Ibid. 5

<sup>41</sup> Ibid. 85



and nonidentity. That is what Adorno meant by negative dialectic. The non-identity, the object or anti-thesis, will never get united with the identity, or thesis, to form an identity. It will only lead to a non-identity. You can never fix the concept in a way that mirrors the object completely. And this is why he rejects Hegel's positive dialectic.<sup>42</sup>

Adorno did not think that we could have access to the nonidentity any more than Kant thought we could have access to the noumena, but '*...the semblance cannot be decreed away, as by avowal of a being-in-itself.*'<sup>43</sup> Although he acknowledged that we also need to identify because to think is to identify: '*...yet the appearance of identity is inherent in thought itself, in its pure form. To think is to identify.*' However, his notion of the nonidentity over identity was a way of criticizing those positive identities '*...dialectics is the consistent sense of nonidentity.*' In other words, Adorno neither accepted the notion of an autonomous epistemic subject nor did he completely reject the notion of objectivity. He held onto the subjective principle, while critiquing its historical form. He tells us that we must '*...use the strength of the subject to break through the fallacy of constitutive subjectivity*'.<sup>44</sup>

As we have seen, Rawls simply asked us to place a veil over those identities but Adorno's work reveals just how difficult that would be. For example, one way according to Adorno is by taking such concepts out of their established patterns and rearranging them in 'constellations'<sup>45</sup> around a specific subject matter. By doing this philosophy can unlock some of the historical dynamic hidden within objects whose identity exceeds the current classifications imposed upon them.<sup>46</sup> (This is not that dissimilar to allowing Being to reveal itself differently in Heidegger, or thought from outside in Foucault). What mainly distinguishes Adorno's materialist epistemology from Kant, Hegel and Heidegger is his insisting on the '*priority of the object.*'<sup>47</sup> It follows from this that when imagining oneself with no particular gender, age, or historical period etc., one's concepts under the veil would not be complete

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<sup>42</sup> Ibid. 143-61

<sup>43</sup> Ibid. 5

<sup>44</sup> Ibid. xx

<sup>45</sup> Adorno could have borrowed the notion of constellation from Benjamin. See Martin Jay, *Adorno*, Cambridge: Harvard University Press, 1984, pp. 14-15

<sup>46</sup> Adorno, *Negative Dialectics*, op. cit. pp. 52-53, 162-66

<sup>47</sup> Ibid. 183-97.

because there will be a remainder. And this remainder may have an effect on the choices in the original position. It may even be this remainder that allows oneself the experience of imagining oneself without those characteristics.

If we agree with Adorno's argument that our concepts of identities are mediated non-identities, then at best the veil can only cover our limited concepts of the characteristics. And, following Foucault, it is these limited understandings that have been constructed within certain periods of time called epistemes. So at best we can only place the veil over the meaning of those categories constructed in our own time. This means that we cannot place a veil over our time in history, which is another characteristic Rawls wanted veiled. *'They must choose principles the consequences of which they are prepared to live with whatever generation they turn out to belong to.'*<sup>48</sup> Because our time in history presupposes the characteristics that we are attempting to veil – it's almost a precondition for our concepts. Adorno's negative dialectics was an attempt to release other possibilities contained in the object but this would not lead to an identity, which could then be veiled in order to be unbiased. Adorno's way of reducing discrimination based on identity was to show that there is more to those identities than what we think. And one could imagine that the majority of theorists writing about justice have a different concept of the worst off than those among the worst off have of themselves. However, in both cases – following Adorno – neither concept would match reality.

In the film *'One Flew over the Cuckoo's Nest'* we hear the words from Jack Nicholson's character that *'Justice is based on truth and truth is relative, hence the need for laws'*.<sup>49</sup> But how do we justify the justice of the laws if they too are relative? Especially, if as Rawls' asserts, future generations are bound by the decisions in the original position. This is important because different people in the original position might come from different backgrounds and therefore have different concepts of the same reality. If it is not possible to universally justify the laws then are there any alternatives or are we back in Plato's Republic listening to Thrasymachus proclaim that *'justice or right is simply what is in the interest of the stronger party.'*<sup>50</sup> Two possibilities will be

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<sup>48</sup> Rawls, *A Theory of Justice*, op. cit. p. 137

<sup>49</sup> Milos Forman (Director) *One Flew Over the Cuckoo's Nest*, 1975

<sup>50</sup> Plato, *The Republic*, op. cit. p. 77

discussed below. Firstly, other ways of looking at notions of identity and difference. And secondly, by basing justice on something else. The first possibility will be examined in the remainder of this chapter by drawing on the work of Deleuze, while the second will be explored in chapter 5.

#### ***D. Deleuze's fold***

Deleuze, like Adorno, took issue with Hegel's priority of identity over non-identity.<sup>51</sup> But, unlike Adorno, he was also critical of dialectics. The priority of identity, according to Deleuze, can be seen in Hegel's notion of the non-identity as negation of the identity. *'Hegelian contradiction appears to push difference to the limit, but this path is a dead end which brings it back to identity, making identity the sufficient condition for difference to exist and be thought. It is only in relation to the identical, as a function of the identical, that contradiction is the greatest difference.'*<sup>52</sup> The priority of identity means that difference is left outside of identity. Deleuze attempts to look at identity or representation in such a way that includes what was excluded in Hegel's dialectics. In other words he puts forward a notion of identity that does not exclude difference. However, in order to do that he had to formulate a different non-dialectical understanding of difference.

Deleuze's different understanding of difference allowed him to move away from dualisms and put forward a non-dialectic philosophy of becoming where he understood the different as not unified, but also where consciousness was not subordinated. Deleuze focused on a different understanding of difference because he thought that it is a way to move beyond western notions of identity where an identity is understood to be like an atom. Deleuze formulated an understanding of identity and difference, which was more like a differentiation. This can be seen in *The Fold* where he examined different identities of Adam. Adam as an atom and Adam as a differentiation. *'Adam the sinner and Adam the nonsinner, is a relation of contradiction. In contrast, an entirely different kind of relation must be added if we are to explain that Adam*

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<sup>51</sup> G. Deleuze, *Difference and Repetition* (Trans. Paul Patton) New York: Columbia University Press, 1994, p. 50

<sup>52</sup> *Ibid.* 263

*the nonsinner is not contradictory in itself.*<sup>53</sup> In other words, in terms of Western notions of identity both Adams were seen as atoms, which could contradict each other (like gamblers and problem gamblers). Deleuze's non-atomistic notion of the identity of the two Adams was based on a series of differentiations over time. In this way identity is more like a process than an atom.

Deleuze's notion of identity as a process, which does not exclude difference, leads to a notion of difference that is not really other. This means that the relationship between identity and difference is immanent rather than transcendent. Deleuze called on Spinoza's notion that God is nature and vice versa as an example of immanence. In so doing he shows the difference between an emanative cause and an immanent cause. In the former, the effect comes from the cause but in the latter the effect is in the cause.<sup>54</sup> It is a relationship of difference with itself. We came across a similar notion when discussing the difference between online gambling and online betting. In the former the actual gamble takes place online while in the latter the event, be it horse racing or something else, takes place offline – it transcends the net – yet the actual bet on the outcome of the event takes place online. So online gambling can be seen as immanent while online betting as transcendent.<sup>55</sup> Deleuze's notion of the fold is an example of immanence. Drawing on Leibniz's work Deleuze tells us that '*A fold is always folded within a fold, like a cavern in a cavern. The unit of matter, the smallest element of the labyrinth, is the fold...*'<sup>56</sup> which can be seen as a relationship of difference with itself. Rather than an atomistic notion of identity such as  $A=A$  of which the difference is not  $A$  which  $=$  not  $A$ , Deleuze's  $A$  and not  $A$  flow in and out of each other in a non-dialectical immanent way. And the  $A$  and not  $A$  are themselves folds rather than fixed points or atoms.

This notion of identity and difference shares similarities with Newman's understanding of the logic of hegemony in relation to the anti-globalisation movement.<sup>57</sup> Calling on the work of Laclau he refers to the universal which was

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<sup>53</sup> G. Deleuze, *The Fold* London: The Athlone Press, 1993, p. 59

<sup>54</sup> G. Deleuze, *Spinoza: Expressionism in Philosophy* (Trans. Martin Joughin) New York: Zone Books, 1990, p. 11, 172

<sup>55</sup> I will return to this point in chapter 5

<sup>56</sup> Deleuze, *The Fold*, op. cit. p. 6

<sup>57</sup> Saul Newman, 'Anarchism, Marxism and the Bonapartist State,' *Anarchist Studies*, 12, 1 (2004). Available online at <http://info.interactivist.net/article.pl?sid=04/07/28/1537224&mode=>

Hegel's ethical principle and Marx's proletariat. Newman points out that the anarchists rejected the proletariat because, like representations of the universal, it is not only universal but also particular. According to this view the '*universal is contaminated by the particular*' and vice versa. This means that the universal according to Laclau is an '*impossible object*'. It is impossible because a representation of the universal is necessary but impossible. Because the universal is contaminated by the particular it can only partially symbolise the universal. But this partial aspect is crucial for politics along with its association with others as a 'chain of equivalence', which also draws it away from partiality. Newman further tells us that the anti-globalisation movement contingently joins a number of non-essentialist identities together, in a chain of equivalence, to stand against a common enemy. And because '*... this link is indeterminate and contingent, this opens the political field to other identities to attempt to fulfil this incarnating function.*' This notion of openness and non-essential is also theoretically similar to Deleuze' and Guattari's ideas about reterritorialization and deterritorialization as well as rhizomes that will be discussed below.

Deleuze also saw the relationship between the one and many, univocity and multiplicity, as immanent rather than transcendent.<sup>58</sup> In *The Fold* he examined the relationship between the one and many by drawing on Spinoza's notion of substance as well as Leibniz's work on monads. While references to Leibniz run throughout the book Spinoza is only mentioned in about four places. Deleuze recasts Spinoza's substance into an infinity of folds and places a fold within Leibniz's monads, which can join up with Spinoza's substance as an infinity of folds. In this way the relationship between the one and many and identity and difference neither leads to dualism nor reduces one to the other. His notion of folds leads to an understanding of the world as inherently multiple and porous, but he does not lose sight of categories. In so doing he puts forward a

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<sup>58</sup> Deleuze's notion of the rhizome is a good example of the immanent relationship between univocity and multiplicity. '*The rhizome is reducible neither to the One or the multiple. It is not the One that becomes Two or even directly three, four, five, etc. It is not a multiple derived from the One or to which One is added (n+1). It is not composed of units but of dimensions, or rather dimensions in motion. It is neither beginning nor end, but always a middle from which it grows and which it overflows.*' G. Deleuze and F. Guattari, *A Thousand Plateaus*, Minneapolis: University of Minnesota Press, 1987, p. 8

non-dialectic philosophy of becoming. Yet, in drawing on Spinoza's substance and Leibniz's monads, within his own philosophy, Deleuze ends up with a similar gap that has been found between Descartes' two substances of mind and body. However, Deleuze does not treat it as an 'explainable gap' but as a space for creativity (particularly in conceptual thinking). In order to argue this point he draws on the work of Whitehead.

In *The Fold*,<sup>59</sup> Deleuze examined the similarities and differences between Leibniz and Whitehead while placing a fold between the two and another between them and himself. While looking at the similarities Deleuze exclaims that '*How remarkable that Whitehead's analysis, based on mathematics and physics, appears to be completely independent of Leibniz's work even though it coincides with it!*'<sup>60</sup> However, it is the differences that allow Deleuze to advance his argument. According to Deleuze, Leibniz's philosophy (and art because both are related via folds) is representative of a closed universe and Whitehead's work is representative of an open universe: '*...from harmonic closure to an opening onto a polytonality*'.<sup>61</sup> The former is closed because it excludes the impossibles where as the latter does not: '*The play of the world has changed in a unique way, because now it has become the play that diverges.....It is a world of captures instead of closures*'.<sup>62</sup> That is why the time period of the former focuses on harmony in music and the latter on dissonance<sup>63</sup>. And it is this dissonance that allows the space for creativity. We will return to this notion in chapter five.

The difference between the closed and open universe is one area in which Deleuze's work seems to undermine Rawls', because Rawls tells us that he '*shall be satisfied if it is possible to formulate a reasonable conception of justice for the basic structure of society conceived for the time being as a closed system isolated from other societies*'.<sup>64</sup> And this is also, as we have seen, where Rawls' early work seems inadequate for a multicultural society or international politics. In addition to that, Deleuze's fold highlights the criticism that Nozick leveled against Rawls and that criticism, as we have also seen, is central to the

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<sup>59</sup> See chapter 6 'What is an event?'

<sup>60</sup> Deleuze, *The Fold*, op. cit. p. 77

<sup>61</sup> Ibid. 82

<sup>62</sup> Ibid. 81

<sup>63</sup> Ibid. Chapter 9

<sup>64</sup> Rawls, *A Theory of Justice*, 1973, op. cit. p. 8

relationship between the one and many within society. Nozick's main argument was that there is no social entity but only individuals.<sup>65</sup> However, Rawls' notion of redistributive justice presupposed that there was something, in terms of benefits, about social cooperation that transcended the individuals doing the cooperation. While Deleuze would not criticize Rawls' move away from individualism he would criticize the notion of transcendence. In addition to that, Deleuze might share Rawls' concern about the basic structure of society leading to inequalities, however, he would disagree with Rawls' solution. Deleuze would, in this instance, be closer to Sandel's criticism of Rawls in terms of the constructed nature of identity. Yet, he would disagree with Sandel's Hegelianism. We will return to Deleuze's references to Whitehead in order to clarify this point.

Whitehead's focus was on objects as events while Deleuze was more interested in ideas as events. According to Deleuze, Whitehead argues against the idea that reality is made up of things. Things are really events which are *prehensive unifications*. These gather diversities together into a unity.<sup>66</sup> He uses the term prehension for uncognitive apprehensions such as feeling, valuing, etc. This means that an event cannot be studied independent of the whole of which it is a part. The process and the notion that something persists. There are two aspects to the idea that things are events or processes and these aspects have a direct link to the relationship between the one and many. Deleuze tells us that things seem to persist, from a psychic point of view, because of a kind of screen, which is *'like a formless elastic membrane, an electromagnetic field, or the receptacle of the Timaeus, which makes something issue from chaos'*.<sup>67</sup> Deleuze also tells us that this screen only allows compossibles to be sifted through.<sup>68</sup>

We came across a similar notion to the screen above. We saw how Heidegger understood this screen in terms of temporality, Kant in terms of categories, Foucault in terms of epistemes, and even a catalytic converter is a screen – it filters out the impurities in petrol. Screens or filters let some thing in and keep other things out. Rawls' veil was meant to keep some things out but it

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<sup>65</sup> Nozick, *Anarchy, State and Utopia*, op. cit. pp. 183-197

<sup>66</sup> Deleuze speaks of assemblages of molar and molecular segments elsewhere and I will return to this below.

<sup>67</sup> Deleuze, *The Fold*, op. cit. p. 76

<sup>68</sup> Ibid. 77

differed from Deleuze's because the latter understood it immanently. However, if we take Deleuze seriously then the veil can only be applied to things which have already been screened in. Not only that but the veil had to distinguish between some parts of the infinity of folds and other parts. Yet, if we agree with Whitehead that an event cannot be studied independently of the whole of which it is a part, then we must assume that Rawls would be unable to ignore gender, age, and ethnicity etc. That is because these things as events precede their negation via Rawls' veil. Therefore, Rawls' veil could be seen as an example of the primacy of identity over difference of which Deleuze and Adorno were both critical.

In *Anti-Oedipus: Capitalism and Schizophrenia* Deleuze, with Guattari, developed a philosophy to suit the immanent becoming reality mentioned above. Reality as a system of flows rather than as a system of static atoms or objects, which are in relationship with each other. They did this by drawing on Artaud's notion of the schizophrenic (as a body without organs). The body without organs is an idealized structure. It takes shape and meaning when a number of what they call 'desiring' and 'paranoid' machines organize flows across the amorphous body. In Deleuze and Guattari's system, a person is not a stable self-conscious ego. It is a nomadic subject that comes into existence where the different flows cross on a body without organs. At one time the person might be daughter, or a mother, or a sister, or a worker, or something else. Some of these might not be imaginable now because at this particular time she might be none of these things (like Adam before he sinned). As some time a new set of flows might cross this nomadic subject and they will migrate and it might become something else – perhaps a poker player.

Perhaps our nomad is currently roaming around the casino in Shaftesbury Avenue. However, in this instance there is no casino there either, only a site where things flow in and out. Water flows into the toilet and leaves through pipes to the sewers. Shoes walk in from the street and walk out again. Faxes come in and go out again as rubbish. Ideas flow through this place as well as the flu. Food and drinks flow through here and so does paper money and coins. From the point of view of a croupier the casino is a place where they earn their money, which also flows out to pay bills etc. Delivery drivers might see it as one destination for their loads. Cleaners might see it as dirty carpets and tiles.



Decorators might see it as walls, skirting boards, and ceilings. Plumbers might see it as a collection of pipes and drains. And where these flows cross, we have our casino. But, as we have seen, the money flows into the casinos at a faster rate than it flows out because the odds are stacked against the punter. In addition, the punter's gender, age, ethnicity or sexuality probably means little to the casino so long as the money continues to flow in that direction. However, these criteria seem to be important when it comes to identifying problem gamblers. And as we have seen the rise in problem gambling has been the main argument against the expansion of the gambling industry. It remains to be seen if these gamblers are essentially problem gamblers or a result of constructivism.

### *E. The folded veil*

According to a Deleuzian notion of identity, a thing such as a casino, or a horse, or a building, or a concept or a problem gambler is a manner or mode of assembling the world. A particular chair, for example, is not a copy of an ideal chair, as Plato suggested. On the contrary, each chair, like other objects, is an event. It is at once the idea and the example (immanence) or what Deleuze would call a repetition of chair. This is similar and different to Nietzsche's eternal return.<sup>69</sup> Each particular chair is a redefining of what a chair is. That is because Deleuze privileges difference over identity. This means that there is no static model against which an individual thing is identified. Instead of that there is only a multiplicity of self-defining things. In chapter 2 we saw the way that gambling itself has been defined and re-defined at different historical periods and places when we discussed Foucault's genealogical method. For now we can see from a Deleuzian perspective how gamblers can be defined and re-defined. And within Deleuze's perspective there can be no essential difference between gamblers and problem gamblers as the apparent difference is a result of folding and re-folding. Like Adam the sinner and Adam the non-sinner the difference is a differentiation.

Both Foucault and Deleuze would be critical of Rawls' veil as a form of bracketing. That is because both critique the notion of a stable fixed origin

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<sup>69</sup> I will return to this point in chapter 5

which would be left after the bracketing.<sup>70</sup> For example, in Deleuze and Guattari's understanding of schizoanalysis everything is related to the event. Nothing can be bracketed out, it can only be moved in and out of focus via folding and un-folding. And this folding and un-folding can be seen in their notion of 'deterritorialization' and 'reterritorialization'. However these are not easy to distinguish between because *'they are mutually enmeshed, or like opposite faces of one and the same process.'*<sup>71</sup> And according to their economics, which is related to their notion of identity and difference, *'capitalism is continually reterritorializing with one hand what it was deterritorializing with the other.'*<sup>72</sup>

*During the deterritorializing and reterritorializing process meanings and categories change. We have seen how attitudes towards gambling have changed as it has moved, or has folded, from the outside to become part of the entertainment industry. Deleuze and Guattari's notion is not unlike Marx and Engels' idea that 'all that is solid melts into air.'*<sup>73</sup> And reterritorialization is a counteraction to this breakdown of meanings. This is when capitalism, in order to retain its relations of production and private property, is forced to artificially resurrect all the old meanings such as *'States, nations, families.'*<sup>74</sup> In so doing it alters meanings by recoding and rechanneling those *'who have been defined in terms of abstract qualities'*. So even if it was possible to place things like gender, age, etc. behind the veil of ignorance, the meaning of those abstract qualities may change and new or different things that we cannot yet recognize because of their closeness to us now,<sup>75</sup> may need to be veiled in order to prevent cheating. However, even if one was able to bypass that problem and cheat in the original position persons might not be promoting their own self interest. As well as making Rawls' veil and what it attempts to cover problematic, Deleuze and

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<sup>70</sup> Yet, I think that Husserl's bracketing was intended to gain a critical distance rather than finding some pure truth. This can be seen in his 'The Origin of Geometry'. I have already mentioned Derrida's *Introduction to the origin of geometry* as an example of those who have misread Husserl.

<sup>71</sup> G. Deleuze and F. Guattari, *Anti-oedipus: Capitalism and Schizophrenia* London: The Athlone Press, 2000, p. 258

<sup>72</sup> Ibid. 259

<sup>73</sup> K. Marx and F. Engels, *The Communist Manifesto* Middlesex: Penguin Books, 1968, p. 83

<sup>74</sup> Deleuze and F. Guattari, *Anti-oedipus: Capitalism and Schizophrenia*, op. cit. p. 34

<sup>75</sup> It's easier to recognize discriminations in the past than it is to recognize those taking place now.

Guattari's politics of desire, as we will see, also casts doubt over Rawls' notion of self-interest.

In the last section we saw how Deleuze prioritized immanence over transcendence and difference over identity. He criticized the priority of identity over difference because it meant that difference was left outside of identity and this was incompatible with his priority of immanence over transcendence. We saw how Deleuze put forward a notion of identity that does not exclude difference by formulating an immanent non-dialectical philosophy of becoming based on difference. His notion of univocity and multiplicity was an immanent way of understanding the relationship of the one to the many in such a way that did not prioritize one over the other.<sup>76</sup> And in addition to that, his notion of univocity means that all identities are fundamentally equal. In one sense this was Rawls' aim for the veil of ignorance – a level playing field. However, Rawls also placed self-interest in a prominent position within his theory and it is that which could be seen as problematic if we take Deleuze's politics of desire on board.

There are three main features to Deleuze and Guattari's politics of desire that are consistent with their focus on immanence and the priority of difference. Their criticism of desire based on the notion of lack, desire coming after identity and their notion of assemblages. Assemblage is similar to the notion of constructivism and it is also similar to the notion of an underlying genetic code. For example, during the industrial revolution most of the birds in London had dark feathers. That was because the burning coal made the buildings black. The birds with lighter colored feathers stood out to their predators. So only those with dark feathers survived. However, after that time the birds with lighter feathers came back because both dark feathers and light feathers were in the genes.<sup>77</sup> Unlike this example based on biology Deleuze and Guattari's assemblage is more about meaning or concepts. However, their notion of assemblage and desire does cross over with biological coding.

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<sup>76</sup> Although he still has a gap or space for creativity. We will see how this gap differs from the notion of lack

<sup>77</sup> This is also similar to Saussure's distinction between *Lingue* and *Parole* that we have previously mentioned. And as we will see in chapter 5 it is also similar to the distinction between a deck of cards and one particular hand.

According to Deleuze and Guattari, desire is an assemblage because it both produces identities and leads to their change as it transgresses the limits of that identity that it produced. And these identities and their changes come from the multiplicity. They tell us that '*desiring-production is pure multiplicity, that is to say, an affirmation that is irreducible to any sort of unity.*'<sup>78</sup> Three important things come from this. Firstly, desire produces the identities that desire also undermines. Secondly, as desire produces identities it cannot be a result of those identities as we find in Freud.<sup>79</sup> And thirdly, as all this happens immanently then desire cannot be based on the notion of a lack. We will explain these further before relating them to Rawls and gambling.

Deleuze and Guattari developed the notion of assemblage further by telling us that they are made up of molar and molecular segment. But again these are not completely separate.<sup>80</sup> A molar segment of a woman, for example, could be their behaviors, expectations and genetic predispositions etc. while their molecular segments could be mannerisms, fashion, taste etc. So the molar segments are sort of the larger part while the molecular segments are more refined. For example, if we applied this to Adam in *The Fold* we could say that Adam is molar while eating the apple was molecular. If we examine these segments and add them to Deleuze's priority of difference over identity we find a striking similarity between this theory and the area of molecular biology in relation to change.

Prior to Darwin's notion of natural selection, where change stemmed from random mutations, Lamarck suggested that the motive force for change was the animal's needs. For example he suggested that a giraffe '*acquired the genetic specification for a long neck through generations of browsing upon the upper foliage of trees.*'<sup>81</sup> In this example there is an animal that does something to change future generations. Now as a result of our knowledge about DNA in the area of molecular biology we can see that coded information passes from the DNA to the protein molecules rather than the other way around. In other words identity comes from difference rather than difference from identity. As a model

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<sup>78</sup> G. Deleuze and F. Guattari, *Anti-oedipus: Capitalism and Schizophrenia*, op. cit. p. 42

<sup>79</sup> On the other hand, if the unconscious is taken to be like Deleuze's difference and the Id is in the unconscious, then one could argue that desire precedes identity.

<sup>80</sup> Deleuze, G. and Guattari *A Thousand Plateaus*, op. cit. p. 210

<sup>81</sup> A. Bullock and S. Trombley (Eds.) *The New Fontana Dictionary of Modern Thought* London: Harper Collins, 1999, p. 466

for political theory this would not only undermine Hegel and Rawls' priority of identity over difference but it also casts doubt over Rawls' focus on self-interest.

The focus on self-interest presupposes a self to have the interest. In other words, the way the principles are chosen, on the basis of self-interest, reflects an underlying individualism. This means that individualism underpins Rawls' basic argument that the veil of ignorance entails the coincidence of our self-interest with that of justice. In other words liberty is just so long that it does not make the worst off worse off. That means that everyone has liberty to compete against each other so long as the worst off do not suffer. This is also the basis of the new gambling laws in the UK. Yet persons in the original position are not treated as individuals because there is little to distinguish one from the other. And while regulation and the difference principle takes care of the problem gamblers and worst off, those competing against the casino are not doing so on a level playing field because the odds are stacked against the punter. In other words, the vast majority of punters within the gambling industry, like the vast amount of people in society, are not covered by Rawls' framework of justice. His theory then is not an improvement on utilitarianism but simply its opposite. But if justice for all cannot be based on truth or ignorance then what could it be based on?

This chapter has focused on the epistemological interpretation of the veil of ignorance in the original position but there have been political interpretations as well as the *epistemological* interpretations of the original position. In our epistemological interpretation the original position was understood as a methodological device for getting rid of things that might hinder a person's clear and distinct perception of ethico-political facts. Ridding oneself of knowledge of personal characteristics enforces a kind of *impartiality* or disinterestedness that eliminates the possibility of cheating. In this regard, as Rawls himself recognized, the original position device resembles that of ideal spectator theorists. However we have already seen that this could lead to a basic structure that leans in the direction of one desire system.

## *Conclusion*

While this chapter concentrated on the epistemological issues related to the veil of ignorance Rawls himself favored the political interpretation. In a political interpretation the original position is a device of representation. Under the veil of ignorance it represents the widely accepted principles for the choice of principles of justice. This is because, as we saw above, the veil of ignorance embodies the concept of justice. We noted that the concept of justice means that distributions should not be based on morally irrelevant features such as one's gender, race, etc. Rawls places a veil over what he understands as features that are morally irrelevant to the choice of principles of justice. Working within the framework defined by the veil of ignorance and derived from this widely shared concept of justice, rational calculators choose principles of justice for the concrete individuals whom they represent. We have seen that their choice is not of an objectively correct conception of justice but one that best expresses a shared understanding of justice in the community.

Applying the political interpretation to our current topic – gambling – we have noted a similarity between the objectives in the gambling bill and Rawls' principles. We have seen the priority of liberty for punters and the gambling industry. And we have seen the difference principle in terms of protecting children, vulnerable and problem gamblers. We have also followed a process like reflective equilibrium as the bill has wound its way through parliament. The following chapter will draw on Foucault' notion of power/knowledge, in order to examine the possibility of separating the political reading from the epistemological one.

## CHAPTER 5: GAMBLING-IN-JUSTICE

*What, if some day or night a demon were to steal after you into your loneliest loneliness and say to you: 'This life as you now live it and have lived it, you will have to live once more and innumerable times more; and there will be nothing new in it, but every pain and every joy and every thought and sigh and everything unutterably small or great in your life will have to return to you, all in the same succession and sequence--even this spider and this moonlight between the trees, and even this moment and I myself. The eternal hourglass of existence is turned upside down again and again, and you with it, speck of dust!' Would you not throw yourself down and gnash your teeth and curse the demon who spoke thus? Or have you once experienced a tremendous moment when you would have answered him: 'You are a god and never have I heard anything more divine.' If this thought gained possession of you, it would change, you as you are or perhaps crush you. (Nietzsche) <sup>1</sup>*

*Nature has established patterns originating in the return of events, but only for the most part (Leibniz)<sup>2</sup>*

### **Introduction**

One of the problems with grounding justice on truth is that truth is relative – hence justice is relative. A second and related problem is that the means, norms, principles or criteria used in judgments are themselves products of the process they judge. Rawls did not base justice on truth but, as we have seen, one of the criticisms against him was that his principles simply reflected the then current society. We have already noted that the objectives in the gambling law were not based on truth nor were they promoting concrete decisions. That is because future technological developments may not fit into a concrete law developed now as this may have an impact on the industry. Tessa Jowell mentioned this in her white paper in 2002 when she wrote that *'We also, however, want to see a successful British gambling industry; one that is able to respond rapidly and effectively to technological and customer-led developments*

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<sup>1</sup> Fredrick Nietzsche, *The Gay Science* (Trans. W. Kaufmann) USA: Random House, 1974, p. 341

<sup>2</sup> See chapter 2 above

in both the domestic and global marketplace,<sup>3</sup> And secondly that there may be developments in the way that cheating occurs. That was the reason for why the section on cheating was very open ended. It did not specify exactly what cheating was because that might allow loopholes for people to devise new and creative ways to alter the odds in their own favour. However, Rawls' principles were similar to the criteria underpinning the new gambling laws and could be seen to justify them. Rawls' justice as fairness was not based on truth but on agreement. However, following Foucault we could say that the agreement could be a result of reflective equilibrium within the same episteme. And in addition, the similarity between Rawls' principles and the Government's objectives could also be a result of homogeneity.

The need for ongoing developments in regulation has been cited as one thing that distinguishes gambling policy from other commercial areas, which rely on competition to minimise the harm to consumers while also attempting to maximise economic development.<sup>4</sup> However, this regulation is based on criteria that seem to be part of the same Foucauldian episteme. The important question to ask now is about the possibility of gaining a distance on that episteme.

Rawls begins his *A Theory of Justice* with the following words. '*Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust*'.<sup>5</sup> We have noted that the relationship between truth and thought is not currently considered to be one of correspondence. Even though Rawls did not base his theory of justice on truth, his veil of ignorance, which presupposes the correspondence view of truth, was found to be porous. This meant that some participants in the Original Position might be risk-takers rather than being risk-adverse. This undermined a central element in his theory of justice. This chapter agrees with Rawls' statement concerning the need for revision but argues that the reforms or rejections, in a move towards justice, might also include an element of gambling. This is

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<sup>3</sup> *A Safer Bet for Success – modernising Britain's gambling laws*, op. cit.

<sup>4</sup> John Lepper, 'Competition and Control in the United Kingdom's Gambling Policy' *International Journal of Mental Health and Addiction. Proceedings of the New Zealand International Gambling Conference* (2005): 21-28. ISSN 1705-4583

<sup>5</sup> Rawls, *A Theory of Justice*, 1973, op. cit. p. 3



because gambling in justice might be closely related to aesthetics. In order to make this claim this chapter draws on the work of Foucault, Deleuze and Lyotard because their theories attempt to break down the categories that Rawls' veil seems unable to simply exclude.

### ***A. Foucault's exit***

In chapter 4 we examined Heidegger and Foucault's rejection of the idea of a self-transparent subject, an idea stemming from Descartes, and the related notion of autonomous agency, which stems from Kant. However, that is not the end of the story as neither of them denied that some form of freedom was important. Dreyfus tells us that '*while both Heidegger and Foucault reject the Enlightenment idea of an autonomous subject, they have a robust notion of freedom and action.*'<sup>6</sup> One way that Foucault allowed for some agency can be seen in his *What is Enlightenment* and another can be seen in his last two volumes of *The History of Sexuality*. In the former, which we have already noted, Foucault argued that we try to gain a distance on the normalizing regime by focusing on the contingent nature of the limits imposed. In the latter Foucault highlighted the differences between the Greek, Roman and Christian understandings of ethics and argued for a form of aesthetic ethics.

Foucault develops his notion of aesthetic ethics in *The Use of Pleasure and Care of the Self*. In the former he tells us that there are similarities between the way that Greek and Christian cultures were weary of the effects of uncontrolled sexual activity even though the former were originally more tolerant of homosexuality.<sup>7</sup> Both cultures proposed some form of abstention from sexual activities but there were differences between them at the level of everyday practices.<sup>8</sup> For example, in Christianity austerity was compulsory and universal, but in classical Greek times people had more freedom in their interpretations of the demands.<sup>9</sup> However, this freedom was about self-mastery and immorality

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<sup>6</sup> H. Dreyfus, '*Heidegger and Foucault on the Subject, Agency and Practice*', Available online at [http://socrates.berkeley.edu/~hdreyfus/html/paper\\_heidandfoucault.html](http://socrates.berkeley.edu/~hdreyfus/html/paper_heidandfoucault.html) (Accessed 24/5/2007)

<sup>7</sup> M. Foucault, *The Use of Pleasure: Volume 2*, London: Penguin Books, 1992, pp. 15-17

<sup>8</sup> Ibid. 20

<sup>9</sup> Ibid. 23

was in relation to excessive or unrestrained behavior.<sup>10</sup> During the Hellenic Roman era this self mastery gradually turned into the Christian notion of moral codes in which people conformed to external laws.<sup>11</sup> Foucault drew on the notion of early Greek thought about ethics as self-mastery to develop his own theory about aesthetic ethics. However, he did not argue that we should just copy the Greeks because he tells us that it is not possible to find '*...the solution of a problem in the solution of another problem raised at another moment by other people.*'<sup>12</sup> Christian ethics and the later modern secular ethics pressures people to conform via either religion or normalizing practices and this obliterates the autonomy of people. By contrast, the Ancient Greeks were freer to establish a relation with themselves. And it is this relation as an ethics of the self that interested Foucault.

Foucault understood the kind of relation that people have with themselves as a creative activity. '*From the idea that the self is not given to us, I think that there is only one practical consequence: we have to create ourselves as a work of art.*'<sup>13</sup> Instead of finding the truth of oneself we are to create ourselves. Foucault tells us that the arts of existence are '*...those intentional and voluntary actions by which men not only set themselves rules of conduct, but also seek to transform themselves, to change themselves in their singular being, and to make their life into an oeuvre that carries certain aesthetic values and meets certain stylistic criteria.*'<sup>14</sup> In *What is Enlightenment* Foucault drew on and criticized Kant's earlier essay, made a distinction within the Enlightenment not dissimilar to Horkheimer and Adorno's, and then foregrounded Baudelaire the dandy as a modern example of a similar type of relationship as an ethics of the self.<sup>15</sup>

In Kant's understanding of the Enlightenment, reason as a ground for critiquing the present replaced the earlier universal rules of morality. Reason also led to the categorical imperative which was seen as universal. Foucault criticized this universal aspect for the same reason that he criticized the

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<sup>10</sup> Ibid. 47

<sup>11</sup> Ibid. 29

<sup>12</sup> M. Foucault, 'On The Genealogy of Ethics: An Overview of Work in Progress' in *The Foucault Reader*, (ed. Paul Rabinow) London: Penguin Books, 1991, p. 343

<sup>13</sup> Ibid. 351

<sup>14</sup> Foucault, *The use of pleasure*, op. cit. p. 7

<sup>15</sup> Baudelaire is considered modern because he did not try to find the truth of himself but tried instead to invent himself. See M. Foucault, 'What is Enlightenment' in *The Foucault Reader*, (ed. Paul Rabinow) London: Penguin Books, 1991, p. 42

transcendent rules of Christianity. He also criticized the humanism linked to it. However, he did think that there was a certain element of autonomy embedded within the Enlightenment that needed to be nurtured. This idea was similar to Horkheimer and Adorno's notion in the *Dialectics of Enlightenment*. They rejected the domination of instrumental reason but argued for a more critical objective reason. According to them the former was just an updated version of myth *'Yet the myths which fell victim to the Enlightenment were its own products.'*<sup>16</sup> Rather than daring to know as suggested by Kant, or critiquing the known suggested by Horkheimer and Adorno, Foucault argues for an ethics of the self in terms of an ethos of criticism in order to escape certain technologies of the self. And it was those technologies, as we saw above, which make the veil of ignorance porous. However, while Foucault's work could be used to criticize Rawls' simplistic veil his own work has been criticized from a number of fronts.

Foucault has been criticized for basing his theory on things that he presupposed instead of criticizing them also. For example, Feminists have criticized him for basing his theory on an unexamined fantasy of male agency. *'To the extent that Foucault fails to interrogate the implications of the centrality accorded to the themes of self-mastery and a Baudelairean heroization of the self, the transgressive force of the theory of ethics is undercut, appearing as it does to rely on an unexamined and nostalgic fantasy of male agency.'*<sup>17</sup> And he has been criticized for simply presupposing a certain type of aesthetics.<sup>18</sup> Related to both of these criticisms is the worry that it might be difficult to distinguish between act of self creation and a replication of conventional behavior. And this is a similar criticism that we saw placed against Rawls' theory. In other words, Foucault's exit might turn out to be a revolving door. However, if we follow Lyotard and Deleuze's notions of difference it is difficult to see how it could be anything else. But that does not necessarily mean that the entry and exit join at exactly the same place.

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<sup>16</sup> T. Adorno & M. Horkheimer, *The Dialectics of Enlightenment*, London: Verso, 1999, p. 8

<sup>17</sup> McNay, *Foucault: A Critical Introduction*, op. cit. p. 153; See also Seyla Benhabib, 'Situating the Self: Gender Community and Postmodernism' in *Contemporary Ethics*, Cambridge: Polity Press, 1992 p. 152

<sup>18</sup> McNay, *Foucault: A Critical Introduction*, op. cit. p. 155

## ***B. Lyotard's justice***

We have already seen that Gerda Reith called the current time period or episteme the age of chance. Lyotard understood it as something similar. In *The Postmodern Condition* Lyotard called the postmodern a '*...incredulity towards metanarratives*,'<sup>19</sup> where metanarratives are understood as totalizing myths about history and the goals of the human race, which also supply foundations and legitimize various knowledges and cultural practices. There are two metanarratives, in the past that Lyotard understands to be important. Firstly, the Marxist notion that history is progressing towards social enlightenment and emancipation.<sup>20</sup> And secondly, the Hegelian idea that knowledge is progressing towards some form of totalization.<sup>21</sup> He defined Modernity as the age of metanarrative legitimation, and postmodernity as the age in which those metanarratives have become bankrupt.<sup>22</sup> His understanding of the end of metanarratives is similar to other theorists who see postmodernity as an age of fragmentation and pluralism.

Like Foucault and Deleuze, whom we have already encountered, Lyotard is also critical of positive notions of identity, which would include the notion of a problem gambler. In some sense Lyotard's notion of postmodernity is like Deleuze's notion of destabilization because it represents the flux before it settles again. And his notion of modernity is like Deleuze's notion of reterritorialization when it does settle. This is why he tells us that postmodernity comes before modernity. The before of something is the flux it comes from. And of course it works the other way around as '*Modernity produces postmodernity, which, in turn, becomes the 'groundless ground' of the modern*'.<sup>23</sup> It remains to be seen if we are still living in a postmodern flux awaiting the next modernity or reterritorialization, or whether this deterritorialization is a new form of reterritorialization awaiting the next deterritorialization. Or perhaps, following Deleuze, it is a bit of both folding into each other. If it is in the reterritorialization process then one can see the usefulness of theories such as Foucault, Lyotard

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<sup>19</sup> J-F Lyotard, *The Postmodern Condition: A Report on Knowledge*, Manchester: Manchester University Press, 1994, p. xxiv

<sup>20</sup> Ibid. 36-7

<sup>21</sup> Ibid. 33-34

<sup>22</sup> Ibid. 60

<sup>23</sup> S. Golding, 'Jean-Francois Lyotard,' in *Routledge Dictionary of 20<sup>th</sup> Century Political Theories*, London: Routledge, 1997, p. 4

and Deleuze's that attempt to prevent closure in terms of identity. However, if we are in a deterritorialization time then new identities might be formed but that does not necessarily mean autonomy.

While Deleuze used the notion of a fold mixed in with biological coding to discuss identity and difference, Lyotard called on the notion of a moebius strip mixed in with physics. In *Libidinal Economy*<sup>24</sup> he explained identity and difference, or the modern and postmodern, or reterritorialization and deterritorialization, in terms of something like string theory as opposed to particle theory. There are different types of string theories, open or closed, more or less dimensions etc., but what they have in common is that the strings vibrate at different rates to seem like different types of particles. So once again identities merge from difference. According to Hawking it is the ripples on the string that are interpreted as particles.<sup>25</sup> In order to explain the notion of string theory he adds that they operate like violin strings at different tensions. Think of a violin string that has been tuned by stretching the string under tension across the violin. Depending on how the string is plucked and how much tension is in the string, different musical notes will be created by the string. In a similar manner, in string theory the elementary particles observed in particle accelerators could be thought of as the musical notes. However, the '*...different oscillations of a string give rise to different masses and force charges, which are interpreted as fundamental particles*'.<sup>26</sup> And the shorter the wavelength the larger the mass and vice versa. According to Green, this fact is one of the most attractive and unifying aspects of string theory because it postulates that all particles are made of the same fabric as opposed to the particle-physics view that each elementary particle is in effect cut from a different fabric."<sup>27</sup> And this fabric shares similarities with Spinoza's substance, Deleuze's difference and Lyotard's libidinal band.<sup>28</sup>

In *Libidinal Economy* Lyotard attempted to distance himself from the notion of fixed atomized identities with a theory that seems to be a mixture of

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<sup>24</sup> J-F Lyotard, *Libidinal Economy*, London: The Athlone Press, 1993, p. 25

<sup>25</sup> Stephen Hawking, *The Universe in a Nutshell*, London: Bantam Press, 2001, p. 52

<sup>26</sup> Ibid

<sup>27</sup> Brian Green, *The Elegant Universe*, London: Vintage, 2000, p. 136

<sup>28</sup> Although one main difference between Spinoza and the others was that the former was based on Euclidian geometry while the latter are more akin to non-Euclidian geometry. See the triangle in B. Spinoza, *Ethics*, London: J. M. Dent & Sons Ltd., 1989, p. 14

Freud's work<sup>29</sup> and string theory. It was not a theory about truth or reality but more like a metaphorical tool of thought like Deleuze's rhizome.<sup>30</sup> We have already encountered Adorno's negative dialectics in terms of his criticism of the priority of the concept over the object. The object we spoke about was a person walking down the road that was squashed into our concept of either male or female. Likewise Lyotard suggests that we see the body as ambivalently sexed and being cut open and spread out to form a flat surface like a band.<sup>31</sup> This band is then twisted into a moebius strip.<sup>32</sup> In this shape it has no inside or outside. On some level the body could be understood as Deleuze's difference and Spinoza's substance. Rather than identities or events as affects being formed through assemblage (Deleuze) or discourse (Foucault) Lyotard tells us that this happens through systems comprising dispositifs.<sup>33</sup> Affects are things that have the ability to produce desires and feelings. Dispositifs are libidinal and there are different ones that compete with each other in order to exploit the libidinal energies. Hence the name of his book the *Libidinal Economy*. The band is like the primary processes of desire and libidinal intensity which gets stabilized. The way Lyotard describes the formation of affects out of this band is where his work resembles string theory.<sup>34</sup>

Lyotard tells us that this body, band or skin is set in motion and it moves so fast that it glows red with heat and in this state it is undifferentiated, like Deleuze's difference out of which identities are formed. When the band starts to slow down it cools off and turns into a disjunctive bar. Lyotard calls it a disjunctive bar because it differentiated this part from that part and so on.<sup>35</sup> This is like the way differently vibrating strings form different particles. Lyotard's description of the transformations of the libidinal band is used as a theoretical fiction, which gives an account of how the world works through the interplay of intense, excited libidinal energies and the stable structures which exploit them and dampen their intensity. However, these stable structures are

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<sup>29</sup> For example, his use of intensities resemble Freud's primary processes. See J-F Lyotard, *Libidinal Economy*, London: The Athlone Press, 1993, p. xiii

<sup>30</sup> See section 5D below

<sup>31</sup> J-F Lyotard, *Libidinal Economy*, London: The Athlone Press, 1993, p. 1

<sup>32</sup> *Ibid.* 3

<sup>33</sup> *Ibid.* 14

<sup>34</sup> *Ibid.* 15

<sup>35</sup> *Ibid.* 14

also dampened down libidinal energies.<sup>36</sup> For example, if gambling is understood as excited libidinal energies then its intensity has been dampened by so called stable structures which are themselves the result of dampened intensity. For example, in our own time the DCMS is damping down gambling as entertainment.<sup>37</sup> By grounding the new gambling laws on the criteria which resembles Rawls' principles it is excluding other possibilities. And the inclusion of other possibilities lies at the heart of Lyotard's view of justice.

In *Just Gaming* Lyotard tried to base justice on opinion rather than truth, ignorance, the is ought relationship, ontology, principles, reason, and just conforming to laws.<sup>38</sup> He attempted to do this by developing the Kantian Idea and invoking the postmodern notion of 'pagan', which is not determined by prior criteria, but he ended in a paradox and was unable, according to some, to translate his understanding of justice into concrete decisions and policies.<sup>39</sup> Lyotard's notion of justice, like Rawls' reflection prior to equilibrium and the possibility for ongoing changes to the gambling laws do have similarities but the degree of open-endedness varies.

### ***C. Rawls' autonomy***

Following Kant, Rawls believed that from the moral point of view, the most distinctive feature of human nature is our ability to freely choose our own ends. And according to Rawls '*...the principles of justice manifest in the basic structure of society men's desire to treat one another not as means only but as ends in themselves.*'<sup>40</sup> Kant's words were '*never merely as a means, but always at the same time as an end*'. A central feature of Rawls' work is that basic civil and political rights are inviolable, and because of this the state's first duty to its citizens is to respect this capacity for autonomy and let them live life according to their own ends. In order to respect that autonomy in relation to issues around

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<sup>36</sup> See article by Ashley Woodward from the University of Queensland in *The Internet Encyclopaedia of Philosophy* Available online at <http://www.iep.utm.edu/l/Lyotard.htm> (Accessed 19/1/2007)

<sup>37</sup> We will see below that gamblers have also come up with ways to make the industry change.

<sup>38</sup> J-F Lyotard, *Just Gaming*, Minneapolis: University of Minnesota Press, 1996, p. 17, 82, 65.

<sup>39</sup> J-F Lyotard's postmodern approach has been criticized because it fails to generate concrete proposals for political action or analysis. For more about this and a defense of this criticism against Lyotard see Patrick F. McKinlay, 'Postmodernism and Democracy: Learning from Lyotard and Lefort' *The Journal of Politics*, 60, 2 (May, 1998): 481-502

<sup>40</sup> Rawls, *A Theory of Justice*, 1973, op. cit. p. 179

the grounds of basic civil liberties, the limits of political obligation, and the justice of economic and other inequalities, Rawls substituted the Original Position for Kant's categorical imperative. Rawls aligns himself with Kant's categorical imperative rather than the hypothetical imperative because, according to Rawls, the aim is very loose '*the argument for the two principles of justice does not assume that the parties have particular ends, but only that they desire certain primary goods.*'<sup>41</sup>

Kant had previously argued that the sense of freedom and autonomy in everyone leads everyone to reason impartially and to will the same maxims. However, a concern with deducing maxims within Kant's framework for Rawls is that individuals, knowing their present position in society, might not reason in an impartial manner.<sup>42</sup> Although some theorists such as Iris Marion Young have completely rejected the idea that morality is primarily a matter of impartiality.

*It is impossible to reason about substantive moral issues without understanding their substance, which always presupposes some particular social and historical context; and one has no motive for making moral judgments and resolving moral dilemmas unless the outcome matters, unless one has a particular and passionate interest in the outcome [...] when class, race, ethnicity, gender, sexuality, and age define different social locations, one subject cannot fully empathize with another in a different social location, adopt her point of view; if that were possible then the social locations would not be different.*<sup>43</sup>

Rawls veil of ignorance over knowledge of race, gender, social class, talents and abilities, religious beliefs or conception of the good life and so on was to ensure that the participants in the original position are forced, even if self-centered, into the moral point of view. Even though they are self-interested, Rawls tells us that they do not have a telos. '*I have assumed throughout that the persons in the original position are rational. In choosing between principles each tries as best he can to advance his interests. ....while they know that they*

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<sup>41</sup> Ibid. 253

<sup>42</sup> Although we have seen that Kant denies that we can be free as members of the sensible world, and holds that freedom can be consistently thought only if we ascribe it to ourselves as members of an unknowable noumenal world lying beyond nature, beyond space and time.

<sup>43</sup> Iris Marion Young, *Justice and the Politics of Difference*, Princeton: Princeton University Press, 1990, p. 104-5



have some rational plan of life, they do not know the details of this plan, the particular ends and interests which it is calculated to promote.' But rather than left guessing Rawls tells us that '*...they would prefer more primary social goods rather than less.*'<sup>44</sup> However, the increase of primary goods can itself be understood as a telos which is reflected in his choice of principles.<sup>45</sup> Here it seems that Rawls' notion of rationality is like the technological thinking about standing reserve of Heidegger seen above and, as we will see, it is also like the instrumental rationality criticized by Horkheimer.

In *Eclipse of Reason* Horkheimer argued that the means-ends understanding of instrumental or subjective reason limits reason by overshadowing its more objective side. '*If the subjectivist view holds true, thinking cannot be of any help in the determining the desirability of any goal in itself.*'<sup>46</sup> So Rawls emphasizes on '*more rather than less primary goods*' might leave out many other things that could be included under social justice. For example, the capability approach is a much broader normative framework for evaluating and assessing individual well-being and social arrangements, the design of policies, and proposals about social change in society. It focuses on the plural or multidimensional aspects of well-being. '*The approach highlights the difference between means and ends, and between substantive freedoms (capabilities) and outcomes (achieved functionings).*'<sup>47</sup>

Due to the lexical ordering of Rawls' principles, the basic rights and liberties, freedom of movement and choice of occupation, and powers and prerogatives of offices and positions of authority and responsibility are more or less equalized among all persons before the difference principle plays any role.<sup>48</sup> That leaves only income and wealth, and the social basis of self-respect in which to identify the worst-off person or group in society. Rawls argues that the best way to provide the social bases of self-respect is by treating every citizen as

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<sup>44</sup> Rawls, *A Theory of Justice*, 1973, op. cit. p.142

<sup>45</sup> On some level Rawls' basic structure is like Deleuze, Foucault, Spinoza and Lyotard's difference that gives rise to identities.

<sup>46</sup> M. Horkheimer, *Eclipse of Reason*, New York: Continuum, 1974, p. 7

<sup>47</sup> Ingrid Robeyns, 'The Capability Approach: A Theoretical Survey,' *Journal of Human Development*, 6, 1 (March 2005): 93

<sup>48</sup> The social primary goods can be classified in the following five groups.

The basic rights and liberties; freedom of movement and choice of occupation; Powers and prerogatives of offices and positions of authority and responsibility; Income and wealth; the social bases of self-respect. See also 'Social Unity and Primary Goods' p. 362; *Restatement*, p. 58-59.

an equal by giving every citizen the same rights and liberties.<sup>49</sup> If the first principle of justice and the principle of fair equality of opportunity are met, then everyone is provided with the same social basis of self-respect. This means that the difference principle will only be used in terms of income and wealth. This narrow focus has been criticized. For example, Sen criticized justice as fairness because it deals in an unsatisfactory way with severely disabled people.<sup>50</sup> By focusing too much on income and wealth as a gauge of who is well off in a society, the difference principle does not take into account that a group may do relatively well financially, but may still lack 'the social bases of self-respect'. This means that social institutions of various kinds might not affirm their worth.

Because of the veil of ignorance, people do not know their own conception of the good. Rawls argues that they must evaluate basic social structures in terms of what those social structures would provide them by way of goods that will be useful to them as means towards realizing their particular conception of the good no matter what it may turn out to be. Rather than simply assert that the good for humans consists in their self-realization or in excelling at human activities like art, and rather than saying that the good for human beings consists in happiness, Rawls' theory of the good consists in those resources which will enable a person to realize their individual conception of the good, whatever it may be. However, Horkheimer has called into question this ability to assess goals by arguing that subjective or instrumental reason has been reduced to a calculating rationality. As such we can no longer judge the aims that society has installed in us.

In addition, Horkheimer and Adorno, in *Dialectics of Enlightenment*, developed the notion of a culture industry to call attention to the industrialization and commercialization of culture under capitalist relations of production. They argued that popular culture is like a factory producing standardized cultural goods to manipulate the masses into passivity. This is because the easy pleasures available through consumption of popular culture make people docile and content, no matter how difficult their economic circumstances.

*The striking unity of microcosm and macrocosm presents*

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<sup>49</sup> See also J. Rawls, *A Theory of Justice*, rev. ed., p. 386.

<sup>50</sup> A. Sen, 'Equality of What?' in *The Tanner Lectures on Human Values, Vol. I*, Salt Lake City: University of Utah Press, 1979, p. 195-220. Available online at <http://www.tannerlectures.utah.edu/lectures/sen80.pdf> (Accessed 24/5/2007)

*men with a model of their culture: the false identity of the general and the particular. Under monopoly all mass culture is identical, and the lines of its artificial framework begin to show through.*<sup>51</sup>

One complaint against this is that the emphasis on homogeneity and sameness cannot account for the current historical moment, when ever-increasing diversity and market segmentation seem to characterize our culture industry. For example, the culture industry now includes gambling as part of our entertainment and we can see a parallel here. Adorno and Horkheimer were discussing the parallel between culture and industrial capitalism. We are now in a time when gambling is part of the cultural industry of entertainment and when *'chance has become an irreducible aspect of daily life; risk, speculation, indeterminism and flux are our constant companions in social, economic and personal affairs; we have entered the age of chance.'*<sup>52</sup> According to Reith, gambling today can be seen then as endemic in our postmodern world with the dematerialization of reality and the dissolution of all its forms into transitoriness and transitions.<sup>53</sup>

The loss of foundations and the rise in relativism and constructivism is more prominent now than when Rawls was writing. Even in the humanities and social science departments in universities constructive views of knowledge are endemic. However, it has been pointed out that mainstream analytic philosophy departments within the English speaking world are one exception. *'...the result has been a growing alienation of academic philosophy from the rest of the humanities and social sciences, leading to levels of acrimony and tension on American campuses that have prompted the label 'Science Wars.'*<sup>54</sup> It would follow from this that the answer to the question of whether or not people might be more prone to gambling in the original position in today's world may also depend on whether or not the person answering that question is from an analytic philosophy department or some other areas within the humanities. Rawls himself seems to half bridge the gap as he relativised knowledge, but held fast

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<sup>51</sup> M. Horkheimer & T. Adorno, *Dialectics of Enlightenment*, London: Verso, 1999, p. 120-121

<sup>52</sup> Reith, *The Age of Chance*, op. cit. p. 1

<sup>53</sup> This will be discussed in more detail below.

<sup>54</sup> Paul Boghossian, *Fear of Knowledge: Against Relativism and Constructivism*, Oxford: Clarendon Press, 2006, p. 8

to the notion of individual autonomy which he drew from Kant. Kant contrasted the freedom of the will as autonomy with its dependence on something else as heteronomy. Autonomy of the will could be seen in the process of basing our actions on universally valid laws that we have laid down for ourselves – like the categorical imperative.<sup>55</sup> However, Kant's notion of autonomy rests on his distinction between phenomena and noumena which was criticized by Hegel.<sup>56</sup>

Unlike Rawls and the gambling discourse, Lyotard wanted to keep options open by acknowledging the differend. A differend that is ruled out by focusing in on Rawls' principles and the Government's criteria.<sup>57</sup> Lyotard argued that for justice, as the relationship between different people, to be consistent with democratic ideals there has to be the potential of an infinite number of solutions in order to resolve various conflicts. This is why he was criticized for not being able to translate his understanding of justice into concrete decisions and policies. And a similar criticism could apply to the work of Deleuze and Foucault. However, we are not here looking for a definition of justice. We are attempting to overcome some of the difficulties posed by Rawls' veil and his notion of autonomy. But there is a problem. While the theories we have looked out show that Rawls' veil and personal autonomy are more difficult than he assumed these later theories also seem to be tied to their own episteme. A look at Deleuze and Guattari's use of rhizomes highlights this situation.

#### ***D. Rhizomes trees and other rhythms***

We have already mentioned Deleuze's notion of identity and difference as a folded fold. However, it is his idea of a rhizome that interests us here. In *A Thousand Plateaus: Capitalism ad Schizophrenia* Deleuze and Guattari introduce the notion of rhizomatic thought and critique arborescent thought. The latter, according to them, stifles and constrains while the former is presented as a more fitting way forward across a diversity of knowledges and methods of inquiry. In other words, a tree model fits with reterritorialization while a

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<sup>55</sup> See I. Kant, *Groundwork for the Metaphysics of Morals*, New Haven: Yale University Press, 2002, p, 51 'Thus I will call this principle the principle of the autonomy of the will, in contrast to every other, which on this account I count as heteronomy'. (The editor of this edition would have preferred the translation to read 'in contrast to that other, which'. See his footnote 75

<sup>56</sup> G. Hegel, (Trans. A.V. Miller) *Phenomenology of Spirit*, Oxford: OUP, 1977.

<sup>57</sup> Lyotard's notion of the differend was referred to above

rhizome is more like deterritorialization. A rhizome is a stem of a plant that usually grows underground. Deleuze and Guattari use it metaphorically as an alternative to the tree of knowledge metaphor. A tree has branches which create binaries (that are the basis for the categories Rawls' wanted to exclude) while a rhizome is an alternative way of ordering. They discuss six main points about the rhizome which is connection, heterogeneity, multiplicity, asignifying rupture, cartography and decalcomania.<sup>58</sup> Although it is important to not see these as separate but mixing with each other and proliferating.<sup>59</sup> Deleuze and Guattari summarize the concept of a rhizome as

*..unlike trees or their roots, the rhizome connects any point to any other point, and its traits are not necessarily linked to traits of the same nature; it brings into play very different regimes of signs, and even nonsign states. The rhizome is reducible to neither the One or the multiple. It is not the One that becomes Two or even directly three, four, five etc. It is not a multiple derived from the one, or to which one is added (n+1). It is comprised not of units but of dimensions, or rather directions in motion. It has neither beginning nor end, but always a middle (milieu) from which it grows and which it overflows.<sup>60</sup>*

The Internet and its rapidly spreading communities have been described as a rhizome because of its popularity and quick growth.<sup>61</sup> This means that the rhizome model might be compatible with our current information age. Others use the notion of a rhizome as a way to discuss Internet surveillance as a model different to Orwell's Nineteen Eighty four and Foucault's panopticon in Discipline and Punish. It has been argued that Orwell and Foucault have their strengths but miss out on the nature of surveillance that has emerged with the Internet. For example, Haggerty and Ericson understand today's surveillance as an assemblage of information flows like rhizomic plants that spread their structures horizontally under the ground.<sup>62</sup> And according to Wall, the internet offers new possibilities to track and monitor political elites for those who do not

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<sup>58</sup> Deleuze & F. Guattari, *A Thousand Plateaus*, op. cit. p. 7-12

<sup>59</sup> Philip Goodchild, *Gilles Deleuze and the Question of Philosophy*. London, Associated University Presses, 1996, p. 85

<sup>60</sup> Deleuze & F. Guattari, *A Thousand Plateaus*, op. cit. p. 21

<sup>61</sup> Alice van der Klei, 'Repeating the Rhizome SubStance,' 97, 31 (Number 1, 2002): 48-55 Available online at <http://muse.jhu.edu/login?uri=/journals/substance/v031/31.1klei.html>

<sup>62</sup> K. Haggerty and Ericson, 'The Surveillant Assemblage,' *British Journal of Sociology* 51, 4 (2000): 605-22

have political power.<sup>63</sup> An example of the latter can be seen in Lord Hutton's 2004 inquiry into David Kelly's death.<sup>64</sup>

Boundas tells us that Deleuze and Guattari think that the tree model of thought supports Greek thinking which goes from one point into a structure that points back to the root. However, a rhizome moves and changes in a non-centred way and disconnects and connects with itself and other things.<sup>65</sup> In other words, a tree is centred while a rhizome is decentred. On some level Spinoza, Saussure, Foucault and Lyotard's work could also be seen as rhizomatic. The rhizome is like Spinoza's substance and the sprouts of the rhizome could be like Spinoza's modes. Alternatively, the rhizome could be like Saussure's langue while the sprouts like his parole. Even Foucault's notion of power as decentred is like the rhizome. And when Lyotard's skin stops spinning it resembles something like the sprouts. Some scholars seem to understand the rhizome in a binary opposition to the trees,<sup>66</sup> but Deleuze and Guattari themselves caution that '*the root-tree and canal-rhizome are not two opposed models.*'<sup>67</sup> However, from the similarities between the rhizome and Foucault's understanding one can see that the rhizome model on its own will not necessarily prevent domination and discrimination. However, the tree and rhizome do share something fundamental to their survival which may help us with our inquiry into gambling and social justice. It is something which could incorporate the positive aspects of both essentialism and anti-essentialism while limiting their negative aspects. In addition, it may help us clarify some of the epistemological issues related to Rawls' veil of ignorance.

The difference between Deleuze and Guattari's rhizome and tree is almost symbolic of the difference between essentialism and anti-essentialism discussed in chapter 4. We noted that the latter not only undermines the possibility of a veil of ignorance, but it also makes agency problematic. We have seen that a weakness in essentialism is that it can lead to discrimination and domination

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<sup>63</sup> D. Wall, 'Mapping out Cybercrimes in a Cyberspatial Surveilland Assemblage' p. 121 in K. Ball & F. Webster, (Eds) *The Intensification of Surveillance: Crime, Terrorism and Warfare in the Information Age*, London: Pluto Press, 2003, p. 112-136.

<sup>64</sup> Chadwick, *Internet Politics*, op. cit. p. 263

<sup>65</sup> Constantin Boundas (Ed.) *The Deleuze Reader*, New York: Columbia University Press, 1993, p. 27.

<sup>66</sup> See 'Rhizome Versus Trees' in Constantin Boundas (Ed.) *The Deleuze Reader*, New York, Columbia University Press, 1993, p. 1-23.

<sup>67</sup> Deleuze & F. Guattari, *A Thousand Plateaus*, op. cit. p. 20

while a weakness in anti-essentialism is relativity. Recall Rawls' words on page 1 above. '*Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue.*' Foucault, Lyotard and Deleuze have revised our understanding of truth by highlighting the difference out of which it emerges. However, their theories seem to make judgments problematic. For example, Lyotard's *Just Gaming* ended in a paradox. Without the ability to make judgments one can not declare if something is just or unjust. However, there is something that rhizomes and trees share that may be able to help us develop a theory that uses the best from both essentialism and anti-essentialism.

Rhizomes and trees both need photosynthesis in order to survive and this is based on Circadian rhythms. Photosynthesis is an important circadian rhythm in plants.<sup>68</sup> It is the process by which plants convert carbon dioxide and water to sugar and oxygen. Organisms have evolved to co-ordinate their activities with the day-night cycle caused by the Earth's rotation. Direct responses to light or darkness are important but, in addition, biological clocks have evolved to time biological processes. Circadian rhythms are the result of these biological clocks, which times events that occur once per day. Even in the absence of environmental time cues, circadian rhythms persist with a period close to 24 hours. The circadian clock regulates many aspects of metabolism, physiology and behavior, in many other organisms including humans. And in addition it has been argued that the pineal gland is the main source of circadian melatonin synthesis.<sup>69</sup> Descartes had previously suggested that the pineal gland joined mind and body.<sup>70</sup>

Circadian rhythms are one of the many rhythms that Young mentioned in his critique of linearity in western societies. In *The Metronomic Society: Natural Rhythms and Human Timetables*, Michael Young drew on examples of

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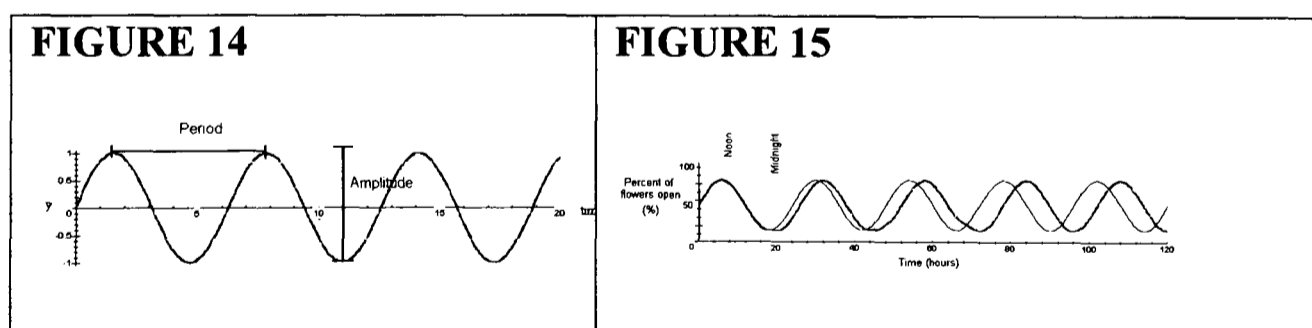
<sup>68</sup> The following information available online at *The Institute of Environmental Modelling* <http://www.tiem.utk.edu/~gross/bioed/webmodules/circadianrhythm.html> (Accessed 24/5/2007)

<sup>69</sup> T. Uz, M. Akhisaroglu, R. Ahmed, H. Manev, 'The Pineal Gland is Critical for Circadian Period 1 Expression in the Striatum and for Circadian Cocaine Sensitization in Mice', *Neuropsychopharmacology*. 12, (Dec 2003): 2117-23; The following information also comes from this paper. The Psychiatric Institute, Department of Psychiatry, University of Illinois at Chicago, Chicago, IL 60612, USA Available online at [http://www.ncbi.nlm.nih.gov/entrez/query.fcgi?cmd=Retrieve&db=pubmed&dopt=Abstract&list\\_uids=12865893](http://www.ncbi.nlm.nih.gov/entrez/query.fcgi?cmd=Retrieve&db=pubmed&dopt=Abstract&list_uids=12865893)

<sup>70</sup> See Aldrich, Virgil, 'The Pineal Gland Up-Dated' *The Journal of Philosophy*, 67, 19 (8 October 1970): 700

the cyclical and linear to argue, that many of the problems associated with modern western societies are due to the emphases placed on the linear over the cyclical<sup>71</sup>. Drawing on cyclical and linear biological analogies - biological rhythms from chronobiology, DNA molecules from molecular biology and linear evolution from evolutionary biology, Young argued that the linear bias in western society had replaced many natural rhythms by artificial ones and in so doing our rhythmic society has been replaced by a metronomic one.<sup>72</sup> One of the differences between the modern and post-modern era is marked by a shift from a linear bias with the belief in the possibility of fixed points and certainty to a more cyclical bias with the belief in multiplicity and uncertainty. The primacy of the linear over the cyclical and vice versa as well as the anxiety about their confusion has also been explored in literature. Young cites Finigan's Wake, Great Expectations, and Jane Eyre as examples. While it might be useful to emphasize the cyclical over the linear at a time when discrimination is based on the linear it might not be as useful when it is based on the circular. So a theory which incorporates both might be more useful.

Circadian rhythms produce repeating patterns over time.<sup>73</sup> A very simplistic rhythm is called a sine wave and is represented as  $y = \sin t$ . In the example (Figure 14) below  $y$  stands for the property or behaviour of the particular rhythm and  $t$  represents the time period. The height of the wave from peak to crest is called the amplitude. The time it takes to get from one wave to the next is called the period.



Circadian rhythms are usually more complicated than the simplest sine wave

<sup>71</sup> Michael Young, *The Metronomic Society: Natural Rhythms and Human Timetables*, London: Thames and Hudson, 1988.

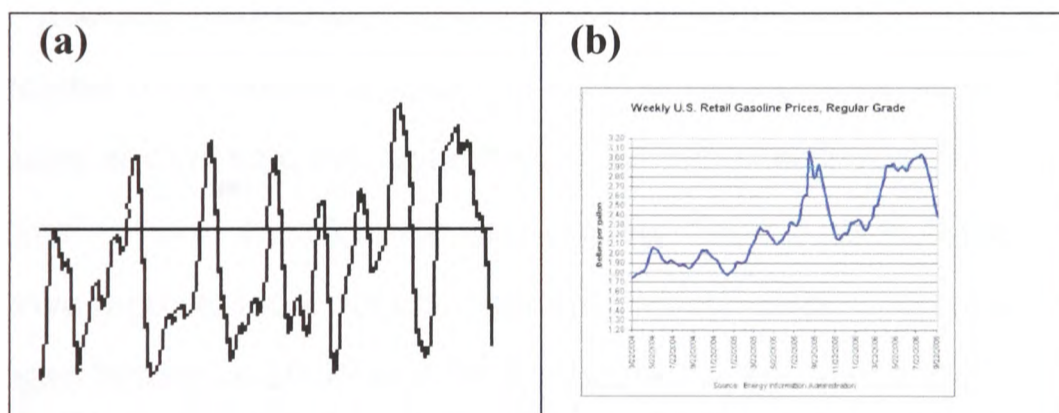
<sup>72</sup> Ibid. 19

<sup>73</sup> F. Halberg seems to have been the first to give the name of circadian rhythm to cycles of about a day. See Eliade Mircea, *The Myth of the Eternal Return, or Cosmos and History* (Trans. W. R. Trask) Bollinger series, 46. Princeton: Princeton University Press, 1954, p. 18. Cited in Young, *The Metronomic Society: Natural Rhythms and Human Timetables*, op. cit. p. 24



and further variations can occur as a result of other variables such as changes in the environment or experimentation. For example, in (Figure 15) above the Circadian rhythms of a flower opening and closing were altered through manipulative experiments to differ from a 24 hour cycle to a 22 hour cycle.<sup>74</sup> This ability to alter the cycle points to the political implications of Nietzsche's 'eternal return' and Leibniz's 'but only for the most part'.<sup>75</sup> Circadian rhythms are not the only waves that interest us here. There are also circalunar, circannual within a day, infradian cycles like lunar and annual cycles which are longer than a day, and ultradian cycles for less than a day.<sup>76</sup> Examples include Figure 16 (a) electrical activity in the brain <sup>77</sup> (b) Weekly US retail gasoline prices.<sup>78</sup> (c) The Hong Kong stock market,<sup>79</sup> (d) the history of cattle cycles<sup>80</sup> and (e) roulette<sup>81</sup>

**FIGURE 16**



<sup>74</sup> The above two graphs and information are taken from M. Beals, L. Gross, S. Harrell, 'Coordinating *Photosynthetic Activity: Circadian Rhythms*.' 1999. The Institute for Environmental Modeling. The University of Tennessee, Knoxville, Available online at <http://www.tiem.utk.edu/~gross/bioed/webmodules/circadianrhythm.html> (Accessed 24/5/2007)

<sup>75</sup> See the two quotes at the beginning of this chapter

<sup>76</sup> M. Young, *The Metronomic Society: Natural Rhythms and Human Timetables*, London: Thames and Hudson, 1988, p. 24

<sup>77</sup> The EEG is a recording of the electrical activity of the brain. Its computerized printout looks similar to that of an EKG which monitors the heart. Brain activity is represented by a graph which shows peaks and valleys which lessen with decreasing levels of consciousness. Available online at [http://www.abihelp.org/NABIS\\_Information\\_Line-Brain\\_Function\\_Tests.htm](http://www.abihelp.org/NABIS_Information_Line-Brain_Function_Tests.htm)

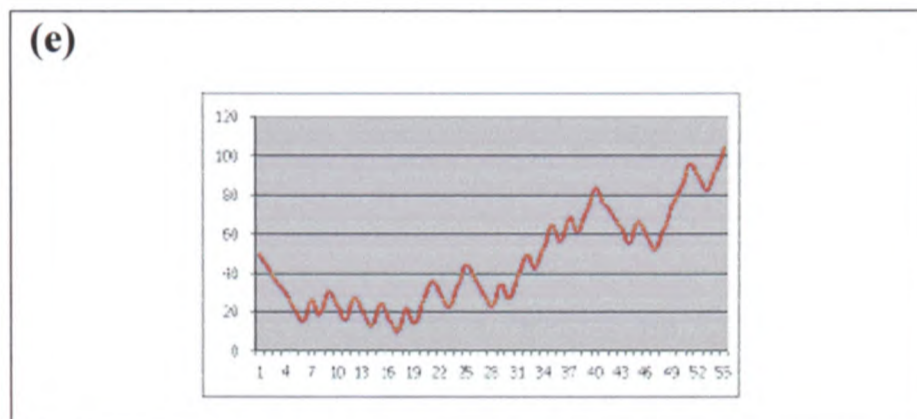
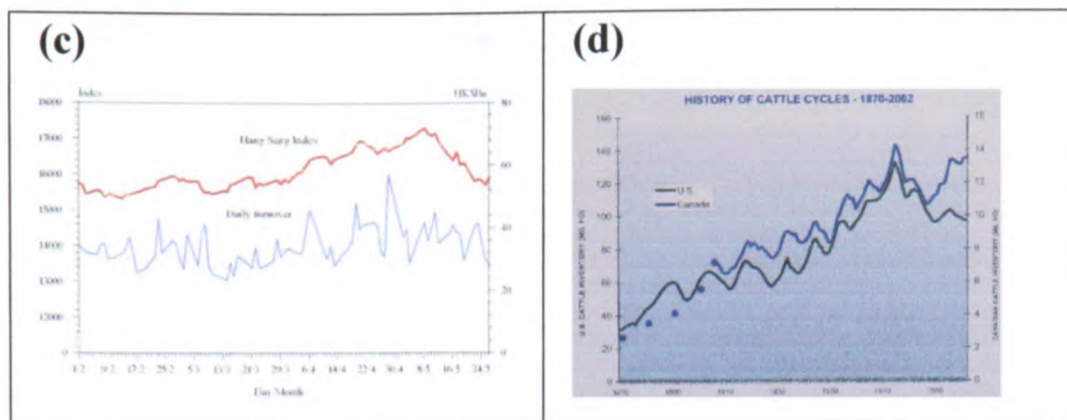
<sup>78</sup> 'Economists on Environmental and Natural Resources: News, Opinion, and Analysis,' Available online at [http://www.env-econ.net/images/mogas\\_chart\\_1.gif](http://www.env-econ.net/images/mogas_chart_1.gif) (Accessed 28/5/2007)

<sup>79</sup> Available online at <http://www.hketousa.gov.hk/ny/e-newsletter/06may/B&F.htm> (Accessed 24/5/2007)

<sup>80</sup> Available online at

[http://www.omafra.gov.on.ca/english/livestock/beef/news/info\\_vbn0403a1.htm](http://www.omafra.gov.on.ca/english/livestock/beef/news/info_vbn0403a1.htm)

<sup>81</sup> Available online at <http://www.teamroulette.com/> (Accessed 29/5/2007)



This author attempted to collect data from a pontoon table (a game similar to blackjack) in order to create a graph. Unfortunately this was prevented as the manager thought it had something to do with card counting rather than theories of justice.<sup>82</sup> However, it should be apparent that a similar pattern emerges because if the punter always lost they would stop betting and alternatively if the punter always won the casino would go out of business. Never the less the graph above (e) will be adequate to make the desired point. Now suppose the graph above represented a punters gambling pattern over a period of time. If the punter began betting at 20:19 and ceased betting at 40:21 then they would have left the game winning. However, if they began at 40:25 and left at 20:28 they would have lost. This shows that when a punter wins or loses will depend on when they begin and end the betting session. Of course if the punter played to infinity, as do the casinos, then as a result of the law of large numbers and the house edge, the punter would lose money. That said, there are two obvious problems with this example: firstly the punter would need to know if they were beginning on the upward curve and ending before the decent. In other words, they would need to know their position and direction on the curve. Secondly, joining and leaving the game might be a variable that altered the pattern. These issues are also central to the study of the wave / particle duality in the study of physics.

<sup>82</sup> This attempt was made on 4/04/07 in the casino on the Pride of Biscay. This is a P & O ferry that travels from Portsmouth UK to Northern Spain.

Wave-particle duality stems from the uncertainty principle which was itself a criticism of an earlier notion. It was previously believed that the lack of accuracy for measuring the positions and momentum of a particle resulted from some deviation owing to constraints of measurement using a real world instrument that is not infinitely precise. However, Heisenberg showed that, even in theory with a hypothetical infinitely precise instrument, no measurement could be made to arbitrary accuracy of both the position and the momentum of a physical object. This means that there is no such thing as zero in terms of position and movement. Hawking explains it by referring to the swing of a pendulum.

*According to quantum theory, the ground state, or lowest energy state, of a pendulum is not just sitting at the lowest energy point, pointing straight down. That would have both a definite position and a definite velocity, zero. This would be a violation of the uncertainty principle, which forbids the precise measurement of both position and velocity at the same time. The uncertainty in the position multiplied by the uncertainty in the momentum must be greater than a certain quality, known as Planck's constant.<sup>83</sup>*

This means that there is a relationship between the wave and particle behavior known as the wave-particle duality. According to this theory all objects in our universe exhibit properties of both waves and of particles.<sup>84</sup> This duality addresses the inadequacy of conventional concepts like particle and wave to meaningfully describe the behavior of quantum objects.<sup>85</sup> This theory has been used to examine the individuality of human beings within the context of society<sup>86</sup> and can be used as a model to highlight a problem within Rawls' theory of justice.

Underpinning Rawls' original position and veil of ignorance is his idea that persons should not be advantaged or disadvantaged by good or bad luck.<sup>87</sup>

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<sup>83</sup> Hawking, *The Universe in a Nutshell*, op. cit. p. 44

<sup>84</sup> In 1923 De Broglie expanded the Principle of Wave-particle Duality of Light put forth by Einstein to include all matter. It was called the Principle of Wave-particle Duality of Matter. He argued that all matter, not just light, exhibits both wave-like and particle-like behavior. See B. Green, *The Elegant Universe*, London: Vintage, 2000, p. 103-4

<sup>85</sup> Ibid. 121

<sup>86</sup> Danah Zohar, *The Quantum Self: A Revolutionary View of Human Nature and Consciousness Rooted in the New Physics*, London: Bloomsbury Publishing Ltd., 1990. See especially p. 9-13

<sup>87</sup> For other theories about justice and luck see R.J. Arneson, R. 'Equality and Equal

According to him, every person's beginning in a society is the result of a social lottery and a natural lottery. The former positions one in a particular political, social and economic place while the latter determines their potential. These positions, according to Rawls, are the result not dissimilar to a lottery which is a matter of good or bad fortune or luck.<sup>88</sup> In other words, the life you live is a result of the lottery ticket or cards that you are dealt. The cards Rawls was referring to were the things he wanted veiled, and that is the reason he was against justice being based on merit or desert. In other words, one cannot merit or deserve the good luck or bad luck of ones starting position.<sup>89</sup> However, the cards that Rawls wanted to exclude from the deck to justify the basic structure of society were themselves a result of that basic structure at the time. In other words there was a close relationship between the meaning of the cards dealt and the rules of the game.<sup>90</sup> And, as we will see below, when the rules change the meanings change. However, the point here is that Rawls' decision of which cards to choose was like trying to identify the particle and its direction on the wave. And if we take note of the gamblers need to know when to start and stop and the uncertainty principle in Quantum mechanics, we can say that Rawls' choice of cards was made under uncertainty – it was a gamble. In order to expand on this we will briefly look at the way the rules have changed in relation to the game of Blackjack. We will be using Blackjack as a theoretical fiction (like Lyotard) and metaphor (like Deleuze and Guattari).

### ***E. Blackjack***

Blackjack can be found today in most casinos around the world. It developed from pontoon which grew out of vingt-et-un.<sup>91</sup> The name 'blackjack'

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Opportunity for Welfare', *Philosophical Studies* 56 (1989): 77-93; G.A. Cohen, 'The Currency of Egalitarian Justice', *Ethics* 99 (1989): 906-944; R. Dworkin, *Sovereign Virtue*, Cambridge Mass: Harvard University Press, 2000.

<sup>88</sup> John Rawls, *A Theory of Justice*, Oxford: OUP, 1973, p. 74, 75

<sup>89</sup> John Rawls, *A Theory of Justice*, Oxford: OUP, 1973, p. 7,104. For more on this point see R. Nozick, *State, Anarchy, and Utopia*, Oxford: Basil Blackwell, 1974, p. 216; R.J. Arneson, 'Luck and Equality', *Proceedings of Aristotelian Society* 75 (2001): 73-90; T. Nagel, *Equality and Partiality*, New York: Oxford University Press, 1991; E. Rakowski, *Equal Justice* Oxford: Clarendon Press, 1991; J.E. Roemer, 'A Pragmatic Theory of Responsibility for the Egalitarian Planner', *Philosophy and Public Affairs* 22 (1993): 146-166; Kasper Lippert-Rasmussen, 'Justice and Bad Luck', *The Stanford Encyclopedia of Philosophy* (Winter 2005 Edition). Available online at <http://plato.stanford.edu/entries/justice-bad-luck/> (Accessed 24/5/2007)

<sup>90</sup> This problem is similar to the problem of trying to distinguish between brute luck and option luck discussed above

<sup>91</sup> Reith, *Age of chance*, op. cit. p. 76

suggests that the jack of clubs and/or jack of spades occupy a central place within the game. This

may have been the case early on but has since been discontinued. In most casinos today the object of the game is to get cards which have a total value that

**FIGURE 17** is closer to 21 (without going over 21) than the dealer's hand.



The best hand would consist of an Ace and a 10. The Ace can be 1 or 11 and all picture cards are worth cards have a value of 10 (Figure 17)<sup>92</sup>



**FIGURE 18**

At the beginning of the game the dealer deals a card to the player to his/her left (Figure 18) and then deals one card to every player at the table, leaving him/herself to the last. He/she then repeats this order dealing everyone a second card except his/her own card. After everyone has been dealt two cards the dealer again starts with the player to his/her left and asks if they want additional cards, these cards are dealt one at a time, until the player busts or indicates that he/she wants to stand (does not want any more cards). Once every player has finished with his or her hand the dealer must play his/hers. The dealer has rules, printed on the table, that determine his/her play. These rules usually say that the dealer will take a card when his/her total is 16, and will stand when he/she has a count of 17 (rules regarding soft 17 vary from casino to casino – a soft 17 is a 6 plus an Ace). After the dealer has finished with his/her hand he/she will pay off bets with better hands, collect bets on worse hands, or in the case of a tie pushes. Players then pick up their winnings, if any, and may make a new bet as the entire process is repeated with new game/hands. The casinos usually pay even money if the punter has a better hand than the dealer, or 3 to 2 if the punter has a blackjack (10 and Ace). In pontoon the dealer wins if their hand equals the punter's hand.

One way to improve the chance of winning is to use statistics to predict the outcome of various hands. The player then plays the way that is statistically the most likely to result in a win. In 1956, a paper titled 'The Optimum Strategy in Blackjack' was published by Baldwin, Cantey, Maisel, and McDermott.<sup>93</sup> This

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<sup>92</sup> Both images from Corporate Entertainment. Available online at <http://www.1stclasscasino.co.uk/corporate/index.html> (Accessed 24/5/2007)

<sup>93</sup> R. Baldwin, E. Wilbert, H. Cantey, J. Maisel, P. McDermott *Journal of the American*

paper laid out a set of recommendations for the play of the game. These recommendations were very close to today's basic strategy. Professor Edward O. Thorp, a mathematician from MIT, refined this strategy and in 1962 he developed one of the first card counting techniques. He published his results in *Beat the Dealer* and this book became so popular that for a week in 1963 it was on the New York Times best seller list.<sup>94</sup> This section will just briefly mention a couple of points about these strategies.

Firstly, the punter's decision about whether on not to take another card depends upon the dealer's card as much as it does on their own hand. For example, if the dealer has a 2, 3, 4, 5 or 6 showing face up then they will have to draw 2 cards because they cannot sit on less than seventeen (however, some casinos allow dealers to sit on soft seventeen and some do not – for those that do then if the dealer drew an ace with the six they could sit). Having to draw two cards means that there is a good chance that the dealer will bust (have a total of over twenty one). Alternatively, the punter can sit if there is a chance of busting but this action will depend on how close they are to busting and which of the above cards the dealer has. For example in (figure 19) below you can see the percentage chance of the dealer busting on the second card if they have the following first cards. Note that a 5 or 6 is the worst card for the dealer while the Ace is the best. If the dealer's first card is a 5 or 6 then there is a 42% chance that they will bust. However, a card counter would interpret these percentages differently.

**FIGURE 19**

Dealer's first card	2	3	4	5	6	7	8	9	10	Ace
Possibility of going over 21	35%	37%	40%	42%	42%	26%	24%	23%	23%	17%

If the dealer has a 3 there is less chance of busting than if they had a 5 or 6 but a card counter might interpret these odds differently. If they do draw a 10

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*Statistical Association*, 51, 275 (Sep., 1956): 429-439 doi:10.2307/2281431 Available online at [http://links.jstor.org/sici?sici=01621459\(195609\)51%3A275%3C429%3ATOSIB%3E2.0.CO%3B2-1](http://links.jstor.org/sici?sici=01621459(195609)51%3A275%3C429%3ATOSIB%3E2.0.CO%3B2-1) (Accessed 24/5/2007)

<sup>94</sup> Edward Thorpe, *Beat the Dealer*, London: Vintage, 1966

then the next card will have to be 8 or below. However, if they have a 6 and then draw a 10 their next card would have to be a 5 or below – card counting aside there are more cards of 8 and below than of 5 or below in the decks. So supposing the punter had 12 even though they can bust with a 10 and there are more 10's in the deck than any other card, they have less chance of winning if the dealer has a 3 than if the dealer has a 6 because the dealer has more of the chance of busting with a 6 than with a 3. Of course, a good card counter will know roughly how many big cards have already been played and therefore roughly how many are still in the deck.

A second strategy in blackjack has to do with betting itself. If in the first two cards the total is 9, 10 or 11 the punter can double their bet. It is a good chance they will draw a 10 and with the 11 this would make a 21. However, this also depends on what card the dealer has. For example, if the dealer had an ace or 10 then they might draw a large card next time. However, if the dealer had a 7 or under then there is a very good chance that if the punter doubled they may well win twice as much as if they did not double. On the other hand, they could end up losing twice as much if the dealer got a better hand. Punters can also double the bet if they have a pair of cards. They split the pair and play each separately. If they are dealt a pair of 7's then it is wise to split as two 7's equals 14 and there is a high chance of busting. Splitting them may allow the punter to get two hands of 17. However, once again their action would depend on what the dealer had. If the dealer had a 10 it might be likely that they drew a high card next time and the two 17's would lose more than the one 14 which busted. This is only based on mathematical probability but a card counter would know roughly how many 10's were left in play and may see a different probability. However, even without bringing card counting in one can see that the odds are very slightly in the favour of the punter and away from the casino. However, the casinos have their own way of balancing the odds.

Some of the ways in which the casinos balance the odds include introducing novelties into the game. For instance, in Jupiter's casino in Townsville Australia the game includes the possibility of gambling on getting 7's. In each game the punter can place a bet leading to them winning four times the bet if they get two 7 of different suit, ten times if the two 7's are the same suit, 100 times if they are three 7's of different suit, 500 times if they are all red

or black, and 5,000 times if they are of the same suit. While the winnings seem high the odds of getting them give the casino an advantage. Other casinos such as the Treasury in Brisbane Australia pay the punter if they get the same value hand as the dealer (most casinos have a stand off which is a draw but in the casinos on some ferries between England and Europe and England and Ireland the dealer wins if the hands have the same value – but they call their game pontoon rather than blackjack).<sup>95</sup> Playing in this way at the Treasury tends to have the big cards accumulate together in the pack which means the smaller cards also accumulate. This leads to the dealer busting less when they have a 4, 5 or 6 than one would otherwise expect.

Some punters double up if they lose a hand. For example, if they lost £5 on the previous hand they would bet £10 on the next and so on until they won.<sup>96</sup> The problem here is that most casinos have a limit on the amount you can bet. For example in the Golden Nugget casino in Shaftesbury Avenue in London the higher limit on their £5 tables is £500. The punter would only have to lose seven hands before this strategy would fail. Their eighth bet would be £640 and they would not be able to place it. Other tables have higher top end limits but their lower limit is also higher leading to the same problem. These limits are found in most casinos for example the limits in the casino (when it was owned by Conrad International) at Surfers Paradise on the Gold Coast in Australia have the same equivalent in Dollars. However, unlike the Golden Nugget which is open from 2pm until 6am except Sunday when it closed at 4am, the Gold Coast casino is open 24 hours a day 364 days a year.

Card counting is a useful strategy to use in blackjack because it lets you keep track of cards that have been played and this helps you know the cards that are still in the deck. This gives you an advantage in the next hands. (However, casinos do not allow card counting devices). For example, if a lot of high cards have been played then there are going to be a lot of low cards left in the deck.

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<sup>95</sup> An example is the P & O Pride of Biscay which travels from Portsmouth to Northern Spain.

<sup>96</sup> A similar strategy is also used by punters at the race track. Firstly, the punter decides on how much they want to win, say £100, and bet enough on the first favourite to return the original bet plus the £100. If they lose then they bet enough on the first favourite in the second race to win the initial loss plus the £100, and so on until a favourite wins. A problem with this strategy is either that if a favourite does not win for a few races (even though a favourite will eventually win) the bookie may refuse to take a large enough bet to recover the total outlay or the punter will run out of stake money.



There are different techniques for keeping track of the cards but here is an example of an easy one for memory. With this one the player does not have to remember every card as they count them in groups. Group A = (2, 3, 4, 5, 6), Group B = (10, J, Q, K, A.), and Group C = (7, 8, 9). We saw above that if a dealer is showing a low first card then they must draw at least two more cards. If you know that there are more big cards than small cards left in the deck you will know that the probability of the dealer busting will be higher than if there are more small cards left so you count in relation to high and low cards, or group A and B. Also, your double-downs will be more likely to succeed if there are more high cards still in play.

So beginning with zero at the beginning of the game you minus one for a group A card or plus one for a Group B card. For example if the first card out is a 4 your count will be -1. If another small card comes your count will be -2. If a Group B card comes out your count will be back to -1. If this is followed by 3 group B cards your count will equal 2 and so on. In order to distinguish clearly between the two groups you count Group C, (like Aristotle's excluded middle) as zero. But bear in mind that the zero is not absolute zero. Also remember too that the casinos do not use all the cards in the decks as they keep a certain percentage out of play. This was one result of Thorpe's book *Beat the Dealer*. In addition, this strategy is also useless if all cards stay in play as with the card shuffling machines that are becoming more popular in casinos. In June 2004 there were only 2 being used at the Treasury Casino in Brisbane but in June 2006 I counted 18 machines. However, it is possible that some punters might devise ways of getting around the problem posed by shuffling machines just as they have gotten around other problems. This is one reason why the section on cheating in the Gambling Act 2005 was left open ended.

For example, some have tried to disguise the card counting behaviour. Ben Mezrich discusses this type of Team Play strategy which the MIT students used with great success in his book *Bringing Down The House*. Team play was a tactic developed by Ken Uston. It works by having various card counters at different tables around a casino. They just bet on the table's minimum because they are not there to win but to determine when the table is advantageous. When the table is to the advantage of the punter they signal to another member who comes to the table as a swaggering, irrational, cash-crazy bettor. He or she

jumps from table to table placing maximum bets. Because this member's play appears random and irrational the casinos take little notice. It must be remembered that this member of the team only places bets when there is an advantage.<sup>97</sup> After having discussed relevant elements of the game of Blackjack I am now in a position to use it as a model for our current topic.

### ***F. Language is not the only game in town***

We have briefly mentioned the use of cards and games in other theories. These included Saussure's use of chess, Kuhn's experiment with the deck of cards, Dworkin's use of poker, and Rawls' use of the lottery, chess and checkers.<sup>98</sup> In this final section we will draw on the card game of blackjack to discuss justice. In order to set the stage we will begin with Hegel then add to it. Within Hegel's dialectical system, Being and nothing make the unity becoming. Being and nothing are both open, abstract, and infinite, until the becoming reaches a limit or, particular nature, finitude, or negates itself, and becomes something. This is an example of determinate negation which is also determinate being.<sup>99</sup> When being reaches its limit (by externalizing or manifesting as determinate – moves from implicit to explicit – becomes determinate instead of indeterminate) it also opens itself up for mediation by becoming available for another negation. This process is repeated as it reaches further limits until it becomes every thing (the absolute with no limits – complete freedom – no more mediations).<sup>100</sup> However, until this stage the absolute is still unknown because there are further limits and mediations. The important point is that the implicit or potential indeterminate being has to become explicit or actual being (momentarily suspending contradictions) so it can discover its limit (other) and be mediated. The other or mediation is then taken back into itself. It continues incorporating more of itself until there is no

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<sup>97</sup> Ben Mezrich, *Bringing Down the House: The Inside Story of Six MIT Students Who Took Vegas for Millions*, The Free Press, 2002. See also the Canadian movie *The Last Casino*, Directed by Pierre Gill. Released 26 June 2004

<sup>98</sup> Even Hawking used cards to explain spin. See Stephen Hawking, *The Universe in a Nutshell*, London: Bantam Press, 2001, p. 48

<sup>99</sup> Hegel, *Phenomenology of Spirit*, op. cit. pp.50-51

<sup>100</sup> J.N. Findlay, 'Forward' in G. Hegel, (Trans. A.V. Miller) *Phenomenology of Spirit*, Oxford: OUP, 1977, pp. x-xii

otherness of its self left.<sup>101</sup>

Now we will substitute a pack of playing cards for Hegel's notion of Geist. Within the pack one particular card can be a winning card or a losing card depending on the rules of the game. (This is similar to the lottery tickets or characteristics Rawls wanted veiled.) Winning and losing are both potentials (implicit). The card is indeterminate when first dealt. Its meaning / value / identity has not yet been determined. Its explicit value (actuality) is not yet known. It becomes a winning or losing card (reaches actuality) when it is exposed to another card and this exposure is determinate. When it meets its other the other gives it meaning (mediates it). For example, a 10 followed by an Ace would be blackjack. Both cards are part of the same deck so the other card is its own otherness. Until we know where all the cards in the deck are and how they will be played we can't know the full value of a single card. We must either wait until the end of the game (early Fukuyama), cheat (Starlin), become fourth dimensional creatures, or utilize some strategy in order to predict.

The issue of prediction is central to one current view of reality in quantum mechanics which has an inbuilt uncertainty. This replaced the earlier notion in classical physics which was based on the possibility of certainty.<sup>102</sup> One of the transitions from the latter to the former can be seen in the work of Richard Feynman. In classical physics the move from 'here' at one time to 'there' at another time is via the shortest path. See the dash line in (figure 20).<sup>103</sup> According to Feynman all the paths are possible and each of the possible paths has a history. He associated these histories with a number called the amplitude and it defines the probability of the path being followed. The classical view of the path has a high probability but the probability of going from 'here' to 'there' is the sum of the probability for all the paths according to Feynman.<sup>104</sup> Hawking tells us that due to the uncertainty principle, mentioned above, we cannot know

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<sup>101</sup> Hegel's translated words are '*But the goal is as necessarily fixed for knowledge as the serial progression; it is the point where knowledge no longer needs to go beyond itself, where knowledge finds itself, where Notion corresponds to object and object to Notion.*' G. Hegel, (Trans. A.V. Miller) *Phenomenology of Spirit*, Oxford: OUP, 1977, Section 80, p. 51

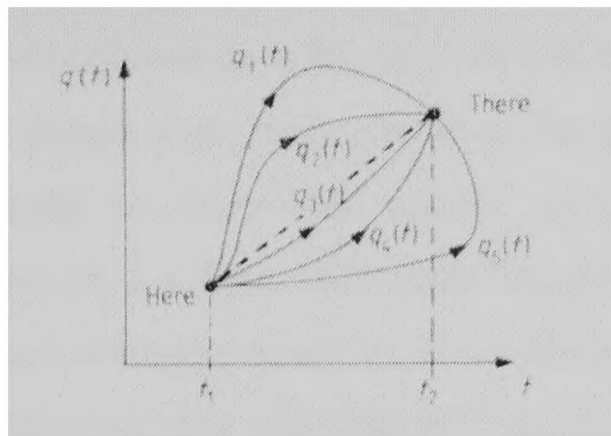
<sup>102</sup> For example, '*Laplace suggested that if we knew the positions and velocities of all the particles in the universe at one time, the laws of physics should allow us to predict what the state of the universe would be at any other time in the past or in future*' Stephen Hawking, *The Universe in a Nutshell*, London: Bantam Press, 2001, p. 104

<sup>103</sup> Figure 20 from <http://universe-review.ca/F12-molecule.htm> (Accessed 24/5/2007)

<sup>104</sup> Hawking, *The Universe in a Nutshell*, op. cit. p. 83

the position but only the wave function. He also criticizes the ‘hidden variable’ hypothesis.<sup>105</sup>

**FIGURE 20**



The Hidden Variables hypothesis is based on the assumption that theories in quantum mechanics are incomplete. According to this view there is an underlying layer of reality which contains additional information about the world. If physicists knew about these hidden variables they could predict the precise outcomes rather than just the probabilities of getting particular results. Einstein was in favor of the notion of hidden variables in relation to the ability of particles at a distance being able to affect one another instantaneously. However, the hidden variable hypothesis was criticized by John Bell.<sup>106</sup> One of the main arguments against hidden variables was that they were essentially non-localized. Nevertheless for our present purposes we can suppose that there is something such as a hidden variable.

For example, if a dealer stacked a pack of cards they would know where every card was. A punter betting on choosing one particular card might suppose that the chance or probability of getting it right would be 1 in 52. Similarity, games of chance in the casino like roulette has hidden variables which are the odds in the house’s favour and these are non local. Alternatively, card counting is a hidden variable in blackjack because it alters the odds against the house. The hidden variables are what allow the gambling industry to make a profit. While gambling is understood as entertainment this profit seems legitimate, but the only ones really gambling are the punters.

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<sup>105</sup> Ibid. 107

<sup>106</sup> Green, *The Elegant Universe*, op. cit. p. 114; See also J.L. Basdevant and J. Dalibard, ‘Hidden Variables and Bell’s Inequalities.’ Ch. 15 in *The Quantum Mechanics Solver: How to Apply Quantum Theory to Modern Physics*. Berlin: Springer-Verlag, (2000): 109-118.

Now if we take another look at the figure above we can see the dash line as the most direct route for the casino to take the punter's money. However, if they took it that directly the punter would stop gambling. Rather than losing money directly the punter wins a bit, loses a bit, wins a bit more etc., like the wave. However, the wave itself still moves in the same overall direction as the dashes. If both the casino and punter were really gambling there would still be waves but the direction would be horizontal instead of diagonal.<sup>107</sup> However, suggesting this as a model at a time when gambling is seen as entertainment within a profit orientated economy would be as incommensurable as criticizing the gambling bill on the basis that gambling is a sin. Lyotard might call these different language games. And if there was a real clash between them he might call it a differend.

A differend is the place where incommensurable ideas or language games clash. For example, it could be the place between essentialism and anti-essentialism, deterritorialization and reterritorialization, modernism and postmodernism, different epistemes or paradigms. So it is a place where change can happen. Lyotard found a differend within Kant's work. According to Lyotard, Kant recognized the openness of thought, but his method for making judgments about what counts as truths excluded all the other methods. We have already noted Lyotard's argument that there should be at least the possibility of accessing a potentially infinite array of possible solutions to resolve justice controversies. He describes this infinite array of possibilities as the domain of the prescriptive language game. But he tells us that Kant's method of judging 'truth' limits possibilities, which places Kant's method in the domain of the efficiency language game. This dissimilarity of language games is an example of what Lyotard calls a differend.

Lyotard argues that the differend allows for the possibility of a strategy that potentially provides for a new type of language game. This would not be one based on truth (in Kant's sense). Applying Lyotard's notion of language games as a framework, we can see that there is a differend within the gambling

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<sup>107</sup> On a microscopic level particles are localized phenomena which transport both mass and energy as they move. Waves are de-localized phenomena, spread out in space, and carry energy but no mass as they move. At the macroscopic scale physical objects that one can touch, such as a football, are particle-like phenomena, while ripples on the river are waves. Instead of footballs and ripples I am suggesting a physical hand in a card game as the particle and the movement of the game from winning to losing and vice versa as the wave.

industry also. On the one hand, gambling is more liberal and regulation may keep it fair and crime free, but on the other hand the odds are stacked against the punter. When the punter works on a strategy that evens up the odds and thereby making the transaction a real game of chance, giving equal liberty, the gambling industry either bans the punter or changes the rules of the game to accommodate those strategies. And this discrimination is not based on Rawls' categories. And if we take a look at the experiences of gamblers we will find that those categories do not work as a form of control over the punters.

Firstly, the experience of gambling can challenge Kant's fixed fundamental categories of perception such as time, space and cause. It has been argued that certain different contexts can alter the subjective experiences as well as the experiencing self. '*...the world is not fixed and unchanging, but rather depends very much on how we feel, what we are doing, where we are.*'<sup>108</sup> For example the gamblers experience of play has been described as twilight zones and dissociated states.<sup>109</sup> In his *The Gambler* Dostoevsky's Alesky '*lost awareness of himself as subject, and could not recall what had happened.*'<sup>110</sup> Balzac called the spirit of gambling '*a passion more fatal than disease*'.<sup>111</sup> These experiences are a result of tensions in the game as '*..the conflicting valences of fear or hope run in tingling arpeggios up and down the spine.*'<sup>112</sup> Tolstoy tells us in relation to playing roulette that '*it is a long time since anything tormented me so much*'.<sup>113</sup> Caillois described the tension experienced in gambling as *ilinx*. He derived that word from '*...the Greek 'whirlpool or vertigo' and 'it is a governing principle of Dionysian or pre-rational societies....*'<sup>114</sup> So if gambling

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<sup>108</sup> Reith, *The Age of Chance*, op. cit. 127.

<sup>109</sup> H. Leiseur, *The Chase: Career of the Compulsive Gambler*, Cambridge, MA: Schenkman Books, 1984; D. Jacobs, 'Evidence for a Common Dissociative-like Reaction Among Addicts' *Journal of Gambling Behaviour*, 1, 4, (1988):27-33; R.I.F. Brown, 'Dissociation phenomena among addicted gamblers', Paper presented at the *Ninth International Conference on Gambling and Risk-Taking Behaviour*, Las Vegas, June 1994. All above cited in G. Reith, *The Age of Chance*, London: Routledge, 2002, p. 130.

<sup>110</sup> F. Dostoevsky, *The Gambler* (Trans. J. Kentish) Oxford: OUP, 1992, p. 241. Cited in G. Reith, *The Age of Chance*, London: Routledge, 2002, p. 132

<sup>111</sup> H. Balzac, *The Wild Ass's Skin* (Trans. H. Hunt) Harmondsworth: Penguin Classics, 1977, p. 22-26. Cited in G. Reith, *The Age of Chance*, London: Routledge, 2002, p. 131

<sup>112</sup> E. Devereaux, 'Gambling and the Social Structure' unpublished Ph.D. thesis, Harvard University, 1949, p. 699. Cited in G. Reith, *The Age of Chance*, London: Routledge, 2002, p. 131.

<sup>113</sup> Cited in R. T. Barnhart, *R Gamblers of Yesteryear*, Las Vegas: Gamblers Book Club Press, 1983, p. 110. Cited in G. Reith, *The Age of Chance*, London: Routledge, 2002, p. 131

<sup>114</sup> R. Caillois, *Man, Play and Games*. (Trans. M. Barash) London: Thames and Hudson, 1962, p. 23. Cited in G. Reith, *The Age of Chance*, London: Routledge, p. 131.

can have such an effect on people how is it that different types of people seem to gamble differently? Perhaps there is a hidden variable. If so, then it might be non-localized rather than being based on certain individual's characteristics. So attempting to place a veil over those particular characteristics in the original position might be like trying to net waves in the ocean.

Even though it might not be possible to know the location and momentum of a particle there is something in the cyclical / linear strategy in blackjack that might allow us an insight to even up the hidden variable without relying on card counting. We have seen that the winning / losing wave moves in the diagonal direction towards the house. Now if we could know when to start betting and when to leave we could start on the winning curve and leave before we start to lose. We can not know where the hand (particle) might be on the curve or in which direction it might be moving. However, if we are lucky enough to begin on the upward curve we must leave before it descends too far. Alternatively, if we begin on the downward curve we must play through the trough and up the next crest until it begins its downward turn. Perhaps this notion could be used as a theoretical device to discuss judgements because it is not based on either essentialism or anti-essentialism. But, then again, discrimination is currently based more on risk-reduction than it is on the culture of objective truth.

A word of warning, when trying to determine your probable place on the curve be aware of the rogue wave with a deep trough while you are pinning your hopes on the one with the high crest.<sup>115</sup> Chasing the latter, where the

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<sup>115</sup> Rogue waves, freak waves or abnormal waves are currently undergoing statistical analysis in an effort to reduce risk to shipping. Rogue waves are understood to be different from other waves because they are instant, singular, and unexpected with a very large and steep crest or trough. At one time rogue waves were more or less dismissed as sailors' tales. But it is only in recent decades that their existence has been accepted. They are now understood as natural phenomena that is severely hazardous to merchant marines, offshore platforms, naval fleets, as well as other sea-going vessels. See [http://www.esa.int/esaCP/SEMOKQL26WD\\_index\\_0.html](http://www.esa.int/esaCP/SEMOKQL26WD_index_0.html) (Accessed 24/5/2007)

The current practice of wave measurement, which began over four decades ago, is based on the universal assumption of ocean wave process to be a stationary, Gaussian random process. This assumption is inconsistent with the existence of freak waves. See Paul Liu, 'Rogue Waves and Explorations of Coastal Wave Characteristics' NOAA (national oceanic and atmospheric administration) [http://www.glerl.noaa.gov/res/Task\\_rpts/2002/ppliu02-3.html](http://www.glerl.noaa.gov/res/Task_rpts/2002/ppliu02-3.html); According to the European Space Agency rogue waves are freakish ocean waves that rise as tall as ten-storey apartment blocks and have been accepted as a leading cause of large ship sinkings. On 1 January 1995 the Draupner oil rig in the North Sea was hit by a wave whose height was measured by an onboard laser device at 26 metres. In February 1995 the cruiser liner Queen Elizabeth II met a 29-metre high rogue wave. Between February and March 2001 two tourist cruisers – the

hidden variable is in the house's favour, could place you in the realms of problem gambling – the worst off. Rawls attempted to make that position as comfortable as possible but because he was not a problem gambler, he could not see the world from that perspective and was unable to veil out, like the rest of us, his own position.

*It is well, when judging a friend, to remember that he is judging you with the same godlike and superior impartiality. (Arnold Bennett)*

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Bremen and the Caledonian Star – had their bridge windows smashed by 30-metre rogue waves in the South Atlantic. Severe weather has sunk more than 200 supertankers and container ships exceeding 200 metres in length during the last two decades. Rogue waves are believed to be the major cause in many such cases. Data from the North Sea's Goma oilfield recorded 466 rogue wave encounters in 12 years. This helped to convert previously sceptical scientists, whose statistics showed such large deviations from the surrounding sea state should occur only once every 10000 years. The fact that rogue waves actually take place relatively frequently had major safety and economic implications. In December 2000 the European Union initiated a scientific project called MaxWave to confirm the widespread occurrence of rogue waves and how they occur. They are to consider the implications for ship and offshore structure design criteria. See European Space Agency [http://www.esa.int/esaCP/SEMOKQL26WD\\_index\\_0.html](http://www.esa.int/esaCP/SEMOKQL26WD_index_0.html) (Accessed 24/5/2007)



## CONCLUSION

This thesis examined the anti-risk element in John Rawls' *A Theory of Justice* from a more informed position than his critics were in the position to do. The skeleton of the research was based on two vertical and two horizontal axes. On the first vertical axis, it researched the history of risk, gambling and related notions by drawing on the work of Gerda Reith and Peter Bernstein. On the first horizontal axis, it researched the way that these notions have been categorized in contemporary times by referring to The Budd Report and related research. On the second vertical axis, it researched recent changes in the gambling law by trailing the Gambling Bill through parliament. The second horizontal axis was researched by undertaking a comparative study between the UK and US.

Unlike Rawls' other critics, this thesis was able to draw on the upsurge in gambling research that has resulted from developments in gambling technologies, gambling behaviour and gambling laws. It found that gambling has been divided and subdivided between normal gambling, problem gambling and pathological gambling. In this respect normal gamblers are those that gamble for entertainment value, problem gamblers are under the illusion that they can win, and pathological gamblers gamble because of some psychological or physiological defect. Within this context it is unlikely that normal gamblers would risk losing what they already had when making choices in the original position under uncertainty. They may well choose liberty over equality tempered by the difference principle. However, non-gamblers who had little to lose but a lot to gain may choose equality over liberty. So whether or not they would choose Rawls' principles would depend on their current situation. Moreover, if participants in the original position were problem gamblers they might just choose liberty, but if they were pathological gamblers then they would be predetermined to take a risk. From these preliminary observations, one could argue that while participants in the original position could choose Rawls' principles it does not follow that they necessarily would. However, that conclusion is just based on a narrow focus within the contemporary understanding of gambling developed in the current discourses around the changes in the law - but this research, as mentioned above, covered a much broader area.

Chapter 1 outlined Rawls' criticism of Utilitarianism and his similarity with the social contract tradition. It saw that the difference principle was an attempt to compensate for the weakness in Utilitarianism and his veil of ignorance was an addition to the contract theories. It then examined the three main aspects of Rawls' argument for why his principles not only could be chosen, but also would be chosen by participants in the original position. These were self-interest, ignorance and risk-aversion. Rawls' argument that risk-aversion would be the rational path to follow was examined further by exploring the relationship between gambling and related activities such as taking a chance, insurance, investing in the stock market and risk management. By looking at the historical roots of these activities within the development of probability theory it found that Rawls' theory included elements of both risk-aversion and risk-taking. His veil of ignorance imposed an element of uncertainty while his difference principle was a form of risk management. It also found that a participant in the original position may be risk-adverse and still not choose Rawls' principles. But it noted that this situation needed to be further investigated.

One key finding in the second chapter was the similarity between the way that problem gambling is currently being researched and Foucault's previous criticism of the repressive hypothesis. Discourses around the identity and difference between normal and abnormal sexuality in the nineteenth century resembles the current discourses between normal and problem gamblers. Normal gamblers are understood to be just gambling for entertainment while problem gamblers are beginning to resemble a new essential identity. If there is any substance to the research suggesting a pathological basis to problem gambling then it might be almost impossible to veil risk-taking in the original position. Even if it is not based on pathology, problem gambling is understood as an addiction, and addictions presuppose the lack of freewill. However, the lack of freewill, presupposed with addiction, suggest that freewill is possible without the addiction. Yet, Foucault's argument concerning epistemes, discursive formations and subject positions, seems to cast doubt over that possibility. Rawls wrote his theory before the rise in new technologies. If the new technologies are responsible for the changes in gambling attitudes and behaviour then risk-aversion today may be less possible than in Rawls' time.

This would cast doubt over the possibility of veiling one's time-period in history.

The discursive formation of 'The Problem Gambler' does serve a purpose in our own time. By laying the blame on the essential nature of the problem gambler it does take the responsibility away from the government and the gambling industry. By utilizing Foucault's methodology to better understand the contemporary context of gambling this chapter also found that just because what is currently understood to be gambling has increased, that does not mean that gambling per se has increased. With the current culture of risk-aversion it might even be on the decline as the increase in what is understood to be gambling could be a form of pseudo-gambling, but that all depends on one's definition of gambling.

Chapter 3 introduced the gambling discourse by outlining the main arguments for changing the gambling laws. Here it found that the new technologies that allowed Internet gambling were a central issue. It also found that the research into problem gambling was not contradictory between the UK and US yet the former decided to regulate Internet gambling while the latter chose prohibition. It transpired that the reason for this might be related to the two different gambling industries. The US has a thriving land based industry while the UK does not. This was highlighted by showing that the new UK gambling laws will alter the situation of the land based gambling environment more so than the online sector. An examination of the controversies surrounding the location for the new super casino highlighted that point.

The main criticism against changing the gambling laws was that it would lead to a rise in gambling, and with that there would be an increase in problem gambling. This chapter drew on a hypothetical situation that showed a connection between Rawls' principles and the criteria for the new laws. In particular it found that Rawls' difference principle, which he argued will protect the worst off, was in harmony with the need to protect the young, vulnerable and problem gamblers from the averse effects of the expanding gambling industry. It further noted that just because Rawls' principles could be used to justify the government's criteria it did not mean that those criteria were just. This compatibility highlighted the epistemological issues concerning

essentialism and anti-essentialism, which were examined further in the following chapter.

In order to explore those epistemological issues chapter 4 investigated the possibility of a veil of ignorance. After highlighting the interrelationship between epistemology and ontology and the problems related to essentialism it focused on Adorno's solution. The focus here was on one of the characteristics that Rawls' veil was meant to cover. By drawing on Adorno's criticism of identity thinking, and looking at the issue of gender, it found that at best one might only be able to veil a temporally constructed view. This raised the problem of another of Rawls' characteristics to be veiled, which was one's time period in history. This was examined further by drawing on other theories concerning identity and difference. Deleuze's understanding of identity stemming from difference drew a further shadow over the possibility of a veil. It noted that Rawls' himself preferred the political interpretation of the original position over the epistemological but further research suggested that the two could not so easily be separated. This issue was examined further in the following chapter.

In order to claim some form of exit chapter 5 examined the attempts by Foucault, Deleuze and Lyotard. That is because their theories tried to break down the categories that Rawls' veil seemed unable to simply exclude. After examining Foucault's re-working of classical Greek autonomy it found that it might be difficult to distinguish between acts of self-creation and the replication of conventional behaviour. This was not surprising given Foucault, Deleuze and Lyotard's understanding of the relationship between identity and difference. However, justice was the main focus here and the similarity between Lyotard's method and string theory opened up further possibilities.

By drawing on the work of the science community, in relation to the wave-particle paradox, it was able to argue that Rawls' choice of veiled characteristics was itself a gamble. This placed a shadow over the possibility of excluding risk-taking from theories of justice. It then attempted to develop a methodological tool, which could be employed within discourses concerning justice. The focus here was on the circadian rhythms as a common denominator between the tree and rhizome metaphors utilized by Deleuze and Guattari. In the final sections of the last chapter it drew a connection between circadian

rhythms, the wave-particle problem in quantum mechanics, judgements, and the cyclical/linear strategy in Blackjack. It offered the latter as a metaphorical device for discussions concerning decisions under uncertainty. However, it pointed to the phenomena of rogue waves to show that that strategy was not foolproof. However, the rogue wave metaphor could be a useful device to show that if the present time period is one of postmodernism, chance or deterritorialization then the immanent negation, leading to reterritorialization or closure, might be the contemporary culture of risk-aversion. Whether or not that could lead to as many problems as the culture of objective truth is beyond the scope of this thesis.

Perhaps the secret to predicting these rogue waves is related to intuitionism. That was one of the other theories rejected by Rawls. The present author did do some research in the area but that has not been included here because of time-space constraints. During the early stages of research it did find an interesting connection between intuitionism, Kierkegaard's leap of faith, Husserl's apodictic evidence, Bergson's work on time, gambling and the artist's aesthetic judgment. By aesthetic judgment is meant when an artist knows the work is either not quite right yet or when it is finished. In line with Einstein's space-time and matter-energy, the wave-particle duality and Foucault's power-knowledge, a judgment like that would take us from justice and rights to just-right. But it soon became apparent that this notion was far too big to explore in any depth within one section of this current thesis. However, it would make a very interesting topic for a future research exercise. Then I suppose nothing is ever really finished because the author has just heard that the House of Lords rejected Manchester as the location for the new super casino. Apparently it is not a resort town! It remains to be seen if we will be playing Blackjack in the Blackpool beside the ocean, watching the ripples on the river west of the Thames Barrier or surfing the net for online casinos. In either case the majority of punters will probably end up waving goodbye to most of their money.

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## APPENDICES

1. Letter from Martin Niblett to Dave Bawden (11 July 2003) with copies to Helen MacNamare, Robert Raine, Elliot Grant, Ruth Shaw, Chris Bone, Greg Chalmers and Bill Bush.
2. Letter from Chris Bone to Andrew McIntoch (8 August 2003) with copies to Tessa Jowell, Richard Caborn, Elliot Grant, Robert Raine, Dave Bawden, Graham Catt and Bill Bush.
3. Notes of a meeting (12 September 2003) between Chris Bone, Graham Catt, Derek Aldridge, Andy Swyer, Chris Stendall and Richard Beston.
4. Letter from Richard Beston to Andrew McIntosh (19 January 2004) with copies to Alex Towers, Gareth Maybury, Andrew Ramsay, Elliot Grant, Chris Bone, Greg Chalmers, Graham Catt and Nick Bent.
5. Email from Chris Bone to Elliot Grant, Dave Bawden, Graham Catt and Greg Chalmers (6 August 2003).
6. Letter from Richard Beston (20 November 2003) to Andrew McIntosh with copies to Alex Towers, Andrew Ramsay, Elliot Grant, Chris Bone, Derek Aldridge of the gaming board, Greg Chalmers, Graham Catt and Nick Bent.
7. Letter from Tobin Prior (Kerzner International) to Andrew McIntosh (Minister for the Media and Heritage).
8. Email from Chris Bone to Alistair Macdonald (20 August 2003) with copies to Elliot Grant, Graeme Cornell, Hugh Ind, Sue Street, Gareth Maybury, Greg Chalmers, Graham Catt. This email included previous correspondence from Alistair Macdonald to Chris Bone and the others. It also included previous correspondence from Chris Stendall (of the Dome sale unit) to Chris Bone, Graeme Cornell, Hugh Ind and Sue Street.

# APPENDIX 1

Department for Culture, Media and Sport  
 Rt. Hon. Richard Caborn MP

206  
 Minister for Sport's Office

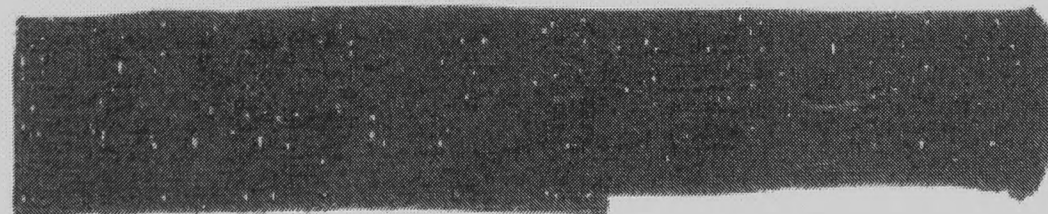
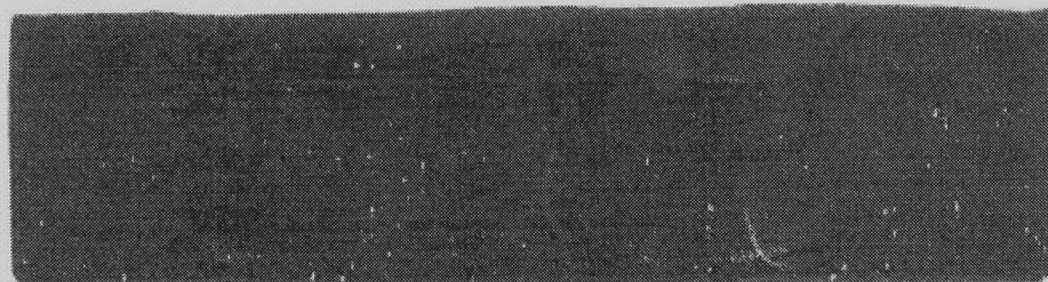
Tel 020 7211 6247  
 Fax 020 7211 6249

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To Dave Bawden cc Helen MacNamara  
 Robert Raine  
 From Martin Niblett Elliot Grant  
 Ruth Shaw  
 File Ref Chris Bone  
 Greig Chalmers  
 Date 11 July 2003 Bill Bush

## RICHARD CABORN'S MEETING WITH DETLEF KORNETT, MANAGING DIRECTOR OF THE ANSCHUTZ GROUP: MONDAY 7 JULY

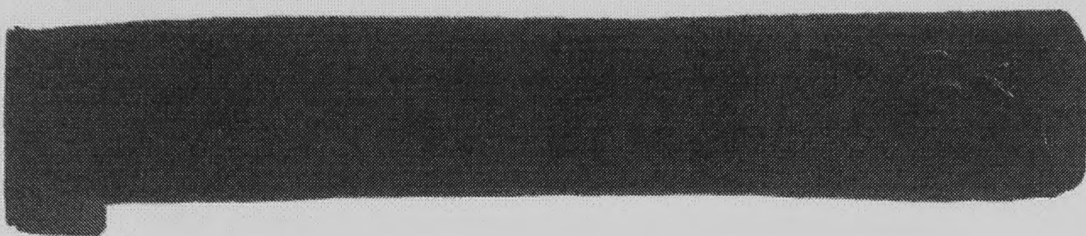
1. You were present when Richard Caborn met Detlef Kornett, Managing Director of the Anschutz Group on Monday 7 July as a follow up to their meeting with the DPM in June. Chris Bone, Greig Chalmers and Robert Raine were also present.
2. The meeting began with Detlef Kornett giving the Minister a brief outline of the Dome project. He explained that it would be a purpose built facility consisting on an arena, surrounded by live entertainment rooms, cinema, theatre and other attractions that would also have commercial and residential buildings. He added that the arena could be turned round quickly enough to hold different types of events in the morning and afternoon, which would be unique to Europe. He gave the example of their Staple Centre in Los Angeles where this already happens and invited the Minister to visit the centre (Martin Niblett to note).



5. The meeting then went on to discuss gambling issues with Detlef Kornett stating that their intention was to have a casino adjacent to the Dome. He added that they have an option to develop a 600 bed hotel which has been agreed in the planning application. He

added that they are not casino operators but they have a number of parties who would be very interested in running it. Greig Chalmers then gave an update on the gambling bill timetable stating that it would be published in draft this year and will go through PLS - the Committee has been announced and must report by April next year. He added though that he did not know whether it would be in this year's Queens Speech. The Minister added that the government is committed to modernising the gambling laws through controlled deregulation, and explained that the Bill could still reach the next session even if it was not included in this year's Queens Speech.

6. Chris Bone stated that the Bill will allow for changes to be made on casino regulation in terms of membership, advertising and the slots per table rules. Detlef Kornett stated that they had been exploring ways of opening a new casino under the existing laws. Chris Bone stated that any application under the existing law would obviously not cover the changes that will be made to the above criteria. He added that a statement will be issued in the next few weeks clarifying the government's intentions and he would ensure that a copy would be forwarded to Mr Kornett (Chris Bone to note).



Martin Niblett  
Assistant Private Secretary

## APPENDIX 2

(b)

*Note - this visit did not take place - the Anschutz people were confused over dates and could not make the Thursday 14<sup>th</sup> appointment they themselves had suggested - cb*

From: Chris Bone  
Gambling and National Lottery Licensing  
3<sup>rd</sup> floor  
Cockspur Street  
☎ 211 6479

cc Tessa Jowell  
Richard Caborn  
Elliot Grant  
Robert Raine  
Dave Bawden  
Graham Catt  
Bill Bush  
(all e-mail)

8 August 2003

Andrew McIntosh

CASINOS - ANSCHUTZ ENTERTAINMENT GROUP (AEG)

Issue

Whether you should meet senior people from AEG, the prospective purchasers of the Dome.

Timing

2. Thursday 14<sup>th</sup> August (time to be fixed).

Summary

3. AEG's plans for the Dome involve a world class sports arena alongside a major entertainment venue with associated shops and restaurants, etc.
4. A casino does not form part of the deal for the Dome. But AEG are keen to have one, and to get it going quickly. They want it to be a major attraction on US lines. But the changes in the planned Gambling Bill will need to be in place before this can happen.
5. The AEG group visiting you will be Tim Leiweke (President), David Steele (President, Real Estate), Kevin Conwick (lawyer) and Detlef Kornet (Head of AEG Europe). Mr Caborn met Detlef Kornet on July 7<sup>th</sup> (and officials will be meeting him again on Monday 18<sup>th</sup>).
6. The Dome Sale Unit in the Deputy Prime Minister's Office are suggesting a further meeting with this more senior group. The important thing that AEG need to hear is high-level confirmation of the Government's continued commitment to the gambling reform programme.
7. Other than that, there is not a lot you can say to them other than what Mr Caborn told Detlef Kornet last month, though you will also be able to talk about this week's casino statement.

Recommendation

6. That you see them. Briefing attached - I would attend.



## Gambling Reform

### Timing of the legislation

- Government is determined to proceed with the legislative package set out in *A Safe Bet for Success* as soon as Parliamentary time permits.
- Not clear that we will *not* be able to proceed during the 2003/04 session. The Government has a lot of important business for 2003/04. But even if the Gambling Bill is not in the Queen's Speech, we may be able to introduce it later in the session. We might then be able to carry it over into the 04/05 session.
- Will definitely publish draft Bill for pre-legislative scrutiny as soon as possible in 2003. Hope that examination of draft Bill will build up support for legislation, and reassure any doubters.
- If we cannot run the Bill in 2003/04, we will run it in 2004/05.
- That will lead to the new law – and the modernised controls on casinos – coming into force in 2005 or early 2006.

### What are the major changes so far as casinos are concerned?

- scrapping casino permitted areas (the 51 permitted areas in GB do not include Greenwich or the Dome);
- scrapping the need for casinos to be members' clubs and the 24 hour gap before you can start playing;
- allowing advertising;
- allowing betting and bingo;
- most important of all casinos will be allowed to have linked, unlimited gaming machines – 'casino slots' – which are the main revenue driver for casinos in virtually every other country. These are currently banned in the UK.

### Casino statement

- We published our statement on detailed casino controls last week (Thursday 7<sup>th</sup>).
- Large casinos – with more than 10,000 sq ft of gaming table area and more than 40 gaming tables – will be able to have unlimited numbers of linked gaming machines. Smaller casinos will not – they will be able to have no more than 3 machines per gaming table.
- The smallest new casinos we will allow must have a table games area of at least 5,000 sq ft.
- Welcome views on this statement – we've asked the industry to let us know what they think by the end of October.

How many of the changes can we deliver without the Gambling Bill?

- Realistically, none – all but one of the changes require the Bill
- in theory we could add Greenwich to the list of permitted areas – using an SI under the current Gaming Act 1968
- **BUT** very strong arguments against that
- Greenwich is not the only new area that might want a casino (for instance there are plans for casinos in Docklands, which is currently not a permitted area) and the Government would have to juggle competing claims.
- That is why the Home Office essentially left this issue alone for 30 years, despite consultation about it in the 1990's. The current permitted areas date from 1971. We might well have to consult again – or face criticism, for instance from OFT, if we went ahead without consultation.
- **IN ANY CASE, THIS WOULD NOT DELIVER WHAT ANSCHUTZ WANT** – all they would get would be an old-style British casino, with
  - membership
  - the 24-hour rule
  - no advertising
  - no betting or bingo
  - small number of old-style gaming machines, with top prize of £2,000 and no linking.

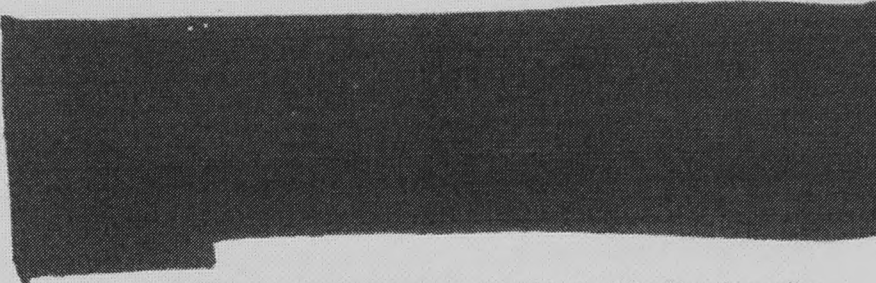
## APPENDIX 3

©

NOTE OF A MEETING WITH ANDY SWYER AND CHRIS STENDALL, ODPM  
12 September 2003

Those present:

Chris Bone  
Graham Catt  
Derek Aldridge  
Andy Swyer  
Chris Stendall  
Richard Beston (note)

1. Andy Swyer outlined the situation to date. A deal for the Dome was signed in 2002, but it was not dependent on gambling de-regulation. However, AEG had worked up its business plan and a casino was now a central feature. A high profit casino would underline all the other facilities. Andy asked for an update on the timetable for the Gambling Bill and how Kerzner's application had progressed, which would be useful for ODPM's overall risk assessment. Chris outlined the likely timetable for the Bill.
2. Andy then outlined the timetable for the new construction at the Dome. ODPM expected the deal to complete in Spring 2004 with work commencing at the end of that year. The arena is expected to be completed by 2006. Any delay would have an impact on regeneration and the Olympic bid. Andy specifically asked that we keep him informed of any meetings with regard to the Dome.
3. 
4. Chris agreed to keep ODPM updated on progress with the Bill and casino policy, including any contacts with AEG. Derek agreed that, if Kerzners are successful with its application, he would provide broad details of what the Board had scrutinised.

## APPENDIX 4

Department for Culture, Media and Sport  
Gaming and Lotteries Branch  
GAMBLING AND NATIONAL LOTTERY LICENSING DIVISION

Tel 020 7211 6498  
Fax 020 7211 6460

(d)

From Richard Beston cc Alex Towers  
Gareth Maybury  
Andrew Ramsay  
Elliot Grant  
File Ref 03/18213 Chris Bone  
Greig Chalmers  
Date 19 January 2004 Graham Catt  
Nick Bent

Andrew McIntosh

Issue:

1. Briefing for your meeting with top-level representatives from Kerznerns International:
  - Sol Kerzner
  - Tobin Prior
  - Jerry Hosea
2. Chris Bone and I will attend.

Timing:

3. 22 January at 09:45.

Recommendation:

4. That you use this meeting as an opportunity to learn more about Kerzner's plans to capitalise on gambling de-regulation in the UK.

Summary:

5. You can expect to be pressed on the usual issues from casino operators, including: money laundering directive, timetable for the Gambling Bill, taxation and the details in the casino statement (i.e. planning and numbers of slot machines).
6. Kerzner's have submitted an application to open a casino in Northampton. The Gaming Board is currently processing its application for a Certificate of Consent. Enquiries are likely to take a few more weeks and we should give no indications on the timescales or likely outcome.
7. You should be aware that John Prescott recently met Phil Anschutz, owner of the Anschutz Entertainment Group (AEG), which is going to build a new arena inside the Dome. There are plans for a hotel and casino inside the Dome. ODPM colleagues advise that AEG has entered into an agreement with Sol Kerzner for his organisation to build and operate the hotel and casino next to the Dome arena, once the legislation allows and the necessary consents have been secured. The Dome deal is not contingent on a casino being built, but the casino is a key plank in AEG's long-term business strategy.

Department for Culture, Media and Sport

8. Although AEG has never formally confirmed the connection between itself and Kerzner, there has been much press speculation and comment. It is likely that the connection will be announced once the commercial deal on the Dome and the Greenwich Peninsula is confirmed – which ODPM currently expect to be in May 2004
9. I have included background briefing and lines to take on: money laundering directive, tax, planning and the timetable for the Gambling Bill.
10. I attach the following:
  - ANNEX A: Background brief and lines to take
  - ANNEX B: Note on Kerzners International
  - ANNEX C: Note on Sol Kerzner

RICHARD BESTON

ANNEX A:

1. Application for a casino license

- This is a matter for the Gaming Board. It would be inappropriate for me to comment

2. Casino Statement

*Issue:*

You may be asked for an update and to clarify planning issues and the limits on slot machines etc.

*Background:*

You indicated to the PLS Committee, when you gave evidence on 16 Dec, that we plan to stick to the numbers set out in the 7<sup>th</sup> August statement:

- a minimum size of 5,000 sq ft (in terms of area set aside for gaming tables) for a new casino;
- a 3 to 1 ratio of gaming machines to gaming tables; but
- where a casino has a gaming tables area of over 10,000 sq ft, and more than 40 gaming tables, the casino should be allowed to have any number of machines; and
- no linking of gaming machines between casinos

Since then, we have had meetings with the Gaming Board, BCA and UKCOA to talk about the proposals in more detail. They seem to have broadly signed up to the general approach we've been outlining as set out in Chris Bone's recent submission.

*Planning:*

As far as planning is concerned, it is clear that neither the existing UK industry nor ODPM will readily sign up to the proposition which we floated before you went to the USA i.e. that all large casinos should be subject to regional planning control. Your message should be that it is something that the Government is still considering.

*Line to take:*

- Interested to hear your views about our casino statement
- Would like to encourage you to submit evidence to the PLS Committee
- Pleased that further discussions with UK operators have taken place and that these have been very constructive
- Recognise the importance of making sure controls are clear and consistent across the United Kingdom
- As I said at our meeting in Las Vegas, Regional Planning Bodies will agree the locations in their region which will benefit from large casino developments and these will be named in the Regional Planning Guidance
- At the local level, the local planning authority is responsible for identifying the site where the development will be encouraged and for granting planning permission

### 3. Tax:

#### Issue:

Like other potential overseas investors, Kerzners will be concerned about tax.

#### Background:

This is a matter for the Treasury, and it has yet to decide on the duty rates.

#### Lines to take:

- The Chancellor said in his last Budget that the Government intends to ensure that reform of gambling taxes moves forward in concert with potential changes to the regulatory environment for gambling.
- The Chancellor is aware of the importance of tax as a consideration in business decision-making.
- Decisions and announcements on taxation are for the Chancellor in his annual Budget statements.
- The Government is fully committed to the objectives of gambling deregulation, and will also need to ensure sustainable revenues for the exchequer from the gambling industry.

### 4. Gambling Bill timetable:

#### Issue:

You can expect to be asked about progress on the draft Gambling Bill.

#### Background:

Tessa Jowell announced the publication of the draft Gambling Bill on 19 November, with pre-legislative scrutiny starting that month as well. You have made it clear that you will not attempt to influence or pre-judge the pre-legislative scrutiny committee's report, due by 8 April 2004. You have stressed the importance of casino operators to submitting evidence to the PLS Committee.

The Queen's Speech said that further draft clauses would be laid.

#### Lines to take:

- We intend that further sections of the draft Bill will be published early next year, as referred to in the Queen's Speech.
- This draft Bill is being scrutinised by a Joint Committee of both Houses of Parliament, with a report due by Easter 2004. We welcome the rigorous examination of our proposals that this will involve.
- We will therefore be in a good position to introduce the final Bill to Parliament after Easter 2004, having given full consideration to the Committee's recommendations.
- At this stage we cannot say exactly when the final Bill will be introduced, but all our

efforts are directed towards getting the earliest possible introduction.

- Parliamentary time will, as always, be very precious, and the Government will want to progress a number of high priority measures, including the Gambling Bill.

#### 5. Problem gambling

##### Background:

The Gambling Bill proposes a range of measures to protect children and vulnerable adults from the effects of harmful gambling. In particular, the Bill proposes reserve powers for the Government to raise a statutory levy on licensed gambling operators and National Lottery licensees to provide funding for research into the treatment of, and education about, problem gambling. We will consider using these powers if the industry, through the GICT, fails to contribute sufficiently to these aims. We believe this collective contribution should be no less than £3 million per annum.

##### Lines to Take

- Place a great deal of importance in problem gambling.
- Our licensing regime for casinos must strike a clear balance between bringing gambling further into the mainstream leisure industry and ensuring fairness to participants and the protection of children and the vulnerable

#### 6. Money Laundering Directive

##### Line to take:

- The draft regulations provide the best option for implementation of the Directive, from the casino's point of view at any rate, while the gambling laws are as they are; and will not significantly affect what they already do. This might still remain the case after the Gambling Bill is enacted.
- There is ample time for further consultations between DCMS, the Gaming Board, the Treasury, and the gambling industry (including interested US firms) between now and the introduction of the Bill next year, once the industry has had a chance to study the draft Bill. The Bill will enable us to amend the Regulations if we need to.



ANNEX B:

Kerzner International Limited is the developer, owner and operator of luxury resort hotels and gaming properties worldwide. Atlantis, the Company's flagship property, is a premier destination resort and casino.

The Company's gaming business is focused on owning, developing or managing casino properties in attractive markets where the Company can capitalize on its development and operating expertise. The Company developed Mohegan Sun in Uncasville, Connecticut, which is currently operated by and owned by the Mohegan Tribal Gaming Authority. Following the completion of a major expansion in June 2002, Mohegan Sun is among the largest and most profitable casinos in the world.

The Company's luxury resort hotel business consists of a collection of premier properties that primarily operate in the five-star, deluxe-end of the resort market in The Bahamas, Mauritius, Dubai, the Maldives and Mexico under the brand One&Only.

**ANNEX C:**

**Solomon Kerzner  
Chairman and Chief Executive Officer**

Solomon ("Sol") Kerzner has been Chairman and Chief Executive Officer since October 1993 and from October 1993 to June 1996 he served as President. Prior to founding Kerzner, he pioneered the concept of an entertainment and gaming destination resort designed and managed to appeal to multiple market segments by developing Sun City, located near Johannesburg, South Africa. Sun City features four hotels with approximately 1,300 rooms, an entertainment center that includes a 6,000-seat indoor superbowl, a 46-acre man-made lake for water sports and approximately 55,000 square feet of gaming space. Mr. Kerzner has been responsible for the development of 21 hotels and founded both of southern Africa's largest hotel groups, Southern Sun Hotels and Sun International South Africa.

**BONE CHRIS**

**From:** BONE CHRIS  
**Sent:** 06 August 2003 17:08  
**To:** GRANT ELLIOT; BAWDEN DAVE; CATT GRAHAM; CHALMERS GREIG  
GREIG  
**Subject:** FW: Meeting with Nick Shattock

I saw these people this afternoon. Nick Shattock outlined Quintain's plans for casinos in the Dome and at Wembley as part of the overall plans for these areas. I gave them the latest on the Gambling Bill and casinos, and suggested they look out for our forthcoming statement on the latter.

c b

-----Original Message-----**From:** Graham Johnson [mailto:grahamj@pallmallconsult.com]  
**Sent:** 06 August 2003 10:02  
**To:** BONE CHRIS  
**Cc:** Natasha Moore; Nick Shattock  
**Subject:** Meeting with Nick Shattock

Dear Chris

We have arranged a meeting between you and Nick Shattock a board director of Quintain at 2pm today.

My colleague Natasha Moore will also be present. The purpose of the meeting is as follows, Nick Shattock is the Director responsible for Quintain's involvement at the Greenwich Peninsular (in partnership with Lendlease) and the land around Wembley stadium is entirely in Quintain's ownership. These are the two largest mixed use developments in London and in both cases major US casino operators have made approaches about the possibility of casino hotels being incorporated within the developments. This obviously depends on the progress of Gambling legislation which we have been tracking for other clients and we have brought Nick up to date with our understanding of the situation. We have told that legislative change will be necessary to allow developments of this type to occur and that the Government is likely progressively to publish draft clauses for the legislation over the next few months for pre-legislative scrutiny. We have also said that we believe that the part of the legislation dealing with casino hotels is unlikely to be dealt with in the next parliamentary session and is more likely to come forward in 2004/5. Nick is keen to speak to you to gain first hand knowledge on this legislative timetable as he will be having discussions with US interests in the autumn.

Regards  
Graham Johnson

.....  
Graham Johnson  
Pall Mall Consult  
11 St James's Place  
London SW1A 1NF

Tel: 020 7009 1020  
Fax: 020 7009 1030

PLEASE NOTE: THE ABOVE MESSAGE WAS RECEIVED FROM THE INTERNET.

06/08/2003

## APPENDIX 6

Department for Culture, Media and Sport  
Gaming and Lotteries Branch  
GAMBLING AND NATIONAL LOTTERY LICENSING DIVISION

Tel 020 7211 6498  
Fax 020 7211 6460



From: Richard Beston                                  cc    Alex Towers                                  Graham Catt  
   Andrew Ramsay    Nick Bent  
   Elliot Grant  
Ref:                                  03/15257    Chris Bone  
   Derek Aldridge (Gaming Board)  
Date                                  20 November 2003     Greig Chalmers

Andrew McIntosh

Issue:

1. Letter from Tobin Prior, Chief Executive (UK) Kerzner International, asking for a meeting to discuss the Gambling Bill and Kerzner's future UK expansion plans.

Timing:

2. Routine.

Recommendation:

3. That you agree to meet Tobin Prior.
4. On the other hand, you have said you will not be open to lobbying from the industry during Pre-Legislative Scrutiny.
5. It will be for you to decide whether or not to meet him.

Summary:

6. We believe there are good reasons for meeting Tobin Prior. We have already met him at official level. Tobin has ambitious plans to expand Kerzner's casino operation in the UK. It would be an informal and straightforward introductory meeting with him; and it would provide you with an opportunity to learn more about Kerzner's future UK expansion plans. You will also be able to brief Tobin about the latest position on the Gambling Bill.
7. The Gaming Board is currently assessing an application from Kerzner's for a 'certificate of consent' to open a casino in Northampton (indications are that it will be granted). Longer term, Kerzner has expressed a keen interest in operating a 'resort' casino next to the Millennium Dome, although clearly this will depend on the Gambling Bill becoming law. We have discussed Tobin Prior's letter with Derek Aldridge at the Gaming Board, who is perfectly content with our advice.

RICHARD BESTON

## APPENDIX 7

Department for Culture, Media and Sport

Tobin Prior  
CEO UK Gaming  
Kerzner International  
2-4 Packhorse Road  
Gerards Cross  
Buckinghamshire  
SL9 7QE

Thank you for your e-mail of 12 November asking for a meeting to discuss the draft Gambling Bill and Kerzner's future UK expansion plans.

I would be most interested in learning more about your plans to capitalise on gambling de-regulation in the UK and I agree that we should meet.

Please contact my Private Secretary, Gareth Maybury (telephone 020 7211 6303), to agree a mutually convenient time and date.

I will look forward to meeting you.

**ANDREW McINTOSH**  
Minister for the Media and Heritage

## APPENDIX 8

(G)

*From: BONE CHRIS  
Sent: 20 August 2003 16:56  
To: MACDONALD ALISTAIR  
Cc: GRANT ELLIOT; CORNELL GRAEME; IND HUGH; STREET SUE; MAYBURY GARETH;  
CHALMERS GREIG; CATT GRAHAM  
Subject: RE: Dome and Greenwich Peninsula - casino*

### Alistair

The principal restriction on the location of casinos is that a casino can only get a licence if it is in one of 51 'permitted areas' around Great Britain. These areas are listed in an SI made in 1971.

In London, the 'permitted areas' are the Boroughs of Westminster and Kensington & Chelsea, and a part of Camden (in other words, the West End). The permitted areas do not include anywhere else in London, such as the City, Docklands, or anywhere south of the river including Greenwich.

The Gambling Bill will abolish permitted areas altogether, so that a casino may set up anywhere in GB as long as it has the necessary Gambling Commission operating licence, local authority premises licence, and planning permission.

In theory, it is possible to amend the list of permitted areas, before we have the Gambling Bill, by an SI under the Gaming Act 1968 in order, for example, to add Greenwich. But there are strong arguments against that and Ministers have previously ruled out such a change.

First, Greenwich is by no means the only new area that wants a casino. For instance we know of plans for casinos in Docklands (currently not a permitted area). If we ran an SI to allow Greenwich to be a permitted area we would have to juggle competing claims from other places. There was a Home Office consultation exercise about this in the 90's (which led to no change) - we might well have to re-run that, or face criticism, for instance from OFT, if we went ahead without consultation. There is also the point that, under the current funding arrangements, we could not finance the expansion of the Gaming Board which would be necessary to regulate a larger number of permitted areas.

Second, allowing Greenwich to be a permitted area would be no use to a prospective Dome casino operator without the other major changes to casino law which we plan. These can only happen as part of the Gambling Bill. These are

- \* abolishing the membership requirement for casinos
- \* allowing casinos to advertise
- \* allowing them to have the linked, no-limit gaming machines which are the main profit driver for international casinos of the kind planned for Greenwich
- \* allowing them to have betting and bingo.

The Bill will also bring in the necessary underpinning of regulation by the Gambling Commission.

Third, as Anschutz made clear to us when we met their top man in Europe earlier this week, they will not be in a position to open a casino in Greenwich anyway until 2007.

c b

-----Original Message-----

*From: MACDONALD ALISTAIR  
Sent: 20 August 2003 15:48  
To: BONE CHRIS  
Cc: GRANT ELLIOT; CORNELL GRAEME; IND HUGH; STREET SUE; MAYBURY GARETH  
Subject: RE: Dome and Greenwich Peninsula - casino*

Chris

Andrew has seen this and would appreciate clarification on if and how the present restrictions on the location of casinos can be changed without legislation.

Thanks

Alistair MacDonald  
Assistant Private Secretary  
Andrew McIntosh's Office  
x 6304

for box closure times click below  
[http://intranet/ministers\\_private\\_office\\_and\\_management\\_board/ministers/ministers\\_box\\_closure.asp](http://intranet/ministers_private_office_and_management_board/ministers/ministers_box_closure.asp)

-----Original Message-----

From: BONE CHRIS  
Sent: 19 August 2003 18:07  
To: MACDONALD ALISTAIR; MAYBURY GARETH  
Cc: GRANT ELLIOT; CORNELL GRAEME; IND HUGH; STREET SUE  
Subject: FW: Dome and Greenwich Peninsula - casino

Alistair - to see and ensure that Lord McIntosh is made aware of this

c b

-----Original Message-----

From: Chris Stendall [mailto:Chris.Stendall@dpm.gsi.gov.uk]  
Sent: 19 August 2003 17:58  
To: BONE CHRIS; CORNELL GRAEME; IND HUGH; STREET SUE  
Subject: Dome and Greenwich Peninsula - casino

**\*\* High Priority \*\***

Graeme/Chris/Hugh (cc Sue Street)

I attach for your and Ministers' information a note I have just put up to the DPM here, which is self-explanatory (with the two attachments). I'd be grateful if you would forward this to Lord McIntosh's office, as I don't know the right e-mail structure for him. Many thanks.

Chris

I attach a 3 page submission to the DPM (and Keith Hill, o/r), with two attachments, for him to see tonight if at all possible - the likelihood of heading off the announcement referred to in the submission is now slim it appears.

The DPM should read the letter from Mike Appleton in due course, but more immediately I should welcome endorsement of the proposed lines to take in case of press approaches following the expected announcement in the States tomorrow.

I have not copied this to No.10, but the DPM's or Keith Hill's office may want to consider this (Martin Hurst is my usual contact). I am sending copies of the submission separately to DCMS.

Chris Stendall  
Dome Sale Unit

