Inviting New Worlds: Jurisgenesis, Anarchism, and Prefigurative Social Change

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DECLARATION

I certify that this thesis does not incorporate without acknowledgment any material previously submitted for a degree or diploma in any university; and that to the best of my knowledge and belief it does not contain any material previously published or written by another person except where due reference is made in the text. I acknowledge the support I received from the FA & MF Joyner Scholarship in Law and through an Australian government Research Training Program Scholarship.

Signed.....

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SUMMARY

One of the central and most persistent themes of critical legal theory concerns the tension between law, power, and social change. Taking as a starting point a thorough interrogation of the nature of law, I argue that a reconceptualization of law — one that militates against essentialism and draws attention to the emergent vitality and plurality of law — provides unique opportunities to rethink the politics of law. It allows for a radical opening of the potential sites, sources, and participants involved in law, and brings to the fore the possibility for creative enactments and reimaginings of law. As conventionally understood, law may reflect broader social structures and relationships of power, but to what extent is it possible to enact alternative visions of law, visions which are less hierarchical and exclusionary?

In order to reconceptualise both law and forms of resistance to law, I draw on theoretical traditions which in different ways can be used to highlight the *life* of law. In the context of social theory, this includes neo-vitalist and neo-materialist theories that reject representational and static models of the world, emphasising instead immanence, becoming, creativity, and ontogenesis. These ideas are explored and applied in the context of law through socio-legal theories including legal pluralism (in particular those approaches which emphasise jurisgenesis), legal consciousness studies, and law in everyday life literature. I argue these provide solid foundations for thinking about law in more open, generative, and plural ways. Finally, I examine the political implications of this through an engagement with anarchist (and postanarchist) theory.

I contend that there are strong synergies between these approaches and that the emphasis on performativity and the possibility for constructing alternative enactments of law sit well with anarchism's focus on prefigurative political action and scepticism of representation (both political and philosophical). Additionally, I will argue that anarchism can provide a valuable and explicit ethical framework that

promotes a participatory politics, resists philosophical and political essentialism, and eschews centralised and hierarchical political structures. I trace the theoretical connections between these different approaches, reading them 'diffractively' and highlighting their continuity and relationality.

In this unashamedly affirmative critical project, I attempt to push beyond the limits of a simply negative critique and bring law to 'life', drawing attention to the ways in which all people (including the theorist/researcher), participate in the creation and negotiation of plural legal worlds.

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We ought to stop circumscribing the nomos; we ought to invite new worlds.[1]

ROBERT M COVER, *NOMOS AND NARRATIVE*

MANY WORDS WALK in the world. Many worlds are made. Many worlds make us. … In the world of the powerful there is no space for anyone but themselves and their servants. In the world we want, everyone fits. … We want a world in which many worlds fit.[2]

SUBCOMMANDANTE MARCOS (EJÉRCITO ZAPATISTA DE LIBERACIÓN NACIONAL), *FOURTH DECLARATION OF THE LACANDON JUNGLE*

Life … is invention, is unceasing creation.[3]

HENRI BERGSON, *CREATIVE EVOLUTION*

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1 Robert M Cover, 'Foreword: Nomos and Narrative' (1983) 97 *Harvard Law Review* 4, 68.

2 Subcomandante Marcos, 'Fourth Declaration of the Lacandon Jungle, January 1, 1996' in *Our Word Is Our Weapon: Selected Writings* (Seven Stories Press, 2011) 78, 80.

3 Henri Bergson, *Creative Evolution* (Dover, 2012) 23.

1. LAW AND LIFE: EMBRACING LAW'S VITALITY

> THE UNIVERSE WANTS TO PLAY. … [T]hose who mold themselves blind masks of ideas & thrash around seeking some proof of their own solidity end up seeing out of dead men's eyes.[1]

> Form is the end, death. Form-giving is movement, action. Form-giving is life.[2]

SETTING THINGS IN MOTION

The statue of 'Justice' is one of the most enduring images in the western legal tradition. Usually depicted as a robed woman holding scales in one hand and a sword in the other (sometimes blindfolded, sometimes not), it adorns court houses and state buildings throughout the world and has become an emblematic personification of the core aspirational values of the legal system: justice is fair and balanced; justice is swift and final; justice is blind and impartial. The origins of the figure can be traced back to classical depictions of the Greek goddess, *Themis,* and the later Roman goddess, *Justicia*. Like the modern versions, these goddesses were depicted with sword and scales, although they were never blindfolded. The blindfold became common in European portrayals from the sixteenth century onwards. While this raises some intriguing questions regarding perceptions of justice — does justice emerge from a clarity of vision or from an imposed (the figure is *blindfolded*, not blind) impartiality? — it is the other metonymic imagery, the sword and scales, which is most relevant here. At a superficial level, these can be understood as speaking to justice's balance, swiftness, and finality. Cesare Ripa, a sixteenth century Italian iconographer, presented such an interpretation in his book *Iconologia*, 'the scale … sees that each man receives that which is due him, no more and no less. The sword represents the rigor of justice, which does not hesitate to

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[1] Hakim Bey, *TAZ: The Temporary Autonomous Zone, Ontological Anarchy, Poetic Terrorism* (Autonomedia, 1991) 22.

[2] Paul Klee, *Notebooks Volume 2: The Nature of Nature*, ed Jürg Spiller (George Wittenborn, 1973) 269.

punish.'[3] However, their meaning, and in particular the symbolism of the sword, is arguably more complicated. The sword originally referred to power and authority.[4] Justice stemmed from divine (or monarchical) authority and it was the right of the ruler to administer, deliver, and enforce justice, to decide what each person was 'due'. Such ideas persisted even after the models of divine or absolute authority began to wither away. As Resnik and Curtis note, '[a]s kings lost their claim of divinity and as countries lost their kings, governing bodies nonetheless insisted on maintaining an affiliation between their states and the imagery of justice. A picture or sculpture of a woman with sword and scales … suggested that sovereignty could rightfully pronounce judgments.'[5]

This symbolism of authority continues in other contemporary interpretations but is filtered through a more liberal understanding of law. In a speech in 2001 Paul de Jersey, then Chief Justice of Queensland, discussed the symbolism of the statute of Themis that stands outside the Queensland Supreme Court building. On the issue of the sword and scales he asserted that these were indicative of the power and authority given to judges, separate from the sovereign, to weigh and enforce the law.[6] In this way, the statue stood for the most liberal of all values, the rule of law, and the separation between executive and judicial power central to this.

The statue of Themis outside the Supreme Court of Queensland has also been etched into the legal history of Australia in another way. In one of the most famous images associated with the series of hearings in the *Mabo* decisions,[7] Eddie Mabo

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3 Cesare Ripa, *Iconography* (1593) cited in Judith Resnik and Dennis E Curtis, 'Images of Justice' (1987) 96 *The Yale Law Journal* 1727, 1749.

4 Martin Jay, 'Must Justice Be Blind? The Challenge of Images to the Law' in Costas Douzinas and Lynda Nead (eds), *Law and the Image: The Authority of Art and the Aesthetics of Law* (University of Chicago Press, 1999) 19, 26.

5 Resnik and Curtis (n 3) 1748.

6 Paul de Jersey, 'Themis and Her Themes' (Speech delivered at Fine Arts Lunch, Brisbane, 26 April 2001) <https://archive.sclqld.org.au/judgepub/dj260401.pdf>.

7 *Mabo v Queensland (no 1)* (1988) 166 CLR 186; *Mabo v Queensland (no 2)* (1992) 175 CLR 1 ('*Mabo*').

(and other plaintiffs including David Passi and James Rice), were photographed with their counsel in front of the statue.[8] The men stand before Themis, deep in conversation, her sword and scales clearly visible in the tableau. Part of this image's fame stems from the juxtaposition of the plaintiffs alongside this ancient symbol of justice. *Mabo*, one of the most significant judicial decisions in the history of the Australian legal system, is often lauded as a critical step towards justice for First Nation peoples in Australia (even if it arrived somewhat late in the country's history). For the first time, the myth of *terra nullius* was officially rejected, and the legal system acknowledged that the Australian land mass was not 'unoccupied'[9] prior to colonisation. The courts had long relied on the erroneous (and convenient) assumption that Indigenous peoples had no interests in land at the time of colonisation. *Mabo* emphatically overturned a series of judgments which had effectively rendered Indigenous Australians, their law, and their interest in country legally invisible. It also created a system of native title that would recognise, at least to a limited extent, pre-existing rights and interests in land, even if subsequent legislation and judicial decisions would weaken these already fragile rights.[10]

Mabo, however, is a case of contradictions.[11] While undoubtedly an important case, it was also a fundamentally flawed decision that operated to reinscribe the colonial

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[8] The photo can be viewed at: 'Mabo Case', *Australian Institute of Aboriginal and Torres Strait Islander Studies* (3 June 2015) <https://aiatsis.gov.au/explore/articles/mabo-case>.

[9] Of course, the fact that the Australian land mass was very clearly occupied at the time of colonisation was accounted for by some deft jurisprudential manoeuvring which extended the common law doctrine of settlement to include land which was 'practically unoccupied': *Cooper v Stuart* (1889) 14 App Cas 286, 291. This was later clarified to also extend to 'a territory which, *by European standards*, had no civilized inhabitants or settled law': *Coe v Commonwealth* (1979) 24 ALR 118, 129 ('*Coe*') (emphasis added).

[10] For an overview of the development of the doctrine of native title in Australia see Lisa Strelein, *Compromised Jurisprudence: Native Title Cases Since Mabo* (Aboriginal Studies Press, 2009); Toni Bauman and Lydi Glick (eds), *The Limits of Change: Mabo and Native Title 20 Years On* (AIATSIS Research Publications, 2012).

[11] These contradictions, as Gerry Simpson has recognised, go beyond the issue of justice at a general level. As he notes, even understood legally, the decision is marked by a range of tensions:

> Political imperatives can force the legal system to jettison in one case (*Mabo)* the very same doctrines which enabled it to ignore accepted history in another (*Milirrpum*). Thus, for example, precedent is a deity greater than universally accepted history in some cases ..., but a disposable adjunct to interpretation in others ... [I]n *Coe v Commonwealth* and *Milirripum* the judiciary ignored international law and history, and called its decisions 'precedent'; in *Mabo*, it rewrote international law and the common law, and called the decision 'justice'.

underpinnings of the Australian legal system. The case may have acknowledged the existence of Indigenous laws; however, there was no recognition of their *independent* normative legitimacy, or of the injustice or illegality of colonisation. In fact, the High Court refused to even consider the foundations of Australian sovereignty, viewing this as beyond their remit and power.[12] The *Mabo* decision may have recognised Indigenous rights to land, but it is clear that there was only one party who had the power to do the recognising and the terms (and underlying relation of power) on which this could happen were already predetermined.

In *Mabo*, we can begin to see some of the tensions in this classical image of justice. Did the plaintiffs in this case, to paraphrase Ripa, receive 'that which they were due, no more and no less'? While not wanting to understate the importance of native title, it is hard to construe the granting of such fragile (and easily extinguishable) proprietary interests as just compensation for the dispossession and violence of colonisation. Were the judges in this case able to exercise the 'sword of justice' in a way separate from sovereign power, as suggested by de Jersey? How could they? As the judges acknowledged in the case, to put into question the sovereignty of Australia, would be to put in to question their own power to make a determination. This decision directly pushes at the boundaries of the liberal concept of law and justice espoused by de Jersey. If justice within the legal system is partly defined by the power and authority to decide, what space is there within law to seek justice against that determining power and authority? Liberal doctrines such as the rule of law or the separation of powers may grant the judiciary some independence, but judicial legitimacy and competence still remain inextricably tied to structures of authority. And inevitably, therefore, engagements with law will reproduce those structures. The decision in *Mabo* may have rejected the 'myth' of *terra nullius*, but in doing so it also implicitly reproduced the power of the colonial state, legitimating its claim to be the sole site and purveyor of justice and legality. In fact, as the recent

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Gerry Simpson, 'Mabo, International Law, Terra Nullius and the Stories of Settlement: An Unresolved Jurisprudence' (1993) 19 *Melbourne University Law Review* 195, 210.

[12] *Mabo* (n 7) 32.

debates surrounding the *Uluru Statement from the Heart* have demonstrated,[13] even almost three decades after *Mabo* the centrality and singularity of the colonial political and legal system remains fundamentally closed to challenge (even when that challenge amounts to the relatively modest proposal to incorporate Indigenous voices in a more formal sense).[14]

SOME INTRODUCTORY COMMENTS ON AUTHORITY, DIFFERENCE, AND THE POLITICS OF LAW

These tensions and contradictions raise important questions regarding the political utility of law. In particular, it forces a consideration of the extent to which people are able to meaningfully employ law in a manner that challenges the dominant social order. It might be easy, for example, to dismiss *Mabo* as an exercise in 'false consciousness', another example of failing to heed Audre Lorde's famous warning that 'the master's tools will never dismantle the master's house',[15] however, it is hard to deny that practical and symbolic significance of this decision and the legal recognition it prompted. Even if *Mabo* was an inherently flawed decision, was it better than no decision at all?

These questions have long haunted progressive politics which has struggled to adequately articulate the relationship between law, power, and social change. Law (and the notion of justice embedded within it) appears to have two faces. When looked at from one perspective, it provides resources that marginalised groups can harness in an attempt to challenge dominant power structures and the ongoing discrimination these permit. When looked at from another perspective, it appears to

[13] The full statement is accessible at 'The Statement', *Uluru Statement from the Heart* <https://ulurustatement.org/the-statement>.

[14] For an overview and reflection on this debate see Megan Davis et al, 'The Uluru Statement from Heart, One Year on: Can a First Nations Voice yet Be Heard?', *ABC Religion & Ethics* (Text, 26 May 2018) <https://www.abc.net.au/religion/the-uluru-statement-from-heart-one-year-on-can-a-first-nations-v/10094678>.

[15] Audre Lorde, 'The Master's Tools Will Never Dismantle the Master's House' in *Sister Outsider* (1984) 110, 112.

be an institutional expression of those dominant power structures and, as such, something itself which demands resistance and challenge.

On one level, this dilemma reflects the age-old strategic questions regarding reform versus revolution. These two 'faces' of law, for example, could be understood as broadly representative of, a liberal reform-based understanding of law and politics, and a more radical critical perspective. Along these lines, liberalism's emphasis on legal and political rights as the primary mechanism for protecting interests leads to a faith in law reform as a central political strategy. In essence, the solution to social inequality is to ensure that legal rights and entitlements apply equally to all. It is an inclusive approach founded on participation in, and engagement with, the system. This understanding of law, however, has been sharply criticised by a broad range of critical legal scholarship. Incorporating a diverse range of perspectives, and utilising a diverse array of theories and methods, this work has consistently highlighted law's close connection to power and, subsequently, its propensity to reflect and reinforce the dominant social order.[16] This has led to a deep scepticism regarding law's political potential. If law simply reflects and reinscribes the status quo, if it is complicit in the perpetuation and legitimation of the very structures under challenge, then political engagements with law are extremely risky. At best, they are strategically limited; at worst, they are an exercise in false consciousness.

[16] Marc Galanter famously noted the role of wealth and power in determining legal outcomes in the early 1970s: Marc Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change' (1974) 9(1) *Law & Society Review* 95. This was followed not long after by the emergence of the Critical Legal Studies movement in the US (and UK): see generally, Mark Kelman, *A Guide to Critical Legal Studies* (Harvard University Press, 1987); feminist legal theory which emerged in the late 1970s and early 1980s: see generally, Clare Huntington and Maxine Eichner, 'Introduction, Special Issue: Feminist Legal Theory' (2016) 9 *Studies in Law, Politics and Society* 1; Rosemary Hunter, 'Contesting the Dominant Paradigm: Feminist Critiques of Liberal Legalism' in Margaret Davies and Vanessa Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate, 2013) 13; and critical race theory in the late 1980s: see generally, Richard Delgado (ed), *Critical Race Theory: The Cutting Edge* (Temple University Press, 1995). I will discuss some of this critical scholarship in more detail in the following chapter.

However, while these critical perspectives are deeply persuasive and have provided powerful critiques of law's relationship to power, they have been less successful at offering a positive political program or alternative avenues for social change. As essential as these critiques have been, they can be politically paralysing, and they can limit opportunities for enacting change. Considering this, it is not surprising that those suffering from marginalisation might seek more direct and pragmatic forms of engagement.[17] In effect, proponents of change can be caught between, on one side, a pure, and at times almost evangelic, commitment to critique; and, on the other, a compromising, and at times flawed, pragmatism. A commitment to critique may be conceptually coherent or consistent, but it often provides little immediate relief and, as such, can be evidence of certain level of privilege on behalf of its proponents.[18] Alternatively, a strategic pragmatism may operate simply as a safety valve — releasing just enough pressure to ensure the system does not boil over, but ultimately leaving the system, including systemic injustices, in place.

However, beyond these strategic questions of reform versus revolution, the tensions between law, authority and social change evident in *Mabo* also strongly point to another related, yet perhaps more fundamental issue, and one that may also provide us with some clues regarding how to navigate a pathway out of this political and strategic impasse. That is, they point to the inability of the legal system, as commonly conceptualised, to accommodate or recognise difference.

The *Mabo* case, including the political and critical responses it provoked, is thoroughly permeated with issues and questions of difference. While this is perhaps most noticeable in the decision's (re)enactment of the colonial state's claim to be

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[17] See, for eg, Mari J Matsuda, 'When the First Quail Calls: Multiple Consciousness as Jurisprudential Method' (1989) 11 *Women's Rights Law Reporter* 7, 8.

[18] In fact, this was a common criticism of the American Critical Legal Studies movement. See Patricia J Williams, 'Alchemical Notes: Reconstructing Ideals from Deconstructed Rights Minority Critiques of the Critical Legal Studies Movement' (1987) 22(2) *Harvard Civil Rights-Civil Liberties Law Review* 401.

the sole site of political and legal authority (thereby excluding alternative sources of normativity), it is also evident at a deeper level. In fact, the whole colonial project, and, in particular, its legal basis in the doctrine of *terra nullius*, speaks fundamentally to issues of difference. This is captured well by John Law who, drawing on the work of Helen Verran, summarises the application of *terra nullius* to Australia in the following way: 'The English *terra nullius* doctrine determined that Aborigines were not *settled*, they did not *cultivate* the land, and neither did they *parcel it up*. Then it argued that since they did not do these kinds of things, it followed that the lands were empty.'[19] In other words, the application of this doctrine stemmed from an inability of the colonisers to recognise the fundamentally distinct cosmology that informed Indigenous understandings of land. As Law goes on to note,

> [i]n Aboriginal cosmology land is not a volume or a surface with features, or a place that can be occupied by people. Instead it is a *process* of creation and re-creation. The world, including people, but also … plants, animals, ritual sites, and ancestral beings, are all necessary participants in a process of continuing creation. … The idea of a reified reality out there, detached from the work and the rituals that constantly re-enact it makes no sense. Land does not *belong* to people … *people* belong to the land.[20]

While the justifications for the colonisation of Australia were multifaceted and profoundly complex, at the level of legal doctrine they were, as Law recognised, substantially encapsulated by this difference in worldviews.[21]

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[19] John Law, 'What's Wrong with a One-World World?' (2015) 16(1) *Distinktion: Journal of Social Theory* 126, 126. See also Helen Verran, 'Re-Imagining Land Ownership in Australia' (1998) 1(2) *Postcolonial Studies* 237.

[20] Law (n 19) 126–127. For an overview of this type of cosmology as understood by Yolngu people of Bawaka Country in Northern Australia, see Bawaka Country et al, 'Co-Becoming Bawaka: Towards a Relational Understanding of Place/Space' (2016) 40(4) *Progress in Human Geography* 455.

[21] For an overview of how these differences in worldview were used to justify colonisation, see Bruce Buchan and Mary Heath, 'Savagery and Civilization: From Terra Nullius to the "Tide of History"' (2006) 6(1) *Ethnicities* 5.

There are several ways we could view or understand this difference and its role in colonisation. One way, for example, is to conceptualise this difference as predominantly cultural and epistemological. That is, the different worldviews of the English colonisers and Indigenous inhabitants stemmed from, and represented, distinct cultural perspectives or beliefs regarding the world. As the famous anthropologist Clifford Geertz might put it, they were different ways of 'imagining the real.'[22] This understanding of cultural difference undoubtedly provides some useful political insights. Primarily, it reveals the Eurocentric nature of the colonists' view, and, in so doing, profoundly unsettles their claims of universality. In fact, this understanding, including its political implications, underpinned both the liberal and critical responses I outlined above, their main point of contention revolving more around the appropriate response.

From a liberal perspective, the central concern is to identify a unifying principle that would enable any difference to be accommodated and respected.[23] Ultimately, in this context, this unifying principle is located in the legal system itself, specifically, in its professed neutrality. That is, the legal system's commitment to neutrality (particularly procedural neutrality) means it is able to protect the interests of all citizens, notwithstanding any differences in cultural beliefs. The central insight of the critical perspective, however, is that the legal system is not able to accommodate or do justice to difference in this way. While agreeing that this issue emerges from cultural differences, they assert that the legal system, despite its claims to neutrality, is itself a product of, and remains thoroughly embedded within, the English worldview. And, as a consequence, it is impossible for it to meaningfully accommodate Indigenous perspectives. All that the legal system is able to do is translate that difference in a way that will allow it to be incorporated within its own (western) worldview. This is an entirely reductive process, and one which simply reproduces the conditions that enabled and justified colonisation in the first place.

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[22] Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (Basic Books, 1983) 173.

[23] Law (n 19) 127–128.

It is also possible, however, to conceptualise these differences in a more fundamental way, to view them as not simply having an epistemological or cultural basis (at least not solely), but also an ontological basis.[24] This would involve thinking not just about difference but, to use a Deleuzean phrase, thinking about difference *in-itself*.[25] 'Difference' in this Deleuzean sense speaks to an ontological view of difference rather than an epistemological or socially constructed one. In this respect, it challenges the dominance of representational approaches in which difference is always defined negatively by reference to already existing entities.[26] That is, in a representational framework difference emerges from, and is always measured by, a proximity to fixed, determinable points, to sameness. Consequently, representational approaches to difference tend to be both sedentary and hierarchical. Difference *in-itself*, however, relates to ontological difference. Ontologically prior to representation (and identity), it refers to a generative and productive process of differentiation, a way of conceptualising the continuous unfolding and becoming of life. This is an understanding of ontology that is not focused on essence or being, but rather is thoroughly immanent, material, and generative. This concept fundamentally destabilises the idea of metaphysically fixed or static entities (as well as the reductive conceptual essentialisms upon which they are based). It highlights life's generativity and processual nature, and, in so doing, brings the world (including law) to life.

To think difference at this ontological level radically challenges how we understand that conflict between alternative cosmologies which shaped colonisation. Understood solely at the level of epistemology or culture, the different worldviews

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[24] As I will discuss in subsequent chapters, I do not mean to suggest that this is an either/or choice. Rather, I seek to bring ontology and epistemology together more fully and interrogate the traditional distinction between them. See Karen Barad, *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter and Meaning* (Duke University Press, 2007) 185; Martin Holbraad and Morten Axel Pedersen, *The Ontological Turn: An Anthropological Exposition* (Cambridge University Press, 2017) 173–174.

[25] Gilles Deleuze, *Difference and Repetition* (Columbia University Press, 1994) 138.

[26] I will discuss representationalism in more detail in chapters 2 and 5.

of the English colonisers and the Indigenous inhabitants are reduced to different *beliefs* regarding the world, or different ways of describing the same static reality. They are, effectively, cultural representations built on top of a singular, already existing, and relatively inert world. A central consequence of this is that in holding out the idea of singular world, it is also holds out the possibility that one interpretation may be more correct or accurate, or that the differences are able to be unified or brought together into a singular truth.[27] And, as the history of colonisation demonstrated, this process of equivocation tends to follow entrenched lines of power. To reiterate my earlier summary of *Mabo,* it was clear that there was only ever one party who had the power to recognise the other, and one party who controlled the terms on which any recognition could take place.

However, if we conceptualise these worldviews along ontological lines, then we are able to understand them as part of the broader generative flux of life. That is, rather than simply offering an interpretation of (or a representation of) an already existing and static world, these worldviews (including the diverse range of material social practices through which they are enacted) can be seen as a part of the life's constant unfolding and becoming. In other words, they actually participate in the continuous production of the world. Or, perhaps more accurately — especially if we are serious about destabilising fixed representational frameworks — they participate in the production of plural *worlds*.[28] I will return to these ideas in more detail later in the

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[27] As the Brazilian anthropologist Eduardo Viveiros de Castro notes, in treating worldviews as a matter of representation, we fail to take those views 'seriously'. He argues, '[t]he anthropologist's idea of seriousness must not be tied to the hermeneutics of allegorical meanings or to the immediative illusion of discursive echolalia. Anthropologists must allow that "visions" are not beliefs, not consensual views, but worlds of vision …' Eduardo Viveiros de Castro, 'Zeno and the Art of Anthropology: Of Lies, Beliefs, Paradoxes, and Other Truths' (2011) 17(1) *Common Knowledge* 128, 133. In other words, in representational frameworks worldviews are not able to stand on their own, they remain subject to interpretation and explanation by external concepts (symbolism, functionalism, power etc). In essence, they are reduced to an effect or by-product of other forces (and often forces which are only discernible to the external expert rather than the people themselves). See also, Michael Carrithers et al, 'Ontology Is Just Another Word for Culture: Motion Tabled at the 2008 Meeting of the Group for Debates in Anthropological Theory, University of Manchester' (2010) 30(2) *Critique of Anthropology* 152, 182–184.

[28] I will return to this idea in more detail in the following chapter. See Marisol de la Cadena and Mario Blaser (eds), *A World of Many Worlds* (Duke University Press, 2018); Christopher Gad, Casper Bruun Jensen and Brit Ross Winthereik, 'Practical Ontology: Worlds in STS and

thesis, however, even in this brief overview it is clear that such a shift in perspective, and embrace of the ontological, has radical implications for how we think about politics. It means giving up on any notion that we will be able to find a unifying or overarching principle for managing difference. And, consequently, it means accepting a far more contingent and partial politics.[29] However, it does provide a mechanism for taking difference seriously and resisting the temptation to reduce difference to sameness. Further, in emphasising the generative and processual features of life, it opens pathways beyond critique and encourages productive engagements in the world.

This same dynamic can also be seen in relation to law more generally. Like the worldviews discussed above, law can also be thought ontologically and conceptualised in ways which destabilise static and hierarchical legal frameworks. In fact, it is my argument in this thesis that by doing this we are able to find a way past those tensions and contradictions that have defined our understanding of the relationship between law, power, and social change. Although the liberal and critical perspectives I sketched out above provide very different interpretations of law, like all conventional legal theory, they remain focused on discovering (or perhaps in the case of critical perspectives, revealing) law's truth or essence. In this way, they both remain committed to a representational framework that treats law in relatively singular and fixed ways. Embracing a generative ontology, however, thoroughly disturbs this construction. Rather than attempting to identify and describe law's truth or being, the focus shifts to tracing the diverse, complex, and interrelated socio-material practices that continuously enact, and thereby produce, law. These generative aspects of law are hidden by representational models. In their attempt to

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Anthropology' [2015] (3) *NatureCulture* 67; Law (n 19); Arturo Escobar, *Designs for the Pluriverse: Radical Interdependence, Autonomy, and the Making of Worlds* (Duke University Press, 2018).

[29] See, for eg, Law (n 19); Mario Blaser, 'Ontology and Indigeneity: On the Political Ontology of Heterogeneous Assemblages' (2014) 21(1) *Cultural Geographies* 49; Martin Holbraad, Morten Axel Pedersen and Eduardo Viveiros de Castro, 'The Politics of Ontology: Anthropological Positions', *Cultural Anthropology* (January 2014) <https://culanth.org/fieldsights/462-the-politics-of-ontology-anthropological-positions>. I will discuss some of the political implications in far greater detail in chapters 6 and 7.

arrive at an accurate description of law, they rely on a reductive analytical method that disconnects law from the lively processes in which it is always embedded, and from which it always emerges. In effect, to paraphrase the quote from Klee at the beginning of this chapter, by focusing on and privileging 'form' over 'form-giving', they are left with a stultifying and lifeless vision of law.[30]

Again, there are very real political implications to this shift in focus. Despite the many differences between them, both liberal and critical approaches rely on essentialist understandings of law. A primary example of this is that they both view law as being synonymous with the centralised legal institutions of the state and, therefore, they both take for granted law's link to authority.[31] In fact, in both perspectives this appears to be a foundational and axiomatic assumption. This assumption is really at the core of that political and strategic impasse exemplified by the decision in *Mabo*, and it limits our political choices: we can either consent to law's authority and accept the deferral to power and risks of systemic co-option this entails; or we can refuse law's authority and reject any opportunity to meaningfully participate in practical ways with the legal system.

However, if we highlight law's generative and processual aspects, then this draws attention to its relative fluidity and instability. This has two critical political consequences. First, it reveals the potential for people to enact law differently. In essence, it can encourage productive engagement with law, promoting and opening spaces in which we can experiment with alternative practices of law, practices that might enable us to enact law in ways which can better accommodate difference. Secondly, and in a related way, this ability to enact law differently and experiment

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[30] Klee (n 2) 269.

[31] See, for eg, Emmanuel Melissaris, *Ubiquitous Law : Legal Theory and the Space for Legal Pluralism* (Ashgate, 2009); Sionaidh Douglas-Scott, *Law after Modernity* (Hart Pub, 2013).This aspect of conventional legal theory has been subject to extensive criticism under the framework of legal pluralism. I will explore this understanding of law and the pluralist critique in more detail in chapter 3.

with alternative legal arrangements also extends to the way we study law. By insisting on our embeddedness in the world, it removes any external position from which objective or overarching principles could be derived. This fundamentally redraws the boundary between ontology and epistemology and exposes their complex interdependence.[32] The observations made by researchers and academics, as well as the conceptual and theoretical models they rely upon, never simply describe phenomena, at least not in detached or impartial ways, they also participated in the creation of phenomena. While we might, for example, reject the claims made by liberal or critical perspectives that they have discovered the 'truth' of law, in making those claims, in conceptualising law in particular ways and not others, they too are participating in law's generative unfolding. In other words, representationalist frameworks and understandings may not reveal some a priori truth about law, but they always are part of the complex and interrelated socio-material practices that produce law.

These are the central issues that I will be exploring across this thesis. I will argue that this radical rethinking of the way we conceptualise and understand law (and the world more generally) can provide unique insights into the relationship between law, power and social change. By viewing law through the lens of a generative and relational ontological framework, we can bring into focus the diverse sites, sources and participants involved in law's enactment. This can allow us to trace enactments which push against conventional legal boundaries, as well help us to develop alternative visions of law, visions which are less hierarchical or exclusionary. The key is to stop searching for law's essence and start focusing on what law could become and what possibilities it can open for rethinking the ways we live and organise. To paraphrase Deleuze, *we do not even know of what a body (of law) is capable.*[33]

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[32] To capture this aspect, Barad has coined the phrase 'onto-epistem-ology': Barad (n 24) 185.

[33] Gilles Deleuze, *Expressionism in Philosophy: Spinoza* (Zone Books, 1992) 226.

THESIS METHODOLOGY AND STRUCTURE

In order to reconceptualise law in the way I have suggested above, I will be drawing on a range of neo-materialist and non-representationalist social theory which rejects static representationalist models of social life, adopting instead an immanent, flat, and relational ontology that emphasises the processual and generative features of life. As I will demonstrate, in the context of law, this framework draws attention to the diverse socio-material practices which enact and (re)produce law, revealing its multiplicity and fluidity, as well as its continuous unfolding or becoming. I will argue that these diverse practices give rise to multiple legal worlds — a legal fractiverse — and I will explore the political implications and new possibilities this concept can provide.

The radical rethinking of law I am proposing will necessarily involve pushing at the boundaries of much conventional legal theory. As I will argue, however, the foundations for such a reconceptualisation are already present in a diverse range of existing theoretical traditions and perspectives. In the context of legal theory, for example, there is a strong critical tradition (including feminist and postmodern legal theory) which has embraced anti-essentialism and persuasively rebutted the notion that law can be understood through abstract or conceptually closed models. Additionally, the tradition of legal pluralism (which sits somewhere between legal-theoretical and socio-legal perspectives) draws analytical attention to the plurality and multiplicity of law, especially as this speaks to its diverse sources and sites. In the context of socio-legal approaches more generally, the empirical and theoretical perspective offered by legal consciousness studies provides a framework which, drawing on broader sociological understandings of 'everyday life', helps us to identify and study the complex and varied micro-practices which underpin law's relationship to society. And finally, in the context of political theory, the tradition of social anarchism, and in particular its rejection of both political and theoretical forms of representation, provides tools for helping us to think about politics and ethics in non-foundationalist ways.

Although providing a valuable starting point for my broader thesis, in different ways and to different extents, each of these theoretical traditions also present some challenges: many critical perspectives in legal theory have become beset by a focus on negative critique, restraining their ability to offer alternative pathways for social change; legal pluralism remains a deeply disparate and hybrid tradition, and many of its iterations retain a latent commitment to a positivistic social science; the development of legal consciousness studies has stalled to some degree with some of its originators and early proponents now questioning its continuing value; and social anarchism has always been, and remains, at the margins of political theory, frequently dismissed as both theoretically light and naively utopian.

Despite these limitations, however, I will argue that these traditions can be brought into a productive relationship with neo-materialist and non-representationalist social theory. In order to do this, I will adopt a 'diffractive' methodological approach. This draws on the work of Karen Barad who uses the concept of diffraction as a way to 'attend to patterns of difference'[34] without lapsing into representationalist methods. Diffractive approaches involve engaging with different theories and perspectives by reading them 'through one another'.[35] Rather than traditional forms of critique which tend to engage in a negative ordering of texts and rely on the conceptual construction of distance, diffractive readings seek to explore relationality and connection, and, therefore, are unashamedly affirmative. In this way, it is 'a mode of assenting to rather than dissenting from … texts'.[36] This is not to suggest that every theory or argument needs to be uncritically celebrated. Critique remains an important component of analysis. However, the aim of this methodology is to bring traditions into conversation, and to explore and investigate

[34] Barad (n 24) 29. In adopting this methodology, Barad drew on the earlier work of Haraway who had first developed the idea of thinking about difference through the lens of diffraction. See Donna Jeanne Haraway, 'The Promises of Monsters: A Regenerative Politics for Inappropriate/d Others' in *The Haraway Reader* (Routledge, 2004) 63, 70.

[35] Barad (n 24) 30.

[36] Elizabeth Grosz, *Time Travels: Feminism, Nature, Power* (Duke University Press, 2005) 3.

the (new) patterns that emerge and flow out when they come into contact with each other.

My analysis in this thesis is split into three main sections. In the first section (chapters 2 and 3), I focus on legal theoretical perspectives. I begin chapter 2 with an analysis of the different ways conventional legal theories have responded to the question of law's political utility. This includes exploring in more detail both the liberal and critical perspectives I briefly outlined above. This is followed by an introduction to my broader theoretical framework in which I outline the features and implications of a relational and generative ontology. In chapter 3, I turn to an examination of legal pluralism. I argue that legal pluralism (especially the critical variations which emphasise jurisgenesis), provides a good starting point for thinking about law in non-essentialist ways, and, through its emphasis on multiplicity and plurality, is a useful theoretical tool for understanding the legal fractiverse.

In the second section of the thesis (chapters 4 and 5), I shift my attention to socio-legal perspectives. In chapter 4, I introduce and engage with the broader sociological literature concerning everyday life. I build on this in chapter 5 by examining the way the everyday has been understood within legal scholarship. In particular, I focus on legal consciousness and argue that, when read alongside neo-materialist and non-representational theories, it provides a valuable framework for understanding and studying the diverse socio-material practices that enact the legal fractiverse.

In the final section of thesis (chapters 6 and 7), I shift to a more explicitly political analysis. This begins in chapter 6 with an introduction to the political theory of social anarchism and an examination of its critique of political and theoretical representation. I build on this analysis further in chapter 7, in which I directly

explore anarchism's model of prefigurative political action. I contend that anarchism provides an explicit and valuable ethical framework that promotes a participatory politics, resists essentialism, and eschews centralised and hierarchical political structures. Ultimately, I argue that this framework provides valuable insights into how we might respond to the political implications inherent in the legal fractiverse.

2. BEYOND PASSIVITY AND NEGATIVITY IN LEGAL SCHOLARSHIP

> The history of thought is a tragic mixture of vibrant disclosure and deadening closure. The sense of penetration is lost in the certainty of completed knowledge. This dogmatism is the antichrist of learning.[1]

INTRODUCTION

Conventional theoretical responses to the question of law's political utility remain unsatisfactory. While liberal legalism fails to adequately account for law's connection to structures of power, the ardent scepticism of critical perspectives can be politically paralysing, and they often fail to provide alternative pathways towards change. As I indicated in my opening chapter, the limitations in these perspectives can partly be attributed to their reliance on essentialist understandings of law; a result of their latent theoretical representationalism which fails to adequately accommodate law's lively, generative, and processual aspects. In this chapter, I want to explore these issues in more depth, examining both liberal and critical approaches to law, and also sketching out an alternative framework which might better be able to accommodate the tensions in relationship between law, power, and justice.

LIBERAL-LEGALISM: JUSTICE IN THE PASSIVE VOICE

It is hard to ignore the dominance of liberalism in shaping contemporary political and legal systems. Liberalism's emphasis on the atomistic and rational individual, limited government underpinned by a social contract, and the importance of private property and a market-based capitalist economy retain a strong ideological

[1] Alfred North Whitehead, *Modes of Thought* (Cambridge University Press, 1956) 81.

influence, particularly in the west.[2] In fact, western legal systems, including Australia's, are thoroughly pervaded with liberal values. These shape broad structural principles and features including the emphasis on individual rights, legality, and formal/procedural forms of justice, as well as specific legal doctrines and categories like 'the reasonable person.'[3] While there are extensive critiques of liberalism from a variety of angles (including, for example, its construction of a decontextualised autonomous and rational legal subject,[4] or its reliance on abstract and politically alienating individual rights[5]), I want to concentrate on a broader political critique focused on its conception of justice. Specifically, I will interrogate the political passivity implicit in liberalism's structural and institutional response to managing justice and equality.

Within liberalism, issues of justice and equality are, ostensibly, resolved through the implementation of a particular institutional arrangement. The exact natures of these arrangements differ depending on the model of liberalism embraced,[6] but at their core, they are designed to promote the rule of law, neutrality, and equality. In this way, any issues or concerns — for example, the relationship between law and power

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[2] Michael Freeden, *Liberalism: A Very Short Introduction* (Oxford University Press, 2015).

[3] For a general overview of the influence of liberalism on Western legal systems, see Stephen Bottomley and Simon Bronitt, *Law in Context* (Federation Press, 4th ed, 2012) ch 1.

[4] This has been a particular focus of many feminist critiques. See, for eg, Anna Grear, '"Sexing the Matrix": Embodiment, Disembodiment and the Law - Towards the Re-Gendering of Legal Rationality' in Jackie Jones et al (eds), *Gender, Sexualities and Law* (Routledge, 2011) 39; Mari Matsuda, 'Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice' (1986) 16(3) *New Mexico Law Review* 613; Rosemary Hunter, 'Contesting the Dominant Paradigm: Feminist Critiques of Liberal Legalism' in Margaret Davies and Vanessa Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate, 2013) 13.

[5] See, for eg, Duncan Kennedy, 'The Critique of Rights in Critical Legal Studies' in Wendy Brown and Janet Halley (eds), *Left Legalism/Left Critique* (Duke University Press, 2002) 178; Carol Smart, *Feminism and the Power of Law* (Routledge, 1989). I will return to this critique of rights when discussing critical approaches.

[6] For example, within classical liberalism, primacy should be given to negative freedom, that is, to restricting the reach of the government into the 'private sphere.' This demands a range of institutions which promote, amongst other things, procedural fairness and equality of opportunity. In more communitarian versions of liberalism, there is a stronger emphasis on positive freedom, or an appreciation of the need for limited government intervention in order to ensure equality of outcome. This distinction between negative and positive liberty, and a defence of negative liberty, was famously outlined by Isaiah Berlin in his essay, *Two Concepts of Liberty*. See Isaiah Berlin, *Four Essays on Liberty* (Oxford University Press, 1969) 118. For a more general overview of liberalism and its numerous iterations, see Freeden (n 2).

— are resolved by effecting specific institutional frameworks that are (pre) designed to minimise their impact. Such an approach is exemplified in John Rawls' classic distributive theory of justice, which remains one of the most influential modern statements of liberalism.[7] In his seminal work, *A Theory of Justice*, Rawls sets out to develop a liberal and social contractarian theory of justice. His central concern was to build and defend a philosophical framework that would provide a stronger and more stable moral grounding than the consequentialism that underpinned traditional utilitarian approaches to liberalism.[8]

Rawls was primarily interested in questions of, what he referred to as, 'social justice'. For him, this encompassed an analysis of society's central political, economic, legal, and social institutions. As he stated, '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 and of advantages from social cooperation.'[9] In Rawls' approach, agreement regarding the overarching principles that will guide this institutional distribution of rights form the basis of the social contract. In order to determine these principles, he developed his famous method of a 'veil of ignorance'. This hypothetical thought experiment is critical in Rawls' framework as it ensures, he argues, a fair and just conception of justice. He describes this process as follows:

> The principles of justice are chosen behind a veil of ignorance. This ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstance. Since all are similarly situated and no one is able to design principles to favour his particular condition, the principles are the result of a fair agreement or bargain.[10]

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7 John Rawls, *A Theory of Justice* (Belknap Press, 1971); Allen Buchanan, 'A Critical Introduction to Rawls' Theory of Justice' in Julian Lamont (ed), *Distributive Justice* (Routledge, 2016) 175.
8 Rawls (n 7) vii-viii.
9 Ibid 7.
10 Ibid.

In other words, the veil of ignorance simulates the 'original position'. As people are unaware of what their eventual position in society will be, rationality dictates they will develop principles that will promote the fairest possible (institutional) distribution of social goods.[11]

Once these foundational principles are decided upon, Rawls identifies four successive stages through which they are enacted and put into force. The first stage is the establishment of a constitutional convention in which members of a community will design a constitution and appropriate political institutions. The next stage involves the creation of a representative legislative body in line with this constitution, which then, as part of the third stage, enacts relevant legislation embodying the chosen principles. The final stage involves the review and application of this newly created legislation by authorised judicial bodies.[12]

Even in such a brief overview of Rawls' theory of justice, it is easy to get a sense of its inherent political passivity. Justice and equality are located in, maintained through, and 'distributed' by, social institutions. For all of liberalism's emphasis on the autonomous and rational individual, it is a system that, somewhat ironically, is consciously structured and designed to sideline the active and ongoing involvement of individual members of the community. The formation of Rawls' social contract (underpinned by agreed principles of justice), as well as his description of how this is enacted, may at first instance appear to imply a level of participation. However, as Rawls himself acknowledges, these are merely hypothetical and speculative thought experiments employed to derive abstract and generalisable principles.[13] In any event,

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[11] Like most liberals, Rawls strongly subscribes to the idea of the individual as being rational and self-interested. For a critique of this position in the context of law, see Matsuda (n 4).

[12] Rawls (n 7) 196–199. For an overview and more thorough discussion of this stages, see Paul Patton, 'Rawls and the Legitimacy of the Australian Government' (2009) 13(2) *Australian Indigenous Law Review* 59, 62–63.

[13] On the veil of ignorance and the original position, he notes it is not 'an actual historical state of affairs … It is understood as a purely hypothetical situation characterised so as to lead to a certain conception of justice.' Rawls (n 7) 12. He also notes that the four-stage sequence for enacting his

it is apparent that the four-stage process that formally establishes the principles of justice is designed to progressively move them from community members to representative institutions. This process of depoliticisation is captured clearly in May's critique of Rawls' theory in which he notes:

> The principles having been decided upon, the task facing the creation of a just society is that of securing the institutions, both legal and administrative, that will guarantee that those principles are applied. The task does not concern how people will participate in politics; nor does it concern people as the subject of politics. Rather, it is a matter of creating institutions that will make people the proper object of politics.[14]

This reliance on institutional arrangements results in a passive and disconnected politics. In this system, responsibility for resolving any tensions regarding justice (for example, the connection between law and power) is always deferred.[15] It is the institutions that will bring the desired goal, not the community or people involved, nor their actions (except insofar as their actions properly reflect and enact their institutional roles). Not only does this institutional deferral remove the issue of justice from community members, it also reinforces the centrality and importance of the institutions themselves. This process was clearly evident in the *Mabo* decision I discussed in chapter one. Justice was deferred in both a literal sense — it took almost two hundred years for these small steps towards recognition and justice to eventuate — but also in relation to responsibility more generally. It was the institution (in this context, the Australian legal system) that delivered justice by acknowledging the historical myth of *terra nullius* and offering a determination of the case. While this decision took place in a broader context and history of Indigenous activism and changing community values, these weren't the official *legal*

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principles of justice is simply 'part of the theory of justice as fairness and not an account of how constitutional conventions and legislatures actually proceed.' Ibid 200.

[14] Todd May, *The Political Thought of Jacques Rancière: Creating Equality* (Edinburgh University Press, 2008) 12.

[15] Although I am not directly drawing on it here, this has some connection with the argument of Derrida that the relationship between law and justice inevitably entails that justice is always deferred. See Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority"' in Drucilla Cornell, Michel Rosenfeld and David Carlson (eds), *Deconstruction and the Possibility of Justice* (Routledge, 1992) 3.

bases for the decision, nor could they be.[16] The majority still felt compelled to locate and offer up the requisite legal precedents to justify its decision. And, in doing this, the court also managed to symbolically cleanse the legal system from its historical participation in colonisation. The legal system shifted from perpetrator to saviour, further entrenching its central role as the sole source of political justice.

There is something very lifeless and passive about this process and commitment to institutional solutions. Justice is something that is 'distributed' rather than demanded; 'given' rather than fought for. And, perhaps, it is in this lifelessness that we can see some hints of the limitations in this model. Politics is disconnected from the world. It becomes an external and sanitised force which, rather than emerging from people and their relationships, acts upon them. In effect, politics is extracted from life and is channelled into predetermined structural forms, draining it of its vitality. Interestingly, this limitation also seems to be recognised by proponents of liberalism themselves. As the abundance of literature within liberalism on the justifications for civil disobedience illustrates, even die-hard liberals acknowledge that justice (and real political change) might not necessarily emerge from within liberal legal institutions but from the dynamic mess and complexity of life outside.[17]

This lifelessness is further compounded by political liberalism's close connection to legal positivism.[18] The apparent neutrality of liberal legal institutions is deeply

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[16] This does not mean that decision wasn't subject to extensive criticism from conservative commentators who argued it was politically motivated, represented a clear excursion into 'judicial activism', and was evidence of the judiciary attempting to usurp the democratic power of parliament. See, for eg, John Gava, 'The Rise of the Hero Judge' (2001) 24 *University of New South Wales Law Journal* 747, 754–755. For a response to these accusations, see Michael Kirby, 'Judicial Activism: Power without Responsibility - No, Appropriate Activism Conforming to Duty' (2006) 30(2) *Melbourne University Law Review* 576, 589–591.

[17] See, for eg, Rawls (n 7) 363–391; Robin Celikates, 'Rethinking Civil Disobedience as a Practice of Contestation — Beyond the Liberal Paradigm' (2016) 23(1) *Constellations* 37.

[18] There has always been a strong historical connection between liberalism and legal positivism. In fact, many of the early liberals (including Bentham and John Stuart Mill) were also avowed positivists. See, for eg, Jeremy Bentham, *Of Laws in General* (The Athlone Press, 1970); Frederick Schauer, 'Positivism Before Hart' (2011) 24(2) *Canadian Journal of Law & Jurisprudence* 455. This connection is also reflected in much critical work engaged in critiques of liberal legalism.

reliant on positivist understandings of law. Positivism's argument that it is possible (and desirable) to study law scientifically, and to develop, as Kelsen famously set out to do, a 'pure theory of law'[19] that clearly demarcates law from political or moral concerns, is at the heart of ideas about neutrality. By excising the moral and political dimensions of law, legal institutions are able to operate in formal, logical, and rational ways, untainted by prevailing structures of power. Like all positivist science, however, this process of 'purification' necessarily involves artificially squeezing the life (and broader connections) out of that which is being studied. And, as Isabelle Stengers has noted in the context of scientific work more generally, this practice entails certain risks:

> The 'phenomenon' is technically redefined 'in the laboratory' and purified to the extent possible of everything assimilable to noise … Experimentation in this context, is a *risky* process. It assumes that the phenomenon as isolated and reworked under laboratory conditions is essentially the same as the one found in 'nature'.[20]

In other words, in attempting to determine the true essence of law, legal positivism relies on a reductive analytical process, which by minimising the noisy chaos of ideas, people, and structures nominally 'outside' law, leaves us with a 'pure' but sterile and lifeless model of law.

I do not mean to suggest that there is never any value in reductive analytical practices of this type. It is undeniable that such processes enable the development

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Margaret Davies, for example, refers to the 'liberal-positivist matrix' which underpins conventional conceptualisations of law. Margaret Davies, 'Exclusion and the Identity of Law' (2005) 5 *Macquarie Law Journal* 5, 30. Of course, this does not mean that there are not also liberal approaches to law which are expressed in alternative theoretical frameworks. For example, although critical of aspects of positivism, the American legal realists remained committed to an underlying liberalism, as did more contemporary authors such as Dworkin. See Brian Z Tamanaha, 'Understanding Legal Realism' (2008) 87(4) *Texas Law Review* 731; Ronald Dworkin, *A Matter of Principle* (Harvard University Press, 1985) ch 8.

[19] As Kelsen argues, his aim is to 'free the science of law from foreign elements.' Hans Kelsen, 'The Pure Theory of Law: Its Method and Fundamental Concepts' (1934) 50(4) *Law Quarterly Review* 474, 477.

[20] Isabelle Stengers, *Power and Invention: Situating Science* (University of Minnesota Press, 1997) 6.

of powerful generalisations and can reveal important and useful patterns and structural relationships. In fact, to completely dismiss the value of such methods would be to completely dismiss the power and insight of much scientific (physical and social) and philosophical investigation. Nevertheless, it is important to remain alive to the dangers and limitations inherent in this process. It is one thing to adopt this practice as a methodology, another thing altogether to adopt it as an ontological presupposition. As powerful as this reductive process can be, we would do well to remember Whitehead's famous axiom regarding philosophical investigation: '[t]he aim of science is to seek the simplest explanations of complex facts. We are apt to fall into the error of thinking that the facts are simple because simplicity is the goal of our quest. The guiding motto in the life of every natural philosopher should be, Seek simplicity and distrust it.'[21] That is, we must be wary of falling foul of the 'fallacy of misplaced concreteness' in which we confuse our generalisations, abstractions, and constructed systems with the phenomenon described in their terms.[22] Or, as Bourdieu artfully puts it, we must be careful not to mistake 'the model of reality for the reality of the model.'[23] By holding out both the desirability and possibility of understanding law through a completely closed conceptual system, legal positivism falls into this trap. It creates a reductive model of law by carefully carving it out from all the broader relationships in which it exists and operates, in effect, subtracting all life, vitality, and dynamism from it. It then reifies and universalises the result claiming to have finally identified law 'as it is.'[24]

Liberalism aims to identify overarching principles in order to design a conceptually consistent and closed institutional framework for managing issues of justice. To do this, however, it relies on abstract and reductive conceptions of both justice and law that explicitly externalises them and, consequently, disconnects them from the

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[21] Alfred North Whitehead, *The Concept of Nature: The Tarner Lectures Delivered in Trinity College, November 1919* (Cambridge University Press, 2015) 104.

[22] Alfred North Whitehead, *Science and the Modern World* (Cambridge University Press, 2011) 64.

[23] Pierre Bourdieu, *The Logic of Practice* (Stanford University Press, 1990) 39.

[24] Kelsen described his project in the following way: 'The Pure Theory of Law … is concerned to show the law *as it is*; without legitimising it as just, or disqualifying it as unjust; it seeks the real, the positive law, not the right law.' Kelsen (n 19) 482 (emphasis added).

world. The result is a vision of politics that is extremely passive and which actively discourages broader participation by the community. In effect, law and justice are stripped of life, and the lively and complex socio-material relations from which they emerge (and in which they always operate) are hidden from view.

CRITICAL LEGAL THEORY AND THE LIMITS OF CRITIQUE

Liberal-legalism's approach to law and justice has been subject to sustained criticism by a diverse range of critical legal perspectives. These include, Critical Legal Studies, feminist legal theory, critical race theory, as well as an assortment of other approaches. These critical perspectives have provided a scathing rebuttal of liberalism's proclaimed neutrality, and have outlined in detail the close connection between law and broader structures of power. In highlighting this connection, these critical perspectives have revealed the complex ways law operates to rationalise and legitimate dominant social structures. Their close scrutiny of the relationship between law and power also means that they thoroughly reject liberalism's highly abstract conceptualisation of law. They offer an understanding of law that is far more grounded in the world, and far more able to accommodate and articulate the way law shapes (and is shaped by) by the broader social world in which operates. As mentioned in chapter 1, despite their powerful and persuasive critique of liberal-legalism, however, they have been less successful at offering alternative political pathways for effecting change. Their project remains predominantly defined by critique and, as important as this is, it can tend towards a negation of law rather than its positive reconstruction.

This limitation is most obvious in the way these critical perspectives deal with questions regarding law's political utility. As is evident from my earlier discussion of the *Mabo* decision, critical perspectives have long struggled with a fundamental political puzzle. If, as their research suggests, the law regularly favours the 'haves' why has it remained so appealing to marginalised groups? Is this simply evidence of

a lack of imagination regarding alternative frameworks? Is 'law' so ubiquitous and dominant that is has effectively set the legitimate frame through which dominant social structures can be challenged? By engaging with law, have proponents of change unwittingly been co-opted by a system which is fundamentally opposed to their interests?

Looked at through the lens of classical or structural Marxism, this could simply be understood as an example of false consciousness in which people unknowingly participate in and support structures which perpetuate and reproduce their oppression.[25] Such an interpretation regarding engagements with law was evident, for example, in some of the early work conducted by the Critical Legal Studies movement (CLS).[26] This was particularly clear in relation to their critique of liberal rights. Within this scholarship, legal rights (as well as the broader discourse surrounding them) were viewed as both abstract and alienating.[27] In essence, rights deflected people from their true political needs. They reified social experience and channelled political issues and complaints into narrow and restrictive frameworks.

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[25] The idea of false consciousness has played an important role in Marxist social theory and, along with related concepts like Gramsci's hegemony, is used as a way to explain why the working class often fails to identify their true interests and, consequently, ends up supporting and defending a system of economic relations that oppresses them. While Marx did discuss consciousness in detail, the phrase, 'false consciousness', was actually coined by Engels: Friedrich Engels, 'Letter to Franz Mehring (1893)' in Robert C Tucker (ed), *The Marx-Engels Reader* (Norton, 1978) 765, 766. The idea was subsequently developed in more detail by Georg Lukács among others. See Georg Lukács, *History and Class Consciousness: Studies in Marxist Dialectics* (MIT Press, 1972). For a more general overview of false consciousness and some of the ways it continues to be employed in contemporary debates, see Steven Lukes, 'In Defense of "False Consciousness"' [2011] (1) *University of Chicago Legal Forum* 19.

[26] This approach to law emerged in the US in the 1970s. Originally developing out of the Conference on Critical Legal Studies, it incorporated a diverse range of positions and perspectives broadly united by their strident critique of liberal-legalism. Specifically, they sought to 'demystify' or 'delegitimate' liberal-legalism's proclaimed objectivity, consistency, and rationality, and reveal the political and ideological underpinnings of the legal system and legal doctrine. See generally David Kairys, *The Politics Of Law: A Progressive Critique, Third Edition* (Basic Books, 3rd ed, 1998); Mark Kelman, *A Guide to Critical Legal Studies* (Harvard University Press, 1987); Allan C Hutchinson and Patrick J Monahan, 'Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought' (1984) 36(Issues 1 & 2) *Stanford Law Review* 199; Frank Munger and Carroll Seron, 'Critical Legal Studies versus Critical Legal Theory: A Comment on Method' (1984) 6(3) *Law & Policy* 257.

[27] Peter Gabel, 'Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves' (1984) 62(8) *Texas Law Review* 1563; Mark Tushnet, 'An Essay on Rights' (1984) 62(8) *Texas Law Review* 1363.

This resulted in people losing sight of their shared experiences and minimised any ability to recognise and account for broader systemic issues. As Tushnet argued, '[t]he language of rights should be abandoned to the very great extent that it takes as a goal the realisation of the reified abstraction "rights" rather than the experiences of solidarity and individuality.'[28] Further, this reification also meant that the inherent indeterminacy of rights was masked; an indeterminacy that usually resulted in rights-based issues being resolved in favour of the powerful.[29] To proactively engage with rights, therefore, was to misunderstand the true (political) nature of liberal legalism, and was evidence of a false consciousness. This was unambiguously set out by Gabel and Kennedy in their famous essay *Roll over Beethoven* (which took the form of a dialogue between the two academics), wherein Gabel summarised his position as follows:

> So what happens is people start translating their political feelings into unconscionability arguments or right-to-privacy arguments without realising that there is a weird dissociation taking place, as if it were inevitable that you had to take your true needs and desires and translate them into one or other of these available arguments. This is the essence of the problem with rights discourse. People don't realise that what they're doing is recasting the real existential feelings that led them to become political people into an ideological framework that coopts them into adopting the very consciousness they want to transform.[30]

While it is hard to deny the political and ideological character of liberal rights, and, therefore, the risks of engaging with liberal legal institutions, there are a number of serious issues with relying on this model of false consciousness.

First and foremost, it implies that there is a 'true' consciousness or a discoverable objective reality hidden behind the façade of ideology. This presumption is

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[28] Tushnet (n 27) 1382–1383.

[29] On this issue of indeterminacy see Gabel (n 27) 1581–1586.

[30] Peter Gabel and Duncan Kennedy, 'Roll Over Beethoven Critical Legal Studies Symposium' (1984) 36(Issues 1 & 2) *Stanford Law Review* 1, 26.

identifiable in much of the early work in CLS, particularly in the description of their project as an attempt to 'demystify' or 'delegitimate' liberal-legalism.[31] On one level, this could simply speak to CLS' general critique of liberalism, specifically, its attempt to challenge liberalism's own claims to objectivity and truth. By 'demystifying' liberalism they were able to reveal the ideological nature of legal rights and doctrines. As I have suggested, this is undoubtedly an important and useful exercise. It allows for an interrogation of the limitations of liberal politics and, as part of that, it is a critical (and perhaps necessary) first step in any broader political project aimed at social change. However, there is also an additional element to this broader project. That is, there is a tangible sense that through this process of demystification or delegitimation, CLS would also be able to disclose or reveal the objective reality obscured by liberalism's political mystification. Freeman, for example, asserted that [t]he point of delegitimation is to expose possibilities *more truly expressing reality*.'[32] In essence, by demonstrating liberalism's underlying political basis, the ideological façade is lifted, and the true nature of social relations is revealed.

This assumes, of course, in a very modernist way,[33] that there is a fundamental reality waiting to be uncovered. This position has been subject to sustained critique, most prominently by poststructuralist authors who have persuasively challenged its inherent essentialism and demonstrated that all social relations are a construction of power. As Lukes summarises, 'there cannot be false consciousness since there are multiple true consciousnesses — socially constructed "regimes of truth," generated and sustained by power. On this view, to impute false consciousness is mistakenly to believe that there even could be a correct view that is not itself imposed by

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[31] Munger and Seron (n 26) 257; Alan Freeman, 'Truth and Mystification in Legal Scholarship' (1981) 90(5) *Yale Law Journal* 1229, 1230.

[32] Freeman (n 31) 1230 (emphasis added).

[33] In a later essay, Duncan Kennedy noted that a key failure of this early critique of rights in CLS was its implicit modernism. He notes, 'the cls critique of rights (Mark Tushnet, Peter Gabel, Frances Olsen, me) was perverse … because it was *modernist*.' Kennedy (n 5) 183 (emphasis in original) (citations omitted).

power.'[34] In other words, liberal consciousness might construct the world in particular ways, but it isn't built on top of an authentic consciousness, it is simply one construction among others. It might be possible to deconstruct liberal consciousness, and even to develop alternative consciousnesses, but there is no singular or fixed foundation behind these. [35]

Secondly, it is hard to ignore the implicit elitism entailed in models of false consciousness. To assert that people have been misled or tricked by ideological apparatuses not only suggests a privileged access to knowledge or truth on behalf of the person making the claim, it also effectively treats others as 'cultural dupes' who are ignorant of their own true interests.[36] Many critical race scholars (among others) were deeply critical of these implications in the work of CLS. Delgado, for example, drew attention to the fact that there is always a multitude of factors that explain marginalisation and noted the danger (and arrogance) in assuming that subordination occurred simply because people held a false faith in existing social structures. He asserted that, 'it is worth questioning the extent to which our current subordination is caused by uncritical absorption of self-defeating ideologies, as opposed to other forces', before (somewhat flippantly) posing the question, '[i]f false consciousness exists and is so powerful, why are only minorities and workers afflicted by it, and not white radicals?'[37]

Finally, a strong model of false consciousness leaves little room for positive political programs. If all engagement with the entrenched system simply reproduces

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[34] Lukes (n 25) 19.

[35] The cultural and symbolic construction of identity was a key postmodern/poststructuralist insight and an idea I will briefly return to later in this section. In the following section, I will outline a non-essentialist framework that resists the more extreme cultural/linguistic constructionism evident in some poststructuralist accounts.

[36] Lukes (n 25) 19. Historically, this has been a common criticism of aspects of Marxist theory more generally. I examine the inherent elitism and vanguardism of Marxist political theory in more detail in chapter 5.

[37] Richard Delgado, 'The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?' (1987) 22 *Harvard Civil Rights-Civil Liberties Law Review* 301, 310–311.

structural forms of power, then the only option for real political change is a complete and radical dismantling of current institutional forms. This is something CLS was acutely aware of, and they consciously and explicitly endorsed a negative program based predominantly on critique (or, as they referred to it, 'trashing').[38] They argued that destabilising the prevailing liberal-legal consciousness was a necessary first step to achieving change, and, until this process was complete, any attempt to implement change would be unsuccessful. While it is hard to deny the importance of critique as part of broader political project, their strident commitment to this principle offered little immediate relief for those excluded by the prevailing system. As Patricia Williams has noted, this position ignores the historical importance (and effectiveness) of a rights discourse for many marginalised groups. She argued that, while it is important to acknowledge the limitations of rights, it is critical to also remember the very real advantages and protections they have historically provided:

> one of the most troubling positions advanced by some CLS is that of rights' actual disutility in political advancement. That position seems to discount entirely the voices and experiences of blacks in this country, for whom politically effective action has occurred mainly in connection with asserting or extending rights.[39]

To assume that the indeterminacy of rights is only ever resolved in favour of dominant groups not only ignores this historical reality, it also appears to be a vast overstatement of the power of these groups to control broader social narratives. As Delgado has also asserted, '[e]ven if rights … paralyse us and induce a false sense of security, … might they not have a comparable effect on public officials, such as the police? … It is condescending and misguided to assume that the enervating effect of rights talk is experienced by the victims and not the perpetrators of racial

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[38] See Mark Kelman, 'Trashing' [1984] (36) *Stanford Law Review* 293; Freeman (n 31). For a critique of this approach from within CLS see Harlon Dalton, 'The Clouded Prism' (1987) 22 *Harvard Civil Rights-Civil Liberties Law Review* 435.

[39] Patricia J Williams, 'Alchemical Notes: Reconstructing Ideals from Deconstructed Rights Minority Critiques of the Critical Legal Studies Movement' (1987) 22(2) *Harvard Civil Rights-Civil Liberties Law Review* 401, 411–412.

mistreatment.'[40] Not only have rights played an important political role historically, it is also worth remembering their great rhetorical and symbolic power. Rights might at times be alienating, as CLS suggests, but they have also been an important rallying point, and a useful strategic tool for uniting communities in a common cause.[41] In this way, completely dismissing rights ignores the lived experience of marginalised people, and is also a fundamental denial of their agency and ability to operate at multiple levels of consciousness.[42]

In line with these criticisms of false consciousness, most contemporary critical theory adopts a far more nuanced approach which emphasises the fact that hegemony is never complete, and the gaps and fractures in hegemony can offer the ability to effect positive social change. An early examples of this type of perspective is the more humanist cultural Marxism of historian E P Thompson. In his famous book, *Whigs and Hunters*,[43] Thompson provides a detailed historical account of the implementation of the Black Act in Britain in the eighteenth century.[44] This Act (and subsequent related Acts) fundamentally restructured aspects of property law; particularly with respect to long established customary rights in relation to forests and common land. While, as Thompson makes clear, there was no doubt the law operated to increase the power of the growing capitalist classes, he rejected outright any idea that law was simply a blunt ideological weapon of the ruling classes. He

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[40] Delgado (n 37) 305.

[41] Ibid.

[42] These insights have led many critical race scholars to adopt what is effectively a dual approach — critiquing law's representations of the world, while continuing to use and engage with law where it can provide pragmatic and strategic advantages. This is perhaps best exemplified in the famous statement made by Mari Matsuda, which highlight the multiple levels of consciousness required when engaging with law critically. In discussing the trial of Angela Davis, she argued:

> There are times to stand outside the courtroom door and say 'this procedure is a farce, the legal system is corrupt, justice will never prevail in this land as long as privilege rules in the courtroom.' There are times to stand in the courtroom and say 'this is a nation of laws, laws recognising fundamental values of rights equality and personhood'. Sometimes … there is a need to make both speeches in one day.

Mari J Matsuda, 'When the First Quail Calls: Multiple Consciousness as Jurisprudential Method' (1989) 11 *Women's Rights Law Reporter* 7, 8 ('When the First Quail Calls').

[43] EP Thompson, *Whigs and Hunters: The Origin of the Black Act* (Penguin, 1975).

[44] The Black Act was a piece of legislation passed in the UK in 1723, which fundamentally altered existing common/customary property rights. Most infamously, it created a series of severe penalties (including the death penalty) for a range of property and poaching offences. The full Act is included in the appendix of *Whigs and Hunters*: Ibid 270–277.

argued that this only makes sense if law if is reduced to formal, state-based legal institutions, a position he rejected.[45] He argued, dominant classes

> employed the law, both instrumentally and ideologically … But this is not the same thing as to say that the rulers had need of law, in order to oppress the ruled, while those who were ruled had need of none. What was often at issue was not property, supported by law, against no-property; it was alternative definitions of property-rights … When it ceased to be possible to continue the fight at law, men still felt a sense of legal wrong: the propertied had obtained their power by illegitimate means.[46]

For Thompson, law often reflected the interests of the powerful, but it was never completely determined by them. It remained a contestable social phenomenon and an important resource for making political claims, even if these weren't always successful.

Similar approaches are also evident in many feminist approaches to law, which have long viewed theory, critique, and political action as inextricably linked. Although a diverse theoretical tradition, feminist legal theory's central aim has always been to explore the relationship between law and gender, and, in particular, to interrogate law's role in perpetuating systems of gender discrimination.[47] Of particular relevance in this context are those feminist approaches, influenced by

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[45] He argued, 'The law when considered as institution (the courts, with their class theatre and class procedures) or as personnel (the judges, the lawyers, the Justices of the Peace) may very easily be assimilated to those of the ruling class. But all that is entailed in 'the law' is not subsumed in these institutions.' Ibid 260. On this point his argument reflects many of the insights of legal pluralism, although he did not explicitly adopt this framework (I will discuss legal pluralism in detail in the following chapter). Interestingly, he appears to have arrived at this conclusion due to his focus on land and agrarian practices more generally. For Thompson, these practices, which predate capitalist economic relations and state forms of legality, are thoroughly defined by law, indicating a normativity outside of the state: 'law was often a definition of actual agrarian *practice*, as it had been pursued "time out of mind". … The farmer or forester in his daily occupation was moving within visible or invisible structures of law: this merestone which marked the division between strips; that ancient oak … which marked the limits of the parish grazing'. Ibid 261.

[46] Thompson (n 43) 261.

[47] For an overview of some of the key approaches within feminist legal theory see Ben Golder, 'Rethinking the Subject of Postmodern Feminist Legal Theory: Towards a Feminist Foucaultian Jurisprudence' (2004) 8 *Southern Cross University Law Review* 73, 74–82.

poststructuralist and postmodern social theory, which have steadfastly rejected the essentialism entailed in both liberal accounts and models of false consciousness.[48] Embracing an understanding of power that emphasises its diffuse nature, as well as its close connection to language, culture and knowledge, they have sought to explore the social construction of gender, and law's role in this process. Within this perspective law doesn't simply reflect (or distort) the reality or truth of gender, it plays a role in its symbolic and discursive construction. As Conaghan has summarised, '[w]ithin such a theoretical framework, law is relocated as one of a range of practices through which gender is acquired, a *process* of which gender and gender differences are an *effect*.'[49] In this way, and similar in aspects to the perspective of Thompson, law is not simply a tool for liberation or oppression, but a site in which competing claims of gender (and law itself) can be contested. While still remaining sceptical of the political utility of law,[50] this more nuanced account of the relationship between law and power leaves space for positive engagement. In highlighting the diverse sites and sources of power it reveals that structures of domination are inherently unstable, and are constantly contested and resisted. Direct engagements with law, therefore, may still be effective, but it is critical that we remain aware of the complex, contingent, and contextual nature of these actions.[51]

There has been a lot of important work done within these critical frameworks that has drawn attention to and challenged the power of law on a number of related levels. By employing this nuanced understanding of law's relationship to power, this work has managed to identify and link the more immediate deficiencies of law's biases (both explicit and implicit) with broader concerns regarding how law is

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48 Some famous early examples of this perspective include Smart (n 5); Mary Joe Frug, *Postmodern Legal Feminism* (Routledge, 1992). For a general overview, see Laura A Rosenbury, 'Postmodern Feminist Legal Theory' in Robin West and Cynthia Bowman (eds), *Research Handbook on Feminist Jurisprudence* (Edward Elgar Publishing, 2019) 127.

49 Joanne Conaghan, 'Reassessing the Feminist Theoretical Project in Law' (2000) 27(3) *Journal of Law and Society* 351, 363.

50 Carol Smart, for example, famously warned against 'the siren call of law': Smart (n 5) 160.

51 Rosenbury (n 48) 127.

conceptualised. In doing this, they have offered strong critiques of both liberal legalism and legal positivism, and drawn attention to the fact that law is never conceptually closed, nor does it exist outside or above broader social processes. In this way they offer a vision of law that, unlike liberalism, is not totally disconnected from the broader social environment in which it operates. Law is thoroughly embedded in social relations and, far from the institutionalised and passive politics implicit in liberal-legalism, it is a site of power, resistance, and contestation.

Further, and in a related sense, these more nuanced critical perspectives have also demonstrated that law is always shaped by, and participates in shaping, broader structures of power. This has revealed the contingent nature of legal constructions, thereby challenging the myth that law simply reflects and/or distorts some universal and absolute truth or reality. Law, through its rules, processes, and conceptual categories, always plays a role in constructing the world and social agents in particular ways. While, at the same time, law itself remains dependent upon, and shaped by, social structures which are nominally external to it. This understanding of law and society's mutual constitution forcefully resists essentialism and marks a significant advance on those critical perspectives which reduce law simply to an expression of top-down, hierarchical power (as exemplified in models of false consciousness). In revealing law's contestability and instability, it is a framework that is better able to accommodate the complex (and at times contradictory) relationship between law, power, and social change.

Despite the important insights provided within these perspectives, however, they often still struggle to move beyond a negative critique. Their strong anti-essentialism — exemplified in their conceptualisation of law as a social construct — reveals the discursive and symbolic contingency of law, and this undeniably opens law to possible reconstruction. However, these critical projects often stop at this observation. There appears to be a real hesitation to engage in that next stage and to

articulate a reconstructed alternative. This theoretical quandary isn't isolated to critical approaches to law, recognising a similar tendency in postmodern and poststructuralist work more generally, the anthropologist Michael Taussig has described this predicament in the following way:

> When it was enthusiastically pointed out … that race or gender or nation … were so many social constructions, inventions, and representations, a window was opened, an invitation to begin the critical project of analysis and cultural reconstruction was offered. And one still feels its power even though what was nothing more than an invitation, a preamble to investigation has, by and large, been converted instead into a conclusion — eg 'sex is a social construction,' 'race is a social construction,' 'the nation is an invention,' … The brilliance of the pronouncement was blinding. Nobody was asking what's the next step? What do we do with this old insight? If life is constructed, how come it appears so immutable? How come culture appears so natural? If things coarse and subtle are constructed, then surely they can be reconstructed as well?[52]

A key reason for this hesitation stems from the theoretical project itself. Demonstrating the socially constructed nature of law (or other social institutions) fundamentally destabilises the realism that underpinned much modernist social theory and, correspondingly, radically challenges any claim that existing social hierarchies have a natural or objective basis. While it is hard to deny the power of this theoretical move, this strong anti-essentialism also removes any foundation from which to articulate a clear and unambiguous politics. One central consequence of this is that it can result in a politically debilitating relativism.[53] As Conaghan has argued in relation to feminist legal theory, despite the numerous analytical advantages in this perspective, it has led to endless debates and given rise to what appears to be irresolvable political challenges. As she summarises,

> if knowledge is always situated and notions of truth, reason and objectivity are but the discursive creations of a foundationalist epistemology which must be jettisoned, how can feminists propound a positive programme for women's emancipation? … if everything is the

[52] Michael Taussig, *Mimesis and Alterity: A Particular History of the Senses* (Routledge, 1993) xvi.
[53] Iris Van Der Tuin, '"A Different Starting Point, a Different Metaphysics": Reading Bergson and Barad Diffractively' (2011) 26(1) *Hypatia* 22, 27.

> product of discourse, including our very selves — how are we to act as autonomous agents let alone as a political movement?[54]

These are difficult yet critically important questions. And, for many proponents, there has been some safety in remaining in (or retreating to) a predominantly negative critical project of deconstruction, rather than embracing the risks that may come from a more affirmative project of reconstruction. However, as I will argue in more detail in the following section, the difficulty of these questions is exacerbated by a propensity within these perspectives to privilege epistemology over ontology. That is, they tend to focus almost exclusively on the linguistic, cultural, and discursive construction of social phenomena, and in doing this they can lose sight of the corresponding material dimensions of life, including the material and concrete conditions that contribute to the production of disadvantage.[55] Their emphasis on linguistic and cultural representations emerged from a deep suspicion of any claim of access to an objective 'truth' or 'reality' and was undoubtedly a powerful corrective to the naïve realism of modernist approaches. However, this mistrust of the 'real' has resulted in a politics that in many aspects remains disconnected from the world. Analysis is focused on symbolic and discursive meaning rather than on both the concrete material practices and relations through which these representations are produced, as well as the broader non-human material environment in which these representations take place.

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[54] Joanne Conaghan, 'Feminism, Law and Materialism: Reclaiming the "Tainted" Realm' in Margaret Davies and Vanessa Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate, 2013) 31, 34.

[55] Of course, not all work conducted within poststructuralist frameworks embraced this strong linguistic and textual focus. A strong materialism was present in the work of key figures including Foucault and Deleuze. For a discussion of the role of materialism in poststructuralist work see Rosi Braidotti, 'A Theoretical Framework for the Critical Posthumanities' (2019) 36(6) *Theory, Culture & Society* 31, 33; Stacy Alaimo and Susan Hekman, 'Introduction: Emerging Models of Materiality in Feminist Theory' in Stacy Alaimo and Susan Hekman (eds), *Material Feminisms* (Indiana University Press, 2008) 1, 8; Dennis Bruining, 'Interrogating the Founding Gestures of the New Materialism' (2016) 22(2) *Cultural Studies Review* 21.

The critical perspectives I have been discussing clearly mark a significant advance on liberal (and positivist) approaches to understanding the relationship between law and power. Liberalism constructs an understanding of politics and law that consciously separates them from the world. In order to maintain a sense of objectivity and neutrality, politics, justice, and law are carefully carved out of social relations. In this way, liberalism seeks to establish a transcendent foundation for politics. People, and the messy, complex world in which they are embedded, are removed in order to create what Haraway has referred to as a 'conquering gaze from nowhere.'[56] However, as she reminds us, this separation of objects from the world is always illusory, it is a 'god trick'.[57] The critical legal perspectives discussed above attempt to return law and politics to the world. They view law as an inherently social phenomenon and attempt to trace the ways law both emerges from, and is shaped by, broader social relations. However, their tendency to privilege the cultural and linguistic construction of law over its material dimensions does mean that they too end up with something of a disembodied vision of law. Law remains defined by a vision from 'nowhere' (albeit a relativistic vision — 'a way of being nowhere while claiming to be everywhere equally'[58] — rather than the singular, totalising, and conquering vision of liberalism). In a different version of the 'god trick', symbolic representations become an external and transcendent force of creation; the socio-material practices and networks that produce these representations are reduced to their product rather than their source. In effect, within this framework law is understood as a force for managing and ordering the messy complexities of life, rather than a continuously shifting and unfolding creation of, and participant in, life. Law may have been placed in the world, but it is not *of* the world.

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[56] Donna Haraway, 'Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective' (1988) 14(3) *Feminist Studies* 575, 581.

[57] Ibid.

[58] Ibid 584.

TOWARDS A VITAL LEGAL FRACTIVERSE: LAW IN A RELATIONAL ONTOLOGY

In an anonymous interview originally published in *Le Monde* in 1980, Michel Foucault discussed the nature and role of critique and criticism. Lamenting the way critique often lapses into negativity and judgement, he commented,

> I can't help but dream of the kind of criticism that would try not to judge but to bring an oeuvre, a book, a sentence, an idea to life; it would light fires, watch grass grow, listen to the wind, and catch the sea foam in the breeze and scatter it. It would multiply not judgements but signs of existence; it would summon them, drag them from their sleep. Perhaps it would invent them sometimes — all the better. … Criticism that hands down sentences sends me to sleep; I'd like a criticism of scintillating leaps of the imagination. It would not be sovereign or dressed in red. It would bear the lightning of possible storms.[59]

In setting out this dream of a creative and lively critique, Foucault restated one of the most central and long held aims of critical theory: that theory and critique should not simply seek to provide descriptive explanation; it should also seek to drive social change. That is, theory should help us to think the world otherwise. As Marx famously wrote over a hundred years earlier, 'philosophers have only *interpreted* the world, in various ways; the point, however, is to *change* it.'[60] Of course, and as can be seen from my discussion in the previous section, this is not necessarily an easy or straightforward task. It is very easy for critical projects to lose sight of this productive goal and to retreat into a passive, and at times, deadening judgement. However, in Foucault's comments we can see some hints as to what a more productive critical project might involve. Primarily, it should seek to bring things to life: to multiply existence rather than reduce it, and to create new possibilities and open new pathways, rather than simply (or at least only) plotting and mapping existing structures.

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[59] Michel Foucault, *Ethics: Subjectivity and Truth*, ed Paul Rabinow (Penguin, 2000) 323.

[60] Karl Marx, 'Theses on Feuerbach' in Robert C Tucker (ed), *The Marx-Engels Reader* (Norton, 1978) 143, 145.

Such a shift towards a more productive, affirmative, and lively critical project has been embraced by a broad range of contemporary perspectives in social theory and social research more generally, including the feminist-inspired new materialisms and posthumanism,[61] science and technology studies (particularly the actor-network approach of Latour, Law, Stengers and others),[62] ontological anthropology,[63] and non-representational theory in human geography.[64] While relatively distinct in their theoretical approaches and research aims, they do share a number of related concerns. Primarily, they all reject static representationalist frameworks, adopting instead a processual, generative, and relational ontology that emphasises materiality and draws attention to life's continuous unfolding.[65]

Representationalism is a pervasive and deeply entrenched ontological position, at least in west,[66] and underpins much scientific and social scientific work. In essence,

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[61] See, for eg, Karen Barad, *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter and Meaning* (Duke University Press, 2007); Diana Coole and Samantha Frost (eds), *New Materialisms: Ontology, Agency, and Politics* (Duke University Press Books, 2010); Rick Dolphijn and Iris van der Tuin, *New Materialism: Interviews & Cartographies* (Open Humanities Press, 2012). Rosi Braidotti, *The Posthuman* (Polity, 2013); David Roden, *Posthuman Life: Philosophy at the Edge of the Human* (Routledge, 2015).

[62] See, for eg, Bruno Latour, *Reassembling the Social: An Introduction to Actor-Network-Theory* (Oxford University Press, 2005); John Law, *After Method: Mess in Social Science Research* (Routledge, 2004); Stengers (n 20).

[63] See, for eg, Amiria JM Henare, Martin Holbraad and Sari Wastell (eds), *Thinking through Things: Theorising Artefacts Ethnographically* (Routledge, 2007); Martin Holbraad and Morten Axel Pedersen, *The Ontological Turn: An Anthropological Exposition* (Cambridge University Press, 2017); Martin Holbraad, Morten Axel Pedersen and Eduardo Viveiros de Castro, 'The Politics of Ontology: Anthropological Positions', *Cultural Anthropology* (January 2014) <https://culanth.org/fieldsights/462-the-politics-of-ontology-anthropological-positions>.

[64] See, for eg, Nigel Thrift, *Non-Representational Theory: Space, Politics, Affect* (Routledge, 2008); Ben Anderson and Paul Harrison (eds), *Taking-Place: Non-Representational Theories and Geography* (Routledge, 2010).

[65] In adopting this position, these different perspectives undoubtedly draw strong inspiration from Deleuze, as well as Deleuzean readings of other process philosophers including Bergson, Whitehead, and William James (among others). For an overview of some of these influences and how they have been adopted see Maggie MacLure, 'The "New Materialisms": A Thorn in the Flesh of Critical Qualitative Inquiry?' in Gaile S Cannella, Michelle Salazar Perez and Penny A Pasque (eds), *Critical Qualitative Inquiry: Foundations and Futures* (Left Coast Press, 2015) 93; Nick J Fox and Pam Alldred, *Sociology and the New Materialism: Theory, Research, Action* (Sage Publications, 2017).

[66] Barad argues that representationalism is so ingrained it has taken on a 'common-sense' appeal in Western culture and thought. While she traces its origins to the atomism of Democritus, she also notes the strong influence of the Cartesian divide between the knowing subject and the world: Barad (n 61) 48–49. An example of the especially Western nature of representationalism can be

it refers to an ontological model that separates the material world from the way it is understood and explained by different knowledge practices. As Barad describes it, 'representationalism is the belief in the ontological distinction between representations and that which they purport to represent; in particular, that which is represented is held to be independent of all practices of representing.'[67] In other words, under representationalist frameworks, representations, and the phenomena that they represent, are treated as two independent and ontologically distinct entities. This is most commonly associated with the common and pervasive distinction between nature and culture (and/or nature and humanity),[68] through which meaning is ontologically stripped from the world, thereby creating a divide between a static and inert natural world and the cultural and scientific representations which give meaning to and make sense of that world.

This ontological distinction between the world and human knowledge of the world is perhaps most clearly discernible in modernist (and realist) natural and social sciences which have long held that objective knowledge can be obtained in unproblematic ways from direct observations of the world (as was evident in liberal-positivist understandings of law). Their faith in this theoretical method, however, is reliant on the conceptual construction of a stable and static world of fixed entities (nature, people, societies etc) external to the observer. And importantly, the representations produced are themselves also external to the world they ostensibly

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seen in the fact that not all cultures embrace such an ontology. For example, the Yolgnu peoples in northern Australia embrace a worldview/ontology based around becoming and generativity: see Bawaka Country including S Wright et al, 'The Politics of Ontology and Ontological Politics' (2016) 6(1) *Dialogues in Human Geography* 23.

67 Barad (n 61) 46.

68 An identification and critique of this ontological distinction between nature and culture forms a key theoretical precept of this broad range of neo-materialist literature. Some classic and influential statements of this specific issue, however, can be seen in Gilles Deleuze and Félix Guattari, *Anti-Oedipus: Capitalism and Schizophrenia* (University of Minnesota Press, 1983); Donna Jeanne Haraway, 'A Manifesto for Cyborgs: Science, Technology, and Socialist Feminism in the 1980s' in *The Haraway Reader* (Routledge, 2004) 7; Braidotti (n 61). For a general overview of some of the broader literature see Fox and Alldred (n 65) ch 3.

describe, simply operating as an objective, mediating link between the world and its observer.[69]

This understanding of knowledge and, in particular, its faith in objective and positive facts, was radically problematized by social constructionist accounts, including the interpretivist micro-sociologies of Berger and Luckman or Goffman (among others),[70] and also, as I noted in the previous section, those perspectives incorporating aspects of postmodernism/poststructuralism usually classified under the umbrella of the 'linguistic' or 'cultural turn' (this would include many of the critical approaches to law I discussed previously).[71] These constructionist approaches drew attention to ways in which language, discourse, and other cultural and symbolic systems played critical roles in the construction of knowledge, thereby undermining any claims of a simple objectivity. However, despite the numerous advantages of these perspectives (including their anti-essentialism and more nuanced understanding of power), they do often still retain a latent representationalism.

Social constructionist perspectives might question the ability of people to obtain objective knowledge and, thereby, to produce representations that describe the 'world as it really is', but only because they view the world as the *product* of our cultural representations.[72] And, in this way, representation still ultimately mediates the relationship between humans and the world as it 'render[s] material realities inaccessible behind the linguistic or discourse systems that purportedly construct or

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[69] Barad (n 61) 47.

[70] See Peter L Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Penguin, 1991); Erving Goffman, *The Presentation of Self in Everyday Life* (Penguin Books, 1990).

[71] For an overview of some of the different perspectives covered within this, see Nancy Armstrong, 'Who's Afraid of the Cultural Turn?' (2001) 12(1) *differences: A Journal of Feminist Cultural Studies* 17.

[72] As Alaimo and Hekman remark (in the context of discussing the linguistic turn in postmodernism), 'postmodernists argue that the real/material is entirely constituted by language; what we call the real is a product of language and has its reality only in language.' Alaimo and Hekman (n 55) 2.

"represent" them.'[73] The world is still externalised, and is still conceptualised as relatively inert and static phenomenon. As Massumi notes, within these constructionist approaches, the ontological divide between nature and culture still remains, and the dynamism of nature, as well as its deep interconnection with culture, is erased in either one of two ways:

> In [a] worst-case solipsist scenario, natures appears as immanent to culture (as its construct). At best, when nature is deemed unworthy of attention, it is simply shunted aside. In that case it appears, by default, as transcendent to culture (as its inert and meaningless remainder) … Theoretical moves aimed at ending Man end up making human culture the measure and meaning of all things in a kind of unfettered anthropomorphism.[74]

Further, by separating meaning from the world, the source and emergence of culture (or other representational forms) are elided. The complex and concrete social-material practices that produce representations are hidden from view.[75] In this way, representationalism offers a deeply sedentary view of the world and one that struggles to explain or accommodate generativity or change. As Deleuze has argued, '[r]epresentation has only a single centre, a unique receding perspective, and in consequence a false depth. It mediates everything, but mobilises and moves nothing. Movement, for its part, implies a plurality of centres, a superposition of perspectives, a tangle of points of view, a coexistence of moments'.[76]

In order to overcome this sedentary and static ontological vision, the materialist and non-representationalist approaches I outlined above have embraced an immanent and flat ontology which collapses the distinction between culture and the world,

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[73] Maggie MacLure, 'Researching without Representation? Language and Materiality in Post-Qualitative Methodology' (2013) 26(6) *International Journal of Qualitative Studies in Education* 658, 659.

[74] Brian Massumi, *Parables for the Virtual: Movement, Affect, Sensation* (Duke University Press, 2002) 39.

[75] Barad (n 61) 53; Massumi (n 74) 39.

[76] Gilles Deleuze, *Difference and Repetition* (Columbia University Press, 1994) 55–56.

bringing them into direct relation.[77] This is not to ignore or deny the importance of culture or other representative practices; as Lecercle has argued, representations remain a critical component in constituting reality and they are part of the 'the structuring process that constructs a liveable world around us.'[78] However, it explicitly embeds these representational practices in broader (and ontologically flat) socio-material networks or assemblages. They are no longer separate from the world, but part of its generative unfolding. That is, these perspectives retain 'a firm belief in the actuality of representation … not as a code to be broken or as an illusion to be dispelled … [but] as performative in themselves; as doings.'[79] A direct consequence of this is that analysis shifts away from an abstract interrogation of representational concepts, categories, and structures, and focuses instead on the socio-material and performative practices which continuously enact and (re)produce these, as well as enact the world more generally.[80] Effectively, any distinction between ontology and epistemology is collapsed within these ontological perspectives. As Barad has argued, [t]o the extent that humans participate in scientific or other practices of knowing, they do so as part of the larger material configuration of the world and its ongoing open-ended articulation.'[81]

In these ways, the alternative ontology embraced by these perspectives draws attention to the processual nature of life and, in particular, to movement, flux, and the continual emergence and reconstitution of the world. It is an ontology focused on concrete material practices rather than structures, and on becoming rather than

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77 I explore aspects of this relational ontology in more detail in chapter 4.

78 J Lecercle, *Deleuze and Language* (Springer, 2002) 60.

79 John David Dewsbury et al, 'Enacting Geographies' (2002) 33(4) *Geoforum* 437, 438.

80 The emphasis on material practices and performativity does bear some resemblance to the practice theory of Bourdieu, and Butler's notion performativity. However, the adoption of a flat and relational ontology does distinguish these approaches from Bourdieu's concepts of practice which retains a strong distinction between practice and structure (or habitus and field), even if these are brought into a dialectical relationship. See Bourdieu (n 23); Willem Schinkel, 'Sociological Discourse of the Relational: The Cases of Bourdieu & Latour' (2007) 55 *The Sociological Review* 707. Further, the emphasis on the socio-material rather than semiotic aspects of performativity rather than the semiotic, as well as on difference as an affirmative and generative force distinguishes them from Butler's work. See Judith Butler, *Bodies That Matter: On the Discursive Limits of 'Sex'* (Routledge, 1993); Vikki Bell, *Culture and Performance: The Challenge of Ethics, Politics, and Feminist Theory* (Berg, English ed, 2007) ch 6.

81 Barad (n 61) 342.

being. It offers a vision of reality that, as Shaviro remarks (in summarising the position of Whitehead), 'is made of events, and nothing but events: happenings rather than things, verbs rather than nouns, processes rather than substances.'[82] In essence, this ontological framework brings the world to life, privileging vitality[83] and ontogenesis[84] over stasis and fixity.

One central implication of this shift to a generative ontology is that, if we accept that the world (or reality more generally) is not fixed or static but is in a constant state of becoming, and, further, that it emerges through concrete socio-material practices, then different practices will inevitably enact the world in a multitude of different ways. In effect, these different enactments can no longer be understood simply as different perspectives on the same singular phenomenon. Rather, they are in fact creating multiple realities or multiple worlds.[85]

John Law has referred to this process as the creation of a 'fractiverse'.[86] While similar approaches have adopted different names for the same concept (including,

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[82] Steven Shaviro, *Without Criteria: Kant, Whitehead, Deleuze, and Aesthetics* (MIT Press, 2009) 17.

[83] A key component of many of these approaches is their adoption of vitalist frameworks. See Jane Bennett, 'A Vitalist Stopover on the Way to a New Materialism' in Diana Coole and Samantha Frost (eds), *New Materialisms: Ontology, Agency, and Politics* (Duke University Press, 2010) 47; Matthew Gandy and Sandra Jasper, 'Geography, Materialism, and the Neo-Vitalist Turn' (2017) 7(2) *Dialogues in Human Geography* 140; Mariam Fraser, Sarah Kember and Celia Lury, 'Inventive Life: Approaches to the New Vitalism' (2005) 22(1) *Theory, Culture & Society* 1.

[84] Tim Ingold, 'One World Anthropology' (2018) 8(1–2) *HAU: Journal of Ethnographic Theory* 158, 169; Ben Anderson and Paul Harrison, 'The Promise of Non-Representational Theories' in Ben Anderson and Paul Harrison (eds), *Taking-Place: Non-Representational Theories and Geography* (Routledge, 2010) 1, 8.

[85] Marisol de la Cadena and Mario Blaser (eds), *A World of Many Worlds* (Duke University Press, 2018); John Law, 'What's Wrong with a One-World World?' (2015) 16(1) *Distinktion: Journal of Social Theory* 126; Christopher Gad, Casper Bruun Jensen and Brit Ross Winthereik, 'Practical Ontology: Worlds in STS and Anthropology' [2015] (3) *NatureCulture* 67; Arturo Escobar, *Designs for the Pluriverse: Radical Interdependence, Autonomy, and the Making of Worlds* (Duke University Press, 2018).

[86] Law (n 62) 59–63; Law (n 85) 127. In using fractals in this context he is heavily influenced by the earlier work of both Marilyn Strathern and Donna Haraway. See Marilyn Strathern, *Partial Connections* (Rowman Altamira, 2004); Donna Haraway, *Simians, Cyborgs, and Women: The Reinvention of Nature* (Routledge, 1991).

for example, the 'multiverse' or the 'pluriverse'),[87] the idea of a fractiverse is especially apt in this context as it clearly captures both the immanent and relational nature of this broader ontological perspective. In speaking of a pluriverse or multiverse, there is the potential that the multiple realities forming it are conceptualised as relatively independent or discrete entities, thereby diminishing their deep connection and relationality, and risking a restatement of problematic representationalist dualisms. As Barad has argued, within a flat and relational ontological frame, 'relata do not pre-exist relations'.[88] That is, entities should not be understood as discrete objects with inherent and clearly defined boundaries. Rather, they always emerge and remain embedded in complex networks of relations, taking (a provisional and contingent) shape only through specific material engagements in the world — a process best described as *intra*-action, not *inter*action.[89]

The notion of a fractiverse manages to capture this process. In mathematics, fractals (to offer a very simplified definition) are shapes with more than one dimension, but less than two. Fractals, as de la Cadena notes, 'offer the possibility of describing irregular bodies that escape Euclidean geometrical measurements because their borders also allow other bodies in — without, however, touching each other everywhere.'[90] In this way, the idea of fractiverse can accommodate multiplicity, difference, and plurality while still retaining a commitment to immanent and relational forms of becoming.[91] It brings into view different worlds, while acknowledging their ontological connection and *intra*-dependence. This emphasis on fractal relationality also problematises any strong theoretical distinction between

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87 Mario Blaser and Marisol de la Cadena, 'Pluriverse' in Marisol de la Cadena and Mario Blaser (eds), *A World of Many Worlds* (Duke University Press, 2018) 1; Escobar (n 85); Walter D Mignolo, 'Foreword: On Pluriversaslity and Multipolarity' in Bernd Reiter (ed), *Constructing the Pluriverse: The Geopolitics of Knowledge* (Duke University Press, 2018) xi.

88 Barad (n 61) 140.

89 Ibid 139–140.

90 Marisol de la Cadena, *Earth Beings: Ecologies of Practice across Andean Worlds* (Duke University Press, 2015) 32.

91 In this way, the concept of the fractiverse also captures what Deleuze and Guattari have referred to as, 'the magic formula we all seek — PLURALISM = MONISM'. Gilles Deleuze and Félix Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia* (University of Minnesota Press, 1987) 2.

parts and wholes, including entrenched dualisms such as structure and agency, and the hierarchical relations which usually underpin them.[92] The world isn't constituted by ontologically discrete or atomistic units which combine to create a 'whole', nor can a bounded whole completely encompass or explain smaller components. At whatever scale of analysis — whether we zoom in or out — fractals reveal an infinite complexity. There is no position or perspective, no level of analysis, which can offer a totalising or unifying view. As Strathern has argued, 'nothing seems to hold the configuration at the centre, there is no map, only endless kaleidoscopic permutation.'[93] In effect, the fractiverse captures a sense of realities and worlds which are, to borrow a phrase from Mol, both 'more than one and less than many.'[94]

The idea of the fractiverse, therefore, not only allows us to identify the existence of multiple worlds or realities, it also allows us to explore the relationships and connections between them. An example of this can be seen in Annemarie Mol's study of the socio-material practices that produce the medical condition atherosclerosis.[95] Mol examined the different practices of clinicians, pathologists, and radiologists (as well as other medical practitioners) who all play critical roles in identifying and treating atherosclerosis. However, the disease emerges and is understood differently depending on the specific technical practices involved. For the clinician, for example, it emerges through a patient's description and report of pain; for the radiographer, from an analysis of pictures of blood vessels; and for the pathologist, from an examination of samples under a microscope. There are

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92 Strathern (n 86) 37.

93 Ibid xvii.

94 Annemarie Mol, *The Body Multiple: Ontology in Medical Practice* (Duke University Press, 2002) 55. This phrase is partly inspired by Haraway's similar comment made in the context of critiquing theoretical dualism that 'one is too few, but two are too many': Haraway, 'A Manifesto for Cyborgs: Science, Technology, and Socialist Feminism in the 1980s' (n 68) 35. Mol's phrase has subsequently become a common refrain in science and technology studies more generally, as well as in ontological anthropology. See, for eg, Law (n 62); Cadena (n 90).

95 Mol (n 94). This study is regularly held out as a primary example in the literature on this question. See, for eg, Law (n 85) 130; Mario Blaser, 'Ontology and Indigeneity: On the Political Ontology of Heterogeneous Assemblages' (2014) 21(1) *Cultural Geographies* 49, 54.

different 'realities' of atherosclerosis depending on the practices through which it is examined.

Under a representationalist framework, this process described by Mol could simply be understood as a range of different (disciplinary) perspectives regarding a singular phenomenon: the disease of atherosclerosis. The disease itself is a fixed and static entity, and any debate between the different practitioners is a reflection of the accuracy and precision (or lack thereof) of their representative practices. Mol found, however, that these different enactments of the disease often did not fit together neatly and, importantly, that these disconnections extended beyond differing levels of exactness in method. There may be, for example, reported pain, but little evidence from the pathologists of a narrowing of arteries, or vice-versa, or some other combination of ostensibly contradictory factors.[96] What was required in order to make sense of this disease, therefore, was a further range of practices through which the different medical professionals could 'negotiate' an appropriate diagnosis.

In effect, the multiple enactments of atherosclerosis required a series of procedures (arranged conferences between practitioners) and conceptual work (negotiations and discussion) in order to render the disease in a singular way.[97] In this example we can see and trace both the existence of multiple worlds, but also their underlying connections. As Mol argues, '[t]he different forms of knowledges aren't divided into paradigms that are closed off from one another. It is one of the great miracles of hospital life: there are different athereoscleroses in the hospital but despite the differences between them they are connected. Atherosclerosis enacted is more than one — but less than many. *The body multiple* … also hangs together.'[98]

[96] Mol (n 94) 54–61.
[97] Ibid 63–64.
[98] Ibid 55.

This leads to a number of important political questions regarding both the extent, and ways in which, enacted realities are brought together or held apart. As can be seen from Mol's example, practices don't simply enact worlds, they also play a role in enacting the connection between multiple worlds. Blaser refers to these coordinating practices as 'storied performativities'.[99] They are, in effect, representational practices that seek to make sense of the world. In referring to them as performativities, however, we are reminded that unlike representationalist understandings, these practices are never external to the world(s) and are never simply descriptive. They always participate in the ongoing production of worlds. And, further, they remind us that the appearance of singularity and sameness (John Law refers to this as the 'one-world world')[100] is not axiomatic, but is always an effect of multiplicity and difference. This does not mean that enactment of a singular vision should always be avoided. At times it may be extremely beneficial. In Mol's study, for example, 'for the radiologist, the clinician, and the pathologist, it goes without saying that they are treating a single entity/disease. Moreover, the assumption of singularity is crucial to the very practices through which they perform atherosclerosis.'[101] However, it is important to remember that this singularity isn't an a priori or foundational truth; it is always a partial and contingent production. To forget this is to return to the myth of a 'one world-world: a world that has granted itself the right to assimilate all other worlds and, by presenting itself as exclusive, cancels possibilities for what lies beyond its limits.'[102]

CONCLUSION

Massumi refers to a shift from critique and constructionism to a position of productivism. He argues:

> To think productivism, you have to allow that even your own logical efforts feedback and add to reality, in some small, probably microscopic way. But still once you have allowed

[99] Blaser (n 95) 54.
[100] Law (n 85).
[101] Blaser (n 95) 54.
[102] Blaser and Cadena (n 87) 3.

> that, you have accepted that activities dedicated to thought and writing are inventive. Critical thinking disavows its own inventiveness as much as possible. Because it sees itself as uncovering something it claims was hidden or as debunking something it desires to subtract from the world, it clings to a basically descriptive and justificatory modus operandi. … As usual, it is not a question of right and wrong — nothing important ever is. Rather, it is a question of dosage. It is simply that when you are busy critiquing you are less busy augmenting. … There are times when debunking is necessary. But, if applied in a blanket manner, adopted as a general operating principle, it is counterproductive. Foster or debunk. It's a strategic question.[103]

In the context of my broader project, embracing the alternative ontological framework I have described provides a radically different way to both conceptualise law, as well as to understand and engage with the relationship between law and social change. Rather than attempting to identify or reveal law's essence or truth, the focus shifts to an analysis of the ways law is constructed through performative, material enactments. And, like the enactment of reality more generally, different legal practices and different enactments of law result in the production of multiple legal worlds: a legal fractiverse. This change in perspective not only draws attention to the performative dimensions of state law as conventionally understood, it also highlights both the existence of, and potential for, the production of alternative and subversive legal worlds, worlds which may be less exclusory and better able to accommodate difference. Further, it also reveals the very real political implications embedded in the ways we chose to study law. In conceptualising law in one way and not another, we are enacting our own storied performativities and these have effects in the world, even if, as Massumi notes, it may be hard to see these effects at times. In revealing this process, however, this alternative ontological framework offers different and productive ways to engage with and think about law, and provides a new range of political tools that extend beyond reductive and negative forms of critique. In the following chapters I will explore different ways for conceptualsing and studying these material practices that enact law and the implications this shift

[103] Massumi (n 74) 12–13.

in focus has on our understanding of the relationship between law, power, and social change.

3. EMERGENT LAW: PLURALISM, JURISGENESIS, AND THE CRITIQUE OF LAW'S FOUNDATIONS

> There was a wall. It did not look important. It was built of uncut rocks roughly mortared. An adult could look right over it, and even a child could climb it. Where it crossed the roadway, instead of having a gate it degenerated into mere geometry, a line, an idea of boundary. But the idea was real. It was important. For seven generations there had been nothing in the world more important than that wall. Like all walls it was ambiguous, two-faced. What was inside it and what was outside it depended upon which side of it you were on.[1]

INTRODUCTION

In this chapter, I will argue that legal pluralism (particularly in its critical iterations which emphasise jurisgenesis) provides a valuable potential framework for conceptualising law without lapsing into essentialist schema. Importantly, pluralism offers a language that allows us to conceptualise and study law in a manner that avoids reducing law to *monism* (that there is 'one' law), *centralism* (the sole source of the law is the state or some other hierarchical institution), *positivism* (that law is autonomous and conceptually closed), and *prescriptivism* (that law is external to, and acts upon, people).[2] In this way, it opens law to multiplicity and to the potential for us to create (and reveal) legal worlds that are both an expression of, as well as are able to accommodate, difference at an ontological level. Further, I will argue that the common criticism that legal pluralism lacks definitional certainty can be overcome. By focusing on a range of critical approaches to legal pluralism which draw attention to the ways in which law emerges from the complex socio-material networks and practices, I believe it is possible to avoid the definitional question to some extent. These perspectives reject the idea that law has some a priori essence of law, viewing it instead as an emergent phenomenon.[3] I will argue that this shifts the

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1 Ursula K Le Guin, *The Dispossessed* (Harper, 1994) 1.

2 I have taken these categories from Macdonald and Sandomierski: Roderick A Macdonald and David Sandomierski, 'Against Nomopolies' (2006) 57 *Northern Ireland Legal Quarterly* 610.

3 Kirsten Anker, *Declarations of Interdependence: A Legal Pluralist Approach to Indigenous Rights* (Ashgate, 2014); Desmond Manderson, 'Beyond the Provincial: Space, Aesthetics, and Modernist

focus from the question 'what is law?' to the question 'how is law being enacted'. In adopting this different analytical focus, legal pluralism extends law beyond the legal institutions of the state. It also reveals law's inherent instability and fluidity. While law often appears, and is commonly experienced, in ways which give the appearance of consistency and singularity, this is due to the practices which enact it (including the way it is conceptualised and understood within legal theory). Law's appearance as an objective fact is produced. And, this production takes place in a context in which law already has an existence (it is already materially enacted — practiced, conceptualised etc — in particular ways). This allows us to accommodate the relative importance of state law, but without holding on to the idea that this is a necessary requirement or defining feature of law more generally. The connection between law and state becomes a fact to be established, assessed, and critiqued rather than an innate characteristic. Importantly, in making this argument, my intention is not to simply sideline or dismiss state-based legal systems (even if I endorse many of the criticisms of state-legality outlined in critical approaches to law), or to assert that all non-state legal systems are somehow inherently more inclusive or fair.[4] Rather, I wish to open spaces in which the connection and relationality between different legal systems (or different legal worlds), and the flows of power which structure these, can be traced, and draw attention to the potential for people to imagine and perform law in ways which may challenge conventional legal boundaries, both within and between legal systems.

Additionally, this change in focus also helps to collapse the distinction between 'inside' and 'outside' perspectives which is a common way to conceptualise distinct disciplinary perspectives on law.[5] While these distinctions may be analytically useful

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Legal Theory' (1996) 20(4) *Melbourne University Law Review* 1048; Martha-Marie Kleinhans and Roderick Macdonald, 'What Is a Critical Legal Pluralism?' (1997) 12(2) *Canadian Journal of Law and Society* 25; Margaret Davies, *Law Unlimited* (Routledge, 2017).

4 One recent approach to legal pluralism which has been critical of some of the political implications of legal pluralism, particularly its challenges to the rule of law and legal certainty is Sionaidh Douglas-Scott, *Law after Modernity* (Hart, 2013). I will discuss the political implications of legal pluralism in more detail later in this chapter and in chapter 5.

5 I will return to this issue shortly.

at times, they too are something to be assessed rather than assumed. By utilising a framework which emphasises the emergent nature of law, the issue of being 'inside' or 'outside' remains relevant, but more for how it helps us to see the ways in which this division enacts law (and power) in different ways. I will argue that there is an inherent plurality in all law, not because there are lots of discrete legal systems (although, when looked at certain scales this is true), but because its boundaries are constantly negotiated and produced through material enactments. Positioning oneself inside or outside the system (whether this is done by participants or researchers) contributes to this process of boundary creation and maintenance. In effect, it is part of the 'storied performativities'[6] and representational practices through which law is enacted.

In these ways, a critical legal pluralism gets closest to articulating a theory of law that avoids transcendence and representationalism and offers an understanding of law that best fits with the materialist and processual framework I outlined in the previous chapter. I will argue that a plural conception of law can lay the groundwork for thinking about law in generative ways and, thereby, open law to creative reconstructions.

In order to establish my argument, I will begin by briefly outlining the conceptual difficulties faced by legal theorists and socio-legal scholars as they attempted to arrive at a definition of law. This will lead into a discussion of the emergence of legal pluralism as a framework for understanding law, one which attempted to move beyond a search for universals and essences and which began to view law (and its boundaries) as inherently fluid and contested, emerging not from fundamental principles but from their continual enactment in social action. I will trace the growth of pluralism in sociology and anthropology beginning in the early twentieth century with the work of Malinowski and Ehrlich, and how the ideas of these

[6] Mario Blaser, 'Ontology and Indigeneity: On the Political Ontology of Heterogeneous Assemblages' (2014) 21(1) *Cultural Geographies* 49.

theorists were embraced and extended over the last few decades of the twentieth century. I will argue that while legal pluralism offers a far more nuanced and flexible understanding of law, it still retains some risk of lapsing into different types of essentialism. This risk is evident in the underlying functionalism of Malinowski and Ehrlich and in some later applications which draw too sharp a distinction between different legal/normative orders, or which attempted to systematise plural legalities. Finally, I will look at the development of 'critical legal pluralism' within legal theory, an approach which built on earlier insights, but which emphasises the jurisgenerative capacity of social agents.

INSIDE OUT AND BACK AGAIN: ESSENTIALISM, PLURALISM, AND THE POLITICS OF DEFINITIONS

'What is law?' This deceptively difficult question has haunted legal philosophy since its beginning. Despite the thousands of pages dedicated to answering this question, law's meaning remains deeply contentious and legal philosophy has provided a dizzying array of definitions and arguments regarding its location, boundaries, and origins. HLA Hart famously recognised this in *The Concept of Law* in which he noted (somewhat hyperbolically):

> Few questions concerning human society have been asked with such persistence and answered by serious thinkers in so many diverse, strange, and even paradoxical ways as the question 'What is law?' Even if we confine our attention to the legal theory of the last 150 years and neglect classical and medieval speculation about the 'nature' of law, we shall find a situation not paralleled in any other subject systematically studied as a separate academic discipline.[7]

Such definitional problems are not unique to legal philosophy; they have also pervaded the social sciences. In the middle of the twentieth century the famous legal anthropologist, E Adamson Hoebel remarked, 'seek[ing] a definition of law is

[7] HLA Hart, *The Concept of Law* (OUP, 3rd ed, 2012) 1.

like the quest for the Holy Grail'[8], before going on to implore us to learn from the wisdom of Radin citing his comment that 'those of us who have learned humility have given over the attempt to define law.'[9] This problem in reaching consensus on a workable definition was considered so serious that by the 1970s some legal anthropologists attempted to sidestep the issue altogether shifting the object of study from 'law' to 'disputes' and 'conflicts'.[10]

It is hard to ignore the political and social impact of law, and scholars remain deeply interested in analysing the legal and normative commitments of people and communities. Of course, these difficulties have not deterred legal philosophers or social scientists from attempting to study and define law (although warning of the risks and dangers, both Hart and Hoebel did offer their own definition). The fact that this failure to arrive at a settled definition (or at least to explicitly articulate clear and sharp taxonomical boundaries) has not necessarily impeded analyses or discussions of law and may provide us with some clues about law's operation. On one level, it may point both to law's ubiquity and to its existence as something of a 'folk category'[11] of cultural and social organisation. It may be extremely hard to arrive at a clear definition of law, but an intuitive concept nonetheless exists. At another level, however, it also points to the fact that the concept of law — its origins, its site, its boundaries, its proper application — is always at stake. In other words, demarcating law's boundaries is inevitably a political act, and this applies equally to those participating within a legal system as much as it does to those who seek to study such systems.

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8 E Adamson Hoebel, *The Law of Primitive Man: A Study in Comparative Legal Dynamics* (Harvard University Press, 2009) 18.

9 Ibid citing Max Radin, 'A Restatement, of Hohfeld' (1938) 51 *Harvard Law Review* 1141.

10 See, for eg, John L Comaroff and Simon Roberts, *Rules and Processes: The Cultural Logic of Dispute in an African Context* (University of Chicago Press, 1981).

11 This is an idea explored in depth by Brian Tamanaha and to which I will return later in the chapter. See, for eg, Brian Z Tamanaha, 'A Non-Essentialist Version of Legal Pluralism' (2000) 27(2) *Journal of Law and Society* 296; Brian Z Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press, 2001); Brian Z Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30(3) *Sydney Law Review* 375, 396.

One of the most significant challenges to conventional approaches to defining law has come from the theory of legal pluralism. Legal pluralism, at its most general level, is simply the idea that there may be multiple legal systems operating within a single geographical location and, consequently, 'law' cannot be understood as directly synonymous with state-law.[12] In many ways, this is not a particularly radical idea. Examples of non-state legal systems are easy to identify.[13] International law, the law of supranational organisations such as the EU, Indigenous laws in colonial/postcolonial societies, religious law, even the internal regulations of large organisations such as universities, all exist and operate alongside the law of the nation state (even if the exact status of these legal systems and their relationship to state law remains contentious). At a basic, almost common-sense level, our lives appear to be awash with legality. Legal pluralism is also not a particularly new idea. In legal anthropology, legal pluralism has been a key conceptual tool since the beginning of the twentieth century (even if that nomenclature has not always been adopted).[14] For many anthropologists, the contention that law is situated solely in centralised political institutions is inherently problematic. Such an assertion would mean that any community that lacks such institutions also lacks law. This is a claim which is deeply ethnocentric, and which has serious political implications. We only need to consider the ongoing implications for Indigenous Australians of Australia's historical classification as 'terra nullius' to recognise the danger in such thinking.

Despite this, however, the idea that law can be understood as set of authorised norms emanating from a single, central authority remains a powerful starting point

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[12] John Griffiths, 'What Is Legal Pluralism' (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1 ('What Is Legal Pluralism'); Sally Engle Merry, 'Legal Pluralism' (1988) 22(5) *Law & Society Review* 869.

[13] See, for eg, Gunther Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism Closed Systems and Open Justice: The Legal Sociology of Niklas Luhmann' (1991) 13 *Cardozo Law Review* 1443 ('The Two Faces of Janus'); Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (n 11); William Twining, 'Normative and Legal Pluralism: A Global Perspective' (2010) 20(3) *Duke Journal of Comparative & International Law* 473.

[14] For example the work of both Bronislaw Malinowski and Eugen Ehrlich in the early twentieth century (which I will consider in more depth below) are often considered inspiration for later pluralist literature even though neither writing explicitly adopted this language. Bronislaw Malinowski, *Crime and Custom in Savage Society* (Routledge and Kegan Paul, 1978); Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Routledge, 2001).

for studying law, particularly within the legal academy.[15] And, like pluralism, this monistic and centralised vision of law also carries some common sense and analytical appeal, especially when viewed in the context of western political history. The importance and power of state law in shaping a community cannot be denied (not least because of its claim to have a monopoly on the legitimate use of violence and the ability to exercise this),[16] and the capacity to effectively enforce non-state legal rights or obligations can be limited. Indigenous Australians, for example, have well established and complex legal systems which govern, amongst other things, their responsibilities and rights in relation to land. Nevertheless, and notwithstanding their own deep commitment to these laws, the ability to enforce such rights remains largely dependent on their recognition by the colonial state.[17] As I noted in the first chapter, a legal doctrine such as native title is not an acknowledgement of the *independent* normative legitimacy and force of Indigenous law.[18] Rather, it is a reduction of Indigenous law to a question of fact and evidence — something that must be established in order to obtain (very weak) proprietary rights within the law of the state.[19]

Whether one sees law as plural or singular often depends on the disciplinary perspective of the observer.[20] Legal pluralism, emerging originally out of the social sciences, has tended to adopt an 'external' view of law. In attempting to describe and analyse social life, it makes sense to draw attention to the rich normative environments in which we live. For those working in the discipline of law, however,

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[15] Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (Butterworths LexisNexis, 2nd ed, 2002).

[16] Max Weber, 'The Profession and Vocation of Politics' in Peter Lassman and Ronald Speirs (eds), *Weber: Political Writings* (Cambridge University Press, 1994) 309, 310–311.

[17] Irene Watson, 'Indigenous Peoples' Law-Ways: Survival Against the Colonial State' (1997) 8(1) *Australian Feminist Law Journal* 39.

[18] Michael J Detmold, 'Law and Difference: Reflections on Mabo's Case' (1993) 15 *Sydney Law Review* 159.

[19] Kirsten Anker, 'The Truth in Painting: Cultural Artefacts as Proof of Native Title' (2005) 9 *Law Text Culture* 91, 95; Shaunnagh Dorsett, 'Since Time Immemorial: A Story of Common Law Jurisdiction, Native Title and the Case of Tanistry' (2002) 26 *Melbourne University Law Review* 32, 43.

[20] Margaret Davies, 'Legal Pluralism' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 805; Roger Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Ashgate, 2006) 48.

it is far more common to adopt an internal perspective. They are primarily interested in 'lawyer's law' and in studying the institutions, practices, officials, and texts of state-based legal systems. This distinction between 'internal' and 'external' perspectives on law can be useful, at least in drawing out broad patterns in how law can be studied, and in drawing attention to the different insights distinct disciplinary gazes can bring to law.[21] However, it is important to recognise that this distinction does not represent the reality or truth of law; it is simply an analytical metaphor which provides a methodological framework and starting point for examining and exploring legal phenomena.[22] Considering this, while it may be useful to recognise or categorise a study as 'internal' or 'external', there are also some inherent risks in conceptualising law in this way.

First, there is a danger that the limitations of each perspective are not recognised and accounted for. This is perhaps best exemplified when it comes to the fundamental definitional question: what is law? For those adopting an internal perspective, there is a real danger that the specific institutional practices of the system in which they are embedded are universalised and elevated to a general description of law.[23] This is potentially problematic as it is extremely theoretically limiting. As briefly mentioned above, such exercises in universalisation are inherently ethnocentric and this limits the opportunity for cross-cultural legal analyses. Additionally, in reifying specific institutional practices in this way, law's

[21] It is worth noting that this internal/external distinction is often employed in different ways within studies of law. While I am using it to refer to a general distinction between different disciplinary perspectives (law, legal theory etc as opposed to sociology, anthropology etc), it has also been used to draw out differences within legal theory itself. For example, both HLA Hart and Ronald Dworkin have consciously adopted and defended an 'internal perspective' while many adherents of critical approaches (for eg Critical Legal Studies, feminist analyses), saw their project as one which looked *outside* law in order to chart the connections between law and broader structures of power. See for eg, Hart (n 7); Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986); Brian Z Tamanaha, 'The Internal/External Distinction and the Notion of a Practice in Legal Theory and Sociolegal Studies' (1996) 30 *Law & Society Review* 163; Charles L Barzun, 'Inside-Out: Beyond the Internal/External Distinction in Legal Scholarship' (2015) 101 *Virginia Law Review* 1203.

[22] Davies, 'Legal Pluralism' (n 20); Margaret Davies, 'Exclusion and the Identity of Law' (2005) 5 *Macquarie Law Journal* 5; Cotterrell (n 20) 48.

[23] Emmanuel Melissaris, *Ubiquitous Law: Legal Theory and the Space for Legal Pluralism* (Ashgate, 2009) 9.

generativity is marginalised and its social and performative aspects are sidelined, usually in favour of emphasising systemic consistency and closure. Alternatively, for those adopting an external perspective it is necessary to adopt an extremely broad definition of 'law', one that will allow it to include a wide range of legal and normative systems. The recognised risk implicit in this is that the category 'law' becomes so wide that it loses any analytical efficacy.[24] As Sally Engle Merry has famously argued, 'where do we stop speaking of law and find ourselves simply describing social life?'[25] Further, there is also a need to be sensitive to the dangers that might come from designating a wide range of normative practices as law. To what extent does this represent a juridification of social life? Is this simply a form of conceptual colonisation or empire-building?[26] A broad and inclusive definition of law might challenge state law's claim of a monopoly, or it could simply reinforce the power and centrality of state law more generally. Considering the power and ubiquity of conventional state-based conceptions of law, a broadening of law's sites may result not in the democratisation or opening-up of state-law, but rather see the extension of a narrow, hierarchical, and exclusory positivist state law into alternative sites of normativity.

Secondly, at a more conceptual level, identifying the study of law as either 'inside' or 'outside' does, at least implicitly, theoretically presuppose that law has clear and identifiable boundaries. In the context of any specific study, identifying boundaries may be necessary, at least for methodological or analytical purposes. To some extent, it may be that lines need to be drawn and limits need to be articulated or, as

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[24] This issue regarding a failure to reach consensus on a workable definition has been a key focus of much literature on pluralism. This is evident in the work of theorists both sympathetic and critical of pluralism as a framework. See, for eg, Sally Falk Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7(4) *Law & Society Review* 719; Sally Moore, 'Legal Pluralism as Omnium Gatherum' (2014) 10(1) *FIU Law Review* 5; Merry (n 12); Tamanaha, 'A Non-Essentialist Version of Legal Pluralism' (n 11); Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (n 11). For an example of a more critical take on this issue see Simon Roberts, 'Against Legal Pluralism: Some Reflections on the Contemporary Enlargement of the Legal Domain' (1998) 30(42) *The Journal of Legal Pluralism and Unofficial Law* 95.

[25] Merry (n 12) 878.

[26] Roberts (n 24).

noted above, there is a risk of methodological and theoretical paralysis. However, it is always important to recognise that this is a methodological frame and does not necessarily represent some truth about law's nature or essence. In drawing these lines too definitively we may lose sight of the permeability of these boundaries and of the ways in which any specific legal system is both shaped by, and shapes, cultural and normative practices that are nominally 'external.' Further, it may mean that we ignore the ways in which those boundaries are themselves continuously enacted and negotiated through the actions of those participating in legal systems (including, of course, the actions of those who are 'studying' the systems), and the role of power inherent in this performative process.

SEEING PAST THE STATE: LAW AND LEGAL PLURALISM

As indicated above, much conventional legal philosophy (especially that conducted within a positivist paradigm) has adopted an internal approach to understanding law and has directed its attention towards the development of clear definitional criteria and tests of validity in order to differentiate law from other social phenomenon.[27] In effect, law is understood in a relatively narrow manner as a unified, coherent, and state-based system. As I discussed previously in this thesis, while many contemporary critical approaches within legal philosophy have mounted well founded attacks on some of legal positivism's key tenets — particularly its treatment of law as a bounded, coherent system and its conceptual separation of law from society — their criticisms have not always extended to a challenge of law's conceptual identification with the state. In assessing the political utility of law, therefore, most approaches within legal philosophy and critical legal theory have directed their attention exclusively to engagements which take place within state legal institutions and which draw upon state-based law and legal instruments.

[27] Hart (n 7); Melissaris (n 23).

This understanding of law stands in direct contrast to many perspectives in the social sciences. For many scholars working within the fields of anthropology and sociology, this reliance on a state-centric framework offered little explanatory power for understanding normative orders within societies.

In this section I will trace the growth and development of legal pluralism in the social sciences. It was within the framework of legal pluralism that many social scientists found an analytical path out of the essentialism that had previously pervaded theories of law. I will begin by outlining and assessing the contribution of Malinowski and Ehrlich, two social scientists who played a critical role in laying the conceptual groundwork for what would later become known as 'legal pluralism.' Both Malinowski and Ehrlich were deeply critical of monistic and hierarchical theories of law, which they believed associated law and the state too closely. Further, they both developed models that gave up on the search for universal essences and conceptual closure, instead viewing law as an emergent (and often contested) part of social action. I then explore some of the ways in which Malinowski's and Ehrlich's understanding of law has been developed and refined. In particular, I will examine Falk Moore's theory of the 'semi-autonomous social field', an attempt to more carefully distinguish between different normative orders, while still retaining the chief insights of this earlier work.

RECONNECTING LAW AND LIFE: EARLY PLURALISM IN THE WORK OF MALINOWSKI AND EHRLICH

In his highly influential work, *Crime and Custom in Savage Society,*[28] the anthropologist, Bronislaw Malinowski laid the conceptual groundwork for the study of law outside of state institutions. For Malinowski, the proposition that law required central institutions for its enactment and enforcement, led to

[28] Malinowski (n 14).

unsatisfactory conclusions regarding those communities which lacked such institutions. First, it tended to suggest that some communities did not have law — a position which Malinowski thoroughly rejected. This was almost unthinkable within his framework as he suggested law was a universal phenomenon.[29] Secondly, it smacked of ethnocentrism and tended to suggest that the 'savage' or 'primitive' person living in small, undifferentiated communities was a qualitatively different type of person to those living in highly differentiated communities. He states:

> Accustomed as we are to look for a definite machinery of enactment, administration, and enforcement of law, we cast round for something analogous in a savage community and, failing to find they are any similar arrangements, we conclude that all law is obeyed by this mysterious propensity of the savage to obey it.[30]

For Malinowski, then, if we want to move past such ethnocentric understanding that simply saw Trobriand Islanders (or any other similar small-scale community), simply following law and custom through an unquestioned or blind acquiescence, we must develop an understanding of law that expands it to non-state forms of normative ordering. If we are not to locate law in these central institutions, then where are we going to find it? For Malinowski, the answer was that we could locate it in the reciprocal relationships that constitute all communities. Further, although there may not be institutional sites or formal rules, law can be identified through actual and concrete practices. For Malinowski, law does not solely consist of 'central authorities, codes, courts, and constables'. [31] If this was the case, then any community which lacked such overt enforcement mechanism would be bereft of law. Rather, law emerges from the obligations which underpin community relationship, which connect and entangle community members, and which emerge from social interaction across time:

> The binding forces of Melanesian civil law are to be found in the concatenation of the obligations, in the fact that they are arranged into chorus of mutual services, a give and

[29] Ibid 2.
[30] Ibid 14.
[31] Ibid 14.

> take extending over long periods of time and covering wide aspects of interest and activity.[32]

Malinowski's approach to law not only shifted the site and source of its location, it also marked a challenge to approaches which conceived of law as a uniform, coherent, and singular system. A key feature of law, according to Malinowski, was that it sources were necessarily varied as they emerged from a broad number of interrelated, yet distinct and irreducible, normative obligations; each stemming from the relatively independent systems or institutions which constituted community life (marriage, religion/rites, political structure etc). He notes:

> The law … consists … of a number of more or less independent systems, only partially adjusted to one another. Each of these … has a certain field completely of its own, but it can also trespass beyond its legitimate boundaries. This results in a state of tense equilibrium with an occasional outbreak.[33]

For Malinowski, therefore, to conceive of law as a unified system was to ignore the deep complexity of it sources and operation. In this model law is messy and complex. It draws from a wide variety of relationships, institutions, and normative obligations. And, as these remain relatively independent and unadapted to each other, it is impossible to ever integrate them into a cohesive, bounded whole. At some scales or at some points in time law may look stable, but any stability or equilibrium is temporary and fleeting. Law remains porous. Its boundaries are always emergent and contested. Rather than having some *a priori* existence or essence, they are continuously enacted and negotiated through social action.

Malinowski's theory of law entails a strong critique and radical departure from those legal-theoretical perspectives I discussed above. He provides an account of law that

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[32] Ibid 67.
[33] Ibid 100.

is grounded in social action rather than in identifying essential and universal criteria. As he notes, this brings us 'face to face with the discrepancy between the ideal of law and its realisation, between the orthodox version and the practice of actual life.'[34] In shifting the study of law in this way, Malinowski provides a more open and fluid conceptualisation of law. It is a perspective on law which attempts to account for its diverse, contingent and contested nature. In Malinowski's framework, people are not the passive objects of law, they are active participants. Law emerges from, and is fundamentally shaped by, their practices and relationships.

While Malinowski's work focused on a small indigenous community, the work of Eugen Ehrlich, an Austrian sociologist and professor of law, provided a very similar (and almost contemporaneous) account of law as Malinowski's but within the context of a highly differentiated, modern western nation.[35] Ehrlich's theory of 'living law' makes it clear that the insights provided by Malinowski are not restricted solely to those communities which lack centralised political/legal structures, nor is it simply a matter of or concern for those focused on small-scale indigenous communities. Similar to Malinowski, Ehrlich attempted to expand understandings of law so that it would accommodate a broad range of normative commitments, including those which are located outside the state. Ehrlich developed his theory in response to the process of legal codification which took place across Europe during the nineteenth and twentieth centuries.[36] For Ehrlich, the construction of a centralised and singular state law completely contained within a legal code was misguided, impractical, and theoretically limiting. He argued that

> to attempt to imprison the law of a time or of a people within the sections of a code is about as reasonable as to attempt to confine a stream within a pond. The water that is put

[34] Ibid 107.

[35] Ehrlich (n 14).

[36] Of course, this process of codification had effects beyond the simple enactment of legal codes. It was both influenced by, as well as provided a mechanism to reinforce, a broader reconceptualization of law as unitary, state-based, and conceptually closed. This can be seen in the work of legal positivists such as Kelsen. See Hans Kelsen, 'The Pure Theory of Law: Its Method and Fundamental Concepts' (1934) 50(4) *Law Quarterly Review* 474.

> in the pond is no longer a living stream but a stagnant pool, and but little water can be put in the pond.[37]

Ehrlich made a distinction between 'living law' and 'norms for decisions.' Norms for decisions are associated with legislation and the action of judges.[38] Importantly, however, he argued that these always operate within the broader framework of the living law. The living law constitutes the principal normative structures which guide human action. Living law does not emerge from a single source, but rather from all those social associations which connect people to their community (families, workplaces, community organisations etc). While state law may form a part of the living law, even an important part, it is not an essential element in its formation. Living law also arises 'from direct observation of life, of commerce, of customs and usages, and of all associations the law has recognised but also those it has overlooked or passed by, indeed of those it has disapproved.'[39] Further, for Ehrlich 'norms for decisions' had no special underlying characteristic which clearly differentiated them from other normative structures. There was nothing special about 'norms for decisions', especially in relation to their source or location. Like all norms, 'norms for decisions' emerged from associations and social relationships. And further, 'norms for decisions' always remained dependent on the broader living law in order to give them meaning and context. As he states:

> The legal norm ... is merely one of the rules of conduct, of the same nature as all other rules of conduct. The prevailing school of juristic science does not stress this fact, but, for practical reasons emphasises the antithesis between law and the other norms, especially the ethical ...[40]

As Ehrlich notes, it might be possible to distinguish 'norms for decisions' from the broader 'living law', but this stems more from convention and use rather than some

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37 Ehrlich (n 14) 488.
38 Ibid 24.
39 Ibid 493.
40 Ibid 39.

essential, unchanging feature intrinsic to the norm itself. Like Malinowski, therefore, Ehrlich's conceptualisation of law shifts the focus from the search for essences and ahistorical principles to an understanding of law as always enacted in social relationships. Ehrlich's theory is an early attempt to illustrate that a monistic conception of law, which locates its source solely in the state, provides only a limited picture of the numerous ways laws actually operate, interact, and guide social action.

The insights provided by both Malinowski and Ehrlich have been deeply influential and still resonate today in much legal anthropology and sociology (although they have been significantly advanced). Their importance lies chiefly in their observations that 'law' was a thoroughly social phenomenon. For both scholars, a search for a universal statement or principle of law was ultimately misguided. Law's boundaries are always enacted through social action and, therefore, its boundaries were always open to negotiation and contestation. By highlighting this fact, they were able to detach law from any transcendent principles or foundations. Their insights proved fundamental for disturbing and destabilising approaches to law that sought to achieve conceptual closure. Law was not necessarily synonymous with state law, and its sources and sites were never singular. For these reasons, it is a futile task to attempt to identify or discover any essential criteria at the base of law that distinguishes it from other normative systems. Perhaps their most important insight, however, was that law doesn't exist outside or above its 'subjects'; it is not a force that is external to, and acts upon, people.

Perhaps it was their 'outside' status that allowed them to initially arrive at these conclusions. As I discussed earlier in this chapter, whether one sees law as plural or singular may often depend on their particular disciplinary perspective. Legal theorists, tied more closely to the discipline and practice of law, inevitably attempted to carve 'law' out from other social phenomenon and to remove law from

the complexities of life in order to more clearly identify its boundaries. But perhaps it is here that we can also see some of the risks associated with their work. Their outside status may have meant that they were less sensitive to the distinctions that may exist between law and other normative systems (although this was clearly less of a problem for Ehrlich). Law may not have any underlying, universal criteria, its boundaries may be flexible and porous, but those boundaries have been enacted in specific ways historically and we do remain subject to those enactments. Law has meaning to people (and not just lawyers) beyond broader normative systems and it is important to recognise this even if it is ultimately contingent.

The socially generated meanings of law are something that has been recognised in many of the critiques of Malinowski and Ehrlich. Sally Falk Moore, for example, has argued that 'the conception of law that Malinowski propounded was so broad that it was virtually indistinguishable from the study of the obligatory aspect of all social relationships.'[41] For this reason, she developed an analytical framework to study law which could better explore the relationship between state-based forms of legality and other distinct normative systems. At the core of this project was her concept of the 'semi-autonomous social field.'[42]

Falk Moore sought to retain many of the key insights regarding law developed in the work of Malinowski and Ehrlich. In particular, the idea that law was an inherently social phenomenon that always emerged from, and was shaped by, the broader social context in which it operated. However, she did draw a clear distinction between state-law and other forms of normativity.[43] For Falk Moore, this distinction was critical as it allowed for the clearer examination of the relationship between different forms of normativity. This can be seen in her analytical approach to studying semi-autonomous social fields. Falk Moore recognised the existence of a

[41] Sally Falk Moore, *Law as Process: An Anthropological Approach* (Routledge, 1978) 220.
[42] Falk Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (n 24).
[43] Ibid 721.

diverse range of social fields between the state and individual (workplaces, community organisations etc). These social fields could be defined by the capacity to generate (and enforce) rules. As she says, 'the semi-autonomous field is defined … by a processual characteristic, the fact that it can generate rules and coerce or induce compliance to them.' While they retained some independence or autonomy, this could never be considered complete, as they were always located within 'a larger social matrix which can, and does, affect and invade it.'[44] In this way, the rules and customs of any semi-autonomous social field are always shaped and influenced by external forces, such as state law. However, at the same time, the application of state is always mediated and shaped by the internal rules. Essentially, within any semi-autonomous social field, there is always a complex mix and strong interdependence between a wide range of legal and social norms. State law is one factor (and an important one), but it is not necessarily the most dominant. As she argues, within a semi-autonomous social field, '[i]t is not unreasonable to infer that at least some of the legal rules that are obeyed, are obeyed as much (if not more) because of the very same kinds of pressures and inducements that produce compliance to the non-legal mores of the social fields than because of any direct potentiality of enforcement by the state.'[45]

In seeking to distinguish more carefully between different forms of normativity, Falk Moore develops a framework that draws an analytical and methodological distinction between state law and other forms of normativity, but still acknowledges their deep interdependence. In acknowledging their relationality, she retains many of the key insights developed by earlier legal anthropologists such as Ehrlich and Malinowski, but achieves a more nuanced understanding of the complex ways different legal worlds come into contact and shape each other.

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44 Ibid 720.
45 Ibid 729.

JURISGENESIS AND CRITICAL LEGAL PLURALISM

In a slightly different tradition, the legal theorist Robert Cover has also drawn attention to and celebrated a deeply rich normative world, and there are strong similarities between his understanding of law and those more sociological approaches previously discussed. Primarily, Cover sees state law as simply one of many normative worlds and asserts that the line between different legal worlds is never clear cut or easy to draw. For Cover, all communities engage in the process of jurisgenesis. That is, they engage in creation, development, and negotiation of normative codes and systems. He writes,

> We inhabit a nomos—a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void. … [T]he formal institutions of the law … are, indeed, important to that world; they are, however, but a small part of the normative universe that ought to claim our attention. No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.[46]

Cover doesn't explicitly adopt the nomenclature 'legal pluralism' or engage with pluralist literature (including, those sociological and anthropological accounts discussed above). Nevertheless, he develops an understanding of law that is remarkably similar in its approach. For Cover, law cannot be reduced to doctrinal rules or institutional practices; it is a shared 'narrative', through which people make sense of, and engage in, the world. Law isn't simply synonymous with state law, but is a feature immanent to all communities. Like Malinowski and Ehrlich, Cover sees law as an emergent phenomenon. It is not located solely in centralised institution, but develops out of and operates across the complicated and shifting relationships that sit at the base of any community. In fact, as Cover explains, the role of state-law

[46] Robert M Cover, 'Foreword: Nomos and Narrative' (1983) 97 *Harvard Law Review* 4, 4–5.

is not *jurisgenetic*, but *jurispathic*.[47] That is, by claiming the right to offer final determinations, it isn't simply providing interpretational clarity, it is killing off alternative legal worlds.

This orientation in Cover's position, of law emerging from community, is also evident in critical legal pluralism.[48] The fundamental argument of critical legal pluralism is that all legal orders are inherently plural. While this perspective draws on some of the basic principles outlined above, it actually entails a more fundamental challenge to monistic and singular theories of law and, in doing so, comes closer to moving beyond representational frameworks and understandings of law. This critical position arose out of a reassessment of social scientific legal pluralism. Critical legal pluralists argue that, although social scientific legal pluralism rejects the monism of legal positivism (particular in its privileging of state-law), it still, at times, relies on a vision of law that is essentially positivistic. While social scientific legal pluralism acknowledges the existence of multiple legal orders (deriving from either the state or some other 'informal' association), it does not critically appraise the plurality *within* each of these legal orders. The result of this is that its focus is restricted to an analysis of the interactions between one coherent, unified vision of law (for example state law) and another coherent, unified vision of law (for example, customary law). Further, in seeking out normative orders and elevating these to the status of law, social scientific legal pluralism forgets that law is more than an analytical concept and does have a conventional social meaning (as contingent and contested as that may be).[49] As Merry has argued 'calling all forms of ordering that are not state law by the name law confounds the analysis.'[50] Surely there is little theoretical utility in deeming a certain social practice as law, if

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47 Ibid 40.

48 Kleinhans and Macdonald (n 3); Margaret Davies, 'Ethos of Pluralism, The' (2005) 27 *Sydney Law Review* 87.

49 Baudouin Dupret, 'Legal Pluralism, Plurality of Laws, and Legal Practices' [2007] (1) *European Journal of Legal Studies* 1, 16. Although note Daniel Jutra's argument that exploring the relationship between law and other 'everyday' forms of normative ordering can help in developing an understanding of both: Daniel Jutras, 'Legal Dimensions of Everyday Life, The' (2001) 16 *Canadian Journal of Law and Society* 45.

50 Merry (n 12) 878.

the social agents engaged in that practice did not recognise it as such. This process privileges a model of law created by the theorist and supplants it in place of a social agent's own understanding.[51]

Critical legal pluralism argues that this uncritical treatment of law(s) retains the positivist assumption that legal orders can be given relatively stable or fixed boundaries. In effect, social scientific legal pluralism reproduces the idea that law has some transcendental existence and an essential essence. In critiquing this form of pluralism, Manderson argues: 'Legal centralism is like monotheism in that it posits one all-powerful god. [Social scientific] pluralism replaces one god with a pantheon, but there is nothing atheistic about it.'[52] Critical legal pluralism attempts to shifts the focus from a study of plural laws to a study of the plurality of law. Tamanaha states this succinctly when he argues, 'the plurality I refer to involves different phenomena going by the label 'law', whereas [social scientific] legal pluralism usually involves a multiplicity of one basic phenomena, 'law' (as defined).'[53]

The central tenet of critical legal pluralism is a steadfast rejection of the idea that law can be described as possessing an essential character.[54] Critical legal pluralists are dedicated to developing a theory which does not reify law in this way. Law is not envisioned as a structure existing outside of society; rather, it seen as originating in social action. The focus of analysis is shifted from a study of the structural characteristics of law to a study of the ways in which social agents, in their everyday life, engage with law. Law is conceived of as a system of discursive practices which are constructed, defined, understood, and applied *by* social agents *within* social relations. In this way social agents, individually and within groups, participate in a process of jurisgenesis and in the ongoing creation and negotiation of law and legal

[51] Dupret (n 49) 16.
[52] Manderson (n 3) 1060.
[53] Tamanaha, 'A Non-Essentialist Version of Legal Pluralism' (n 11) 315.
[54] Kleinhans and Macdonald (n 3) 37–38.

meaning.[55] From this perspective then, 'any act or utterance that codes social acts according to the binary code of lawful/unlawful may be regarded as part of the legal system, no matter where it was made and no matter who made it.'[56]

CONCLUSION

It cannot be denied that in contemporary western nations the conventional understanding of law is state law, and the state does have the power to offer authoritative and enforceable interpretations of law. Yet, it must always be remembered that this 'official' version is never fixed. As Davies notes:

> Law may 'mean' only one thing at a particular time … that meaning is based upon the interaction of legal convention with diverse social meanings. At any point, an alternative meaning may arise, and feed into the conventional legal meaning. Given this, why should we assume that law is only the formal doctrine, and not the living social environment which gives it force and significance?[57]

Critical legal pluralism argues that law and legal subjects exist in a dialectical relationship of mutual constitution. In other words, although law, experienced as an external structure, will always shape and limit what a social agent can do or expect, this external structure only comes into existence through the interaction of plural agents and, as such, its boundaries and limits constantly shift as agents negotiate and contest them. As Kleinhans and Macdonald argue, critical legal pluralism places the emphasis on 'the constructive capacity of the constructed self.'[58]

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55 Ibid 38.

56 Michael King, 'The Truth About Autopoiesis' (1993) 20 218, 223. This statement was made in relation to Teubner's model of legal pluralism which draws on systems theory and ideas of autopoiesis. While most critical legal pluralists would agree with the primacy of social agents this statement implies, they would reject the idea that law is a autonomous, self-referential system. Most are drawn to Geertz's hermeneutic approach which argues that as all cultural systems/meanings are intimately interwoven, a heuristic, interpretative approach is needed to understand them: See Kleinhans and Macdonald (n 3) 40–44.

57 Davies, 'Exclusion and the Identity of Law' (n 22) 28.

58 Kleinhans and Macdonald (n 3) 38.

In rejecting the monistic models of law employed by conventional legal theories, legal pluralism, particularly in its critical form, provides an anti-essentialist vision of law that emphasises its processual nature. Legal pluralism highlights the fact that law does not have any fixed or essential characteristics and is not solely experienced as an external structure. Law emerges from, and is produced by, the practices of social agents embedded within broader social networks. In this way, it provides a solid conceptual foundation for thinking about law ontologically. It brings into view the diverse sites and sources of law and provides tools for articulating the relationship between them.

4. THE EARTH BENEATH: EVERYDAY LIFE IN SOCIAL THEORY

[W]hatever its other aspects, the everyday has this essential trait: it allows no hold. It escapes.[1]

INTRODUCTION

In the previous chapter I examined the theory of legal pluralism and traced its development within legal theory and socio-legal scholarship. I argued that legal pluralism can provide a valuable framework for reconceptualising law as it challenges essentialist models of law emphasising instead its indeterminate and contingent character. As I indicated, pluralism's critique extends to monism (the idea that law, including its sites and sources, are singular), centralism (the idea that law is synonymous with the state/centralised institutions), positivism (the idea that law has identifiable boundaries and characteristics), and prescriptivism (the idea that law exists outside of people and acts upon them). Key to these critiques and this framework is the acknowledgement that law and legal boundaries are always emergent. Law develops from, and is given form by, relationships, and its boundaries take shape through social and material enactments.

This insight results in a fundamental shift in how law is conceptualised on multiple levels. First and foremost, it means that the search for any transcendent, universal criteria is ultimately a futile task. While at different scales and from different perspectives law may appear at times to be singular, or to sit outside of society, operating above and upon people, this stems from patterns of enactment (social, material, and conceptual) rather than from natural or universal characteristics inherent in law. In drawing attention to this, legal pluralism opens the sites and sources of law. Law is not synonymous with the state. When studying law, we are

[1] Maurice Blanchot, 'Everyday Speech' [1987] (73) *Yale French Studies* 12, 14.

not restricted solely to those centralised institutions, rules, and practices of state courts. Law can be located in a range of institutions and practices with varying levels of formality and verticality. Further, even state law itself (or any ostensibly singular legal system) must be understood as inherently plural, encompassing a multiplicity of practices and perspectives which, although related, can never be completely reduced or unified into a bounded whole. Law leaks. It emerges from the flux of socio-material relationships and always overflows and exceeds any constructed boundary or attempt at conceptual closure. It is important, therefore, to focus on law-as-process, emphasising jurisgenesis (law's becoming) over static structural features or the search for definitional certainty or essence.

If we reconceptualise law in this way, accepting a shift in focus from centralised institutional sites and actors, as well as emphasising law's emergent quality, then the field of legal analysis is opened dramatically. We are confronted with a diverse range of legal worlds and legal realities. As noted previously, these worlds are not discrete bounded containers of law, they are always in a state of becoming and always exist relationally. This allows us to trace the practices and 'storied performativities'[2] (both material and conceptual) which enact and (re)create these legal worlds, as well as enact the relations between them, and between law and broader socio-material processes and assemblages. Remembering, of course, that in conducting this research, we too are participating in this process of enactment and constitution. And, importantly, we can trace the politics that underpin these processes. In particular, the extent to which these enactments of law make space for difference and for generativity (both in legal and non-legal contexts). Do they enact a static, singular vision of law and the world? A *uni*verse in which difference is excluded and elided? Or do they enact a lively *fracti*verse that promotes multiplicity and difference, and that provides pathways for thinking and enacting the world otherwise?

[2] Mario Blaser, 'Ontology and Indigeneity: On the Political Ontology of Heterogeneous Assemblages' (2014) 21(1) *Cultural Geographies* 49, 54.

Over the next two chapters I will build on these arguments and explore some of the ways it might be possible to trace these connections. To do this, I will critically examine and assess a range of socio-legal perspectives which have explored the relationship between law and everyday life. While I have already provided some examples of these types of studies from legal anthropology in the previous chapter, there is also a range of studies that have attempted to explicate the relationship between law and the everyday in a slightly different (albeit related) context. These have built out of the socio-legal 'gap' tradition which, drawing on the ground breaking early legal sociology of Roscoe Pound and the legal-theoretical perspectives encompassed within US legal realism, sought to examine the gap between 'law in the books' and 'law in action', between legal ideals and legal reality.[3] Most prominent amongst these perspectives is legal consciousness studies which has set out to document the ways people understand and participate in legal structures and legal meaning-making. I will argue that as these perspectives emphasise the materiality of law and seek to study law as a social practice, they provide additional support for the reconceptualization of law I am proposing, as well as some valuable insights and data regarding how law is engaged with and enacted outside of traditional legal sites.

In this first chapter, I will provide a theoretical grounding by exploring the concept of 'everyday life'. This has been an important conceptual touchstone in the social sciences, particularly since the middle of the twentieth century, and is a key theoretical tool employed in many of the more recent socio-legal approaches I will be discussing in the next chapter.[4] Although embraced by a broad range of theoretical perspectives and, subsequently, understood and employed in diverse

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[3] For an overview see Jon B Gould and Scott Barclay, 'Mind the Gap: The Place of Gap Studies in Sociolegal Scholarship' (2012) 8(1) *Annual Review of Law and Social Science* 323; Susan S Silbey, 'After Legal Consciousness' (2005) 1(1) *Annual Review of Law and Social Science* 323. I will discuss this literature in more detail in the following chapter.

[4] See, for eg, Austin Sarat and Thomas R Kearns, *Law in Everyday Life* (University of Michigan Press, 1995).

ways, the concept of 'everyday life' is, at its core, used to capture the practices of the quotidian — those routine and habitual behaviours and activities that makeup and shape daily life. Its attention to these micro aspects of life, and to the scope for creative and resistant practices, can provide a valuable framework for understanding how people, as they go about their daily life, participate in the constitution of the world(s) around them. I will begin by briefly outlining some of the theoretical heritage of this framework and will trace some of the different meanings attributed to it and different ways it has been employed. As part of this, I will also introduce and critically assess how this framework has been employed to reassess the nature of resistance. I will argue that the everyday can provide a useful perspective on social life; at least to the extent that it promotes practice, performativity and creativity. However, it is important not to fall into a trap in which the everyday is held out as a special rarefied realm, ontologically distinct from other realms of experience.

EVERYDAY LIFE: INTRODUCTION AND INTELLECTUAL ORIGINS

Over the last thirty years, a raft of literature has emerged within the social sciences and humanities dealing with the 'everyday'.[5] While there is currently a great interest in the everyday within social theory, it is a concept that has a long and diverse intellectual history, and that has been equally celebrated and derided. While some see it as offering 'an escape route from the rarefied realm of abstract ideas and esoteric knowledge',[6] others point to its political and rhetorical baggage[7] and

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5 Good overviews of some of this work can be seen in Ben Highmore, *Ordinary Lives: Studies in the Everyday* (Routledge, 2010); Sarah Pink, *Situating Everyday Life: Practices and Places* (Sage, 2012); Lorraine Sim, 'Theorising The Everyday' (2015) 30(84) *Australian Feminist Studies* 109; Sarah Neal and Karim Murji, 'Sociologies of Everyday Life: Editors' Introduction to the Special Issue' (2015) 49(5) *Sociology* 811; Andy Bennett, *Culture and Everyday Life* (Sage, 2005).

6 Rita Felski, 'Introduction' (2002) 33(4) *New Literary History* 607, 607.

7 See, for eg, Tony Bennett, 'The Invention of the Modern Cultural Fact: Toward a Critique of the Critique of Everyday Life' in Elizabeth Bortolaia Silva and Tony Bennett (eds), *Contemporary Culture and Everyday Life* (Sociology Press, 2004) 21; Mariana Valverde, '"Which Side Are You On?" Uses of the Everyday in Sociolegal Scholarship' (2003) 26(1) *PoLAR* 86; George Marcus, 'Mass Toxic Torts and the End of Everyday Life' in Austin Sarat and Thomas R Kearns (eds), *Law in Everyday Life* (1995) 237.

criticise the way it is often conceptualised as a realm of pure and unmediated experience.[8] To understand, therefore, what is meant by 'the everyday' it is first important to critically examine this broader literature and outline the different ways in which everyday life has been conceptualised, employed, and critiqued.

At its most general level, the everyday is usually invoked to denote the realm of experience and activity constituted by those habitual, repetitious, and ordinary actions that all people engage in daily. As Felski explains, 'it typically encompasses such commonplace activities as eating, sleeping, getting dressed, working, home-making, and routine forms of travel, as well as the often elaborate rituals, taboos, protocols, performances and other symbolic activities that encircle and define them.'[9] In part this current interest in the 'everyday' could be seen as reflective of the ongoing importance and influence of poststructuralist approaches to understanding culture.[10] A concern with those micro aspects of social action appears to sit well with poststructuralism's emphasis upon the diffuse nature of power, as well as its privileging of the concrete and particular over the abstract and universal. However, it would be incorrect to assume that this interest in the everyday is a uniquely contemporary pursuit. Featherstone argues that studies of the everyday should not 'be reduced to an effect of postmodernism…' but rather '…we should regard postmodernism as enhancing tendencies to transform the cultural sphere which gained a strong impetus from the 1960s.'[11] A critical interest in the everyday has long informed political, social and artistic movements including feminism, [12]

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[8] See, for eg, Stephen Crook, 'Minotaurs and Other Monsters: "Everyday Life" in Recent Social Theory' (1998) 32(3) *Sociology* 523.

[9] Rita Felski, 'Introduction' (2002) 33(4) *New Literary History* 607, 607.

[10] Ben Highmore, *Everyday Life and Cultural Theory: An Introduction* (Routledge, 2002) ('*Everyday Life and Cultural Theory: An Introduction*'); Mike Featherstone, 'The Heroic Life and Everyday Life' (1992) 9(1) *Theory Culture Society* 159; Rita Felski, *Doing Time: Feminist Theory and Postmodern Culture* (New York University Press, 2000).

[11] Featherstone (n 10) 161.

[12] For example, the famous feminist catchcry, 'the personal is political', can be traced to the late 1960s and was the title of an essay by Carol Hanisch: Carol Hanisch, 'The Personal Is Political: The Original Feminist Theory Paper at the Author's Web Site' <http://www.carolhanisch.org/CHwritings/PIP.html>.

surrealism,[13] and the Situationists.[14] It has also been a central and important focus in a broad range of sociological and philosophical perspectives. This is particularly evident in those sociological approaches with a strong interest in micro perspectives, including, for example, phenomenology, social constructionism, and ethnomethodology amongst others. Theorists as diverse as Schutz, Goffman, Habermas, Lefebvre, and de Certeau (as well as countless others) have all dealt in detail with the everyday.[15]

The extensive range of literature dealing with the everyday ensures it is a notoriously difficult concept to define with any precision.[16] This difficulty is further compounded by the very nature of the everyday itself. Although these everyday practices may be a prominent and pervasive aspect of life, they always seem to operate in the background. They always appear, as Lefebvre notes, as '"what is left over" after all distinct, superior, specialised structured activities have been singled out …'[17] To bring everyday activities to the foreground and to subject them to sustained analysis and examination, therefore, can potentially result in something of their character being lost. As Blanchot famously argued, 'whatever its other aspects, the everyday has this essential trait: it allows no hold. It escapes.'[18] Despite this, however, the centrality and importance of everyday life is hard to ignore. While everyday practices may seem trivial and insignificant, especially when viewed against the more specialised, and traditionally more celebrated and studied, aspects of human life — art, science, philosophy, or law, to view these practices as

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[13] An introduction to the links between surrealism and 'everyday life' can be found in Michael Sheringham, *Everyday Life: Theories and Practices from Surrealism to the Present* (Oxford University Press, 2006) chs 2-3; Michael Gardiner, *Critiques of Everyday Life* (Routledge, 2000) ch 2.

[14] See generally, Guy Debord, *The Society of the Spectacle* (Zone Books, 1995); Sadie Plant, *The Most Radical Gesture: The Situationist International in a Postmodern Age* (Routledge, 2002).

[15] See generally, Alfred Schutz and Thomas Luckmann, *The Structures of the Life-World* (Northwestern University Press, 1973); Erving Goffman, *The Presentation of Self in Everyday Life* (Penguin Books, 1990); Jürgen Habermas, *The Theory of Communicative Action* (Beacon Press, 1984); Henri Lefebvre, *Critique of Everyday Life*, vol 1 (Verso, 1991); Michel de Certeau, *The Practice of Everyday Life* (University of California Press, 1988).

[16] Featherstone (n 10).

[17] Lefebvre (n 15) 97.

[18] Blanchot (n 1) 14.

inconsequential ignores their great complexity and depth. As Lefebvre also reminds us, '...flowers and trees should not make us forget the earth beneath, which has a secret life and a richness of its own.'[19] Everyday life is far from irrelevant or unimportant. In fact, it is within everyday life that some of the most fundamental features of human experience take place. Capturing this importance, Gardiner maintains that everyday life is

> the crucial medium through which we enter into a transformative praxis with nature, learn about comradeship and love, acquire and develop communicative competence, formulate and realise pragmatically normative conceptions, feel myriad desires, pains and exaltations, and eventually expire.[20]

While everyday life may appear mundane, it is, in fact, deeply complex and encompasses fundamentally important aspects of life and social interaction. In a sense, therefore, it is not solely the relative importance or mundanity of the activity that denotes it as being 'everyday', everyday activities may be ordinary, but they are also, arguably, 'at the centre of human existence, the essence of who we are and our location in the world.'[21] Therefore, it is also the way in which these activities are experienced and perceived. In this way, to speak of everyday life is also to speak of a particular way of experiencing, knowing, and relating to the world. In fact, it is in dealing with this issue — how everyday life is experienced and understood by social agents — that there is the greatest divergence between, and tension within, different theories of the everyday. As I discuss below, for some scholars of the everyday, it is conceptualised in ways which stress its taken-for-granted aspects. These approaches tend to emphasise the pre-reflexive elements of the everyday and give prominence to the role of habit, repetition, and routine in establishing a shared cultural framework that enables and gives meaning to social action. Alternatively, as I will also outline, other approaches have conceptualised everyday life as a deeply diverse and heterogeneous domain, viewing it as a site of creativity, invention, and

[19] Lefebvre (n 15) 87.
[20] Gardiner (n 13) 2.
[21] Pink (n 5) 143.

resistance, even if, somewhat ironically, these emerge from routine and habitual activities.

In the following sections I will briefly outline these different perspectives and provide some examples from each. I will argue that both provide key insights into different aspects of how the quotidian is experienced and can be understood. In fact, many of the differences are attributable to different theoretical and methodological frameworks and priorities rather than an inability to get at the 'truth' of the everyday.

It is important to note, however, both approaches to the everyday still retain a tendency to reify the everyday and treat it as a separate realm of existence that is fundamentally different and opposed to other more 'specialised' or 'technical' realms of experience. Ultimately, whether we focus on the activity itself or the way it is experienced, it is hard to completely separate these 'realms'. 'Everyday' activities may be mundane (and this can be seen in the overview of the type of activities included — eating, sleeping, working et cetera), however, they always take place in a broader socio-structural context. And, on the other side, all 'specialised' activities can be viewed themselves as the culmination of mundane activities. In essence, both perspectives on the everyday still lapse into a range of problematic dualisms: structure v agency; power v resistance; pre-reflexivity v intentionality. In the final section of the chapter, I will examine an alternative approach to understanding and analysing the everyday. I will argue that studies of the everyday remains a critical site for analysis and useful theoretical framework, but only if it is understood through the framework of those materialist perspectives discussed in the first chapter which develop a relational and flat ontology and emphasise becoming over being.

EVERYDAY LIFE AS TAKEN-FOR-GRANTED

Within much sociological literature it is the taken-for-granted nature of the everyday life that makes it distinguishable from other realms of experience. The routine, habitual and repetitive nature of everyday practices ensures that they are always carried out in a state of semiconsciousness and are rarely reflected upon, at least not in any significant or meaningful way. In the phenomenology of Schutz and Luckmann, for example, everyday life (or 'the life-world' as they refer to it) is characterised as the 'pre-scientific … reality which seems self-evident' and the 'province of reality which the wide awake and normal adult simply takes for granted in the attitude of common sense.'[22] This understanding of the everyday as a presuppositional framework is also mirrored in the work of Habermas who constructs a communicative model of the life-word, viewing it as the 'storehouse of unquestioned cultural givens' and a 'culturally transmitted and linguistically organised stock of interpretative patterns'[23] To become fully cognisant, or reflect deeply on a routine or habitual activity, therefore, is to remove it from the everyday. As Habermas asserts, 'as soon as one of its elements is taken out and criticised, made accessible to discussion, that element no longer belongs to the life-world.'[24]

In many ways this taken-for-granted nature of the everyday is a crucially important and fundamental fact of life. Social life is a deeply complex web of activities and interactions. If people were forced to consciously assess and reflect upon every situation they encountered then very little would ever be achieved. As Agnes Heller argues, 'we simply would not be able to survive in the multiplicity of everyday demands and everyday activities if all of them required inventive thinking.'[25] For social life to proceed there are an infinite number of assumptions that must be taken for granted. Everything from our own (and others) existence to the physical

[22] Schutz and Luckmann (n 15) 3–4.

[23] Jürgen Habermas, *The Theory of Communicative Action: Lifeworld and System - a Critique of Functionalist Reason* (Beacon Press, 1987) cited in Crook (n 8) 527.

[24] Jürgen Habermas, *Autonomy and Solidarity: Interviews with Jürgen Habermas* (Verso, 1992) 110 cited in Crook (n 8) 527.

[25] Ágnes Heller, *Everyday Life* (2015) 129.

reality of the world are facts of life rarely reflected upon (at least not as we go about our daily lives). When we leave the house in the morning we take for granted everything from the fact that the ground will not give way, to the fact that our car will be in the driveway and the keys will open the door. It is only when something is amiss (more likely to be that we have the wrong keys, rather than have fallen into a void) that these assumptions are brought to the foreground and questioned.

For Schutz and Luckmann, this process of 'bracketing' out core existential questions is central to human experience and, importantly, is also central to inter-subjectivity. They understand the 'everyday life-world' as a particular orientation to the world marked by a common-sense and shared social framework. Not only is it an orientation to the world that takes for granted our own existence, it also encompasses a range of unquestioned beliefs regarding its *shared* nature: 'I simply take it for granted that other men also exist in this my world, and indeed … [are also] … endowed with a consciousness that is essentially the same as mine. … [M]y life-world is not my private world but, rather, is intersubjective; the fundamental structure of its reality is that it is shared by us.'[26]

Therefore, not only is everyday life crucial in allowing us to function in the world without being completely paralysed by existential angst, it also speaks fundamentally to the *social* nature of life. It isn't simply our existence that must be taken-for-granted, it is also the existence of other people (as well as an assumption that they too take-for-granted our existence). For Schutz and Luckmann everyday life provides the crucial underlying framework which enables sociality as 'only in the world of everyday life can a common, communicative, surrounding world be constituted.'[27]

[26] Schutz and Luckmann (n 15) 4.
[27] Ibid 3.

There is a certain logic to this argument. It is hard to imagine a world in which these core questions needed to be continuously established or were continuously interrogated. Social interaction would be impossible if these base ontological and existential questions were always open to question. All social interactions necessarily begin from some shared framework (or at least an assumption of a shared framework), and this goes beyond simple questions of sharing a common language, or linguistic and semantic meaning. Anthony Giddens, drawing on the work of Schutz and Luckmann, makes this point clearly:

> To answer even the simplest everyday query, or respond to the most cursory remark, demands the bracketing of a potentially almost infinite range of possibilities open to the individual. What makes a given response 'appropriate' or 'acceptable' necessitates a shared — but unproven and unprovable — framework of reality.[28]

For Giddens, this presuppositional framework forms part of what he calls 'ontological security.'[29] Giddens use this phrase to describe the sense of security most people have in their self-identity and the broader social and material world:

> Certain questions — 'Do I really exist?' 'Am I the same person today as I was yesterday?' 'Do other people really exist?' 'Does what I see in front of me continue to be there when I turn my back on it?' — cannot be answered in an indubitable way by rational argument. ... A person who is existentially unsure about whether he or she is several selves, or whether others really exist, or whether what is perceived really exists, may be entirely incapable of inhabiting the same social world as other human beings.[30]

In other words, without some certainty regarding the many taken-for-granted aspects of life, there is a risk of existential anxiety, even crisis, and this requirement for certainty relates both to individual and social aspects of life.

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[28] Anthony Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Stanford University Press, 1991) 36.
[29] Ibid 36–37.
[30] Anthony Giddens, *The Consequences of Modernity* (Polity Press, 1990) 92–93.

An interesting example of the existence of this presuppositional framework and how it is produced and maintained can be seen in the work of ethnomethodologist, Harold Garfinkel. Building on the work of Schutz and Luckman, Garfinkel was deeply interested in the ordinary, common-sense knowledge people relied upon as they went about their daily lives. Going beyond the theoretical and conceptual speculation of Schutz and Luckman, he set out to study these activities in action and developed a range of techniques for empirically documenting these common-sense frameworks and their role in managing social interactions. He did this through a series of tests he designated 'breaching experiments.'[31] He would ask students/research assistants to engage in irrational and unpredictable behaviour to elicit reactions from participants, hoping that this would expose those underlying shared common-sense assumptions which people depended on to enable social interaction. One of his most famous experiments involved the game of 'tic-tac-toe' (or naughts and crosses).[32] The student researchers were instructed to play a game of tic-tac-toe with the research subjects, inviting the subjects to make the first move. After the first move, the student researchers would erase the subject's mark on the playing grid and replace it with their own. The vast majority of participants reacted strongly and negatively, most demanding an explanation from the researcher.[33] For Garfinkel, this experiment provided some indications regarding the shared framework for appropriate action. The rules of the game were never explicitly discussed prior to the experiments, yet the participants clearly held a number of assumptions regarding the correct way to play, assumptions they also assumed that the researcher held.

Garfinkel recognised that there were a number of limitations to this experiment. Most significantly, people's reaction to a game may not necessarily translate to how

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[31] Harold Garfinkel, *Studies in Ethnomethodology* (Prentice Hall, 1967); See also, Sarah Fenstermaker, 'The Turn from "What" to "How": Garfinkel's Reach Beyond Description: Garfinkel, Agnes, Transgender, and Intelligibility' (2016) 39(2) *Symbolic Interaction* 295.

[32] Garfinkel (n 31) 71–72; Harold Garfinkel, 'A Conception of, and Experiments with, "trust" as a Condition of Stable Concerted Actions' in OJ Harvey (ed), *Motivation and Social Interaction, Cognitive Determinants* (Ronald Press Co, 1963) 187, 201–206.

[33] Garfinkel (n 31) 72.

people may respond in 'real life'.[34] There is a level of artificiality to game playing in this context and people understand and accept that there are explicit parameters and rules. Nevertheless, this experiment did show the unease and uncertainty generated when those explicit rules are breached. In order to address some of these limitations, Garfinkel also encouraged his students to conduct experiments in which their behaviour would more directly breach ordinary social interactions. In these experiments, students were 'instructed to engage an acquaintance or a friend in ordinary conversation and, without indicating that what the experimenter was asking was in any way unusual, to insist that the person clarify the sense of his commonplace remarks.'[35] One reported outcome was as follows:

> My friend said to me, 'Hurry or we will be late.' I asked him what did he mean by late and from what point of view did it have reference. There was a look of perplexity and cynicism on his face. 'Why are you asking me such silly questions? Surely I don't have to explain such a statement. What is wrong with you today? Why should I have to stop to analyze such a statement? Everyone understands my statements and you should be no exception!'36

For Garfinkel, these experiments demonstrated the ways in which people actively developed and relied on accepted (but often unstated) assumptions and background knowledge in sense-making and social interaction. And, perhaps even more importantly, that this background knowledge, these presuppositional common-sense frameworks, didn't simply exist, they were constantly being produced and, therefore, liable to be breached and potentially revised. These are ideas that he developed further in his famous case study of Agnes, a transgender woman who was seeking sexual reassignment surgery.[37] Garfinkel used this study to explore the 'managed achievement'[38] of gender, viewing gender as a 'contingent, practical

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[34] Garfinkel (n 32) 207.
[35] Garfinkel (n 31) 42.
[36] Ibid 44.
[37] Ibid 116–185. See also, Kristen Schilt, 'The Importance of Being Agnes' (2016) 39(2) *Symbolic Interaction* 287; Fenstermaker (n 31); Don H Zimmerman, 'They Were All Doing Gender, But They Weren't All Passing: Comment on Rogers' (1992) 6(2) *Gender & Society* 192.
[38] Garfinkel (n 31) 116.

accomplishment.'[39] What was of particular interest for Garfinkel was the practical steps and work Agnes took (both conscious and unconscious), to ensure she would 'pass'. Central to this practical work was its intersubjective nature, how Agnes learned from others how to perform gender in ways which appeared authentic. He notes, '[i]n association with members, Agnes somehow learned … how members furnish for each other evidences of their rights to live as *bona-fide* males and females. She learned from members how [to do gender] "without having to think about it".'[40]

Garfinkel's research provides a number of valuable insights into everyday life and the underlying frameworks which enable social life and social interaction. Giddens may be right, there may be aspects of these frameworks that may be unprovable, especially as they speaks to core existential questions, but many of practices and activities that stem from and rely upon them can be documented. And, in documenting these practices it becomes clear that there is nothing essential or natural about the frameworks' content or boundaries. They are constantly produced and negotiated through use and convention, even if they are at their most effective when, as with Agnes, they enable social interaction 'without having to think about it.' Further, because they are most effective when operating in the background, this entails that social agents are always very attuned to pattern identification as they engage in a reflexive process of meaning-making. For this reason, Garfinkel saw all social agents as engaged in a form of sociology:

> a concern for the nature, production, and recognition of reasonable, realistic, and analysable actions is not the monopoly of philosophers and professional sociologists. Members of a society are concerned as a matter of course and necessarily with these matters both as features and for the socially managed production of their everyday affairs.[41]

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[39] Ibid 181.

[40] Ibid. Interestingly, Garfinkel seemed less reflective on the role of the medical practitioners involved in assessing Agnes' suitability for surgery, or even his own role, in contributing to Agnes' practices of gender (or on their own 'managed achievement' of gender).

[41] Ibid 75.

Garfinkel's acknowledgement of this 'lay sociology' conducted by social agents, shares many resemblances to Blaser's concept of 'storied performativities' which I have discussed in previous chapters. Both try to capture the different ways people make sense of the world through the identification of patterns, and the drawing of connections and/or distinctions. In both accounts, however, these aren't simply descriptive practices, they bring things into existence and participate in the (re)production of reality. As we saw in the context of legal pluralism, different legal practices construct different legal worlds. These are ideas I will return to in more detail in the next chapter.

In revealing the importance of an assumed and shared cultural framework in enabling social action, these understandings of everyday life as taken-for-granted have proven extremely influential. The fundamental role played by habit and routine (underpinned by pre-reflexive existential and ontological frames) in organising and giving meaning to daily life cannot be denied. As Felski has argued, 'the life-world consists of all that must remain invisible in order that we be able to see … If it were possible for us to excavate every one of our assumptions, we would have nothing left to stand on (we would simply fall into the hole that we had dug ourselves).'[42] Nevertheless, aspects of this conception of the everyday have been subject to sustained criticism. Primarily, it is argued that in viewing everyday life as fundamentally shaped by a shared and taken-for-granted framework of reality, the political dimensions are diminished and the existence of (or at least potential for) difference, discontinuity and dissent is understated. For example, Gardiner asserts that within such theoretical perspectives

> the everyday world constitutes an overarching, conformist reality that is transmitted to succeeding generations via the acquisition of language-skills and behavioural norms … [It is] construed as an eternal and unsurpassable feature of the social world … [and] … remains a non-contradictory and essentially unproblematic component of social existence. [43]

[42] Felski (n 6) 614.
[43] Gardiner (n 13) 4–5.

Even in the work of Garfinkel, in which there is a hint that this process is a little more complex and contentious, the focus does ultimately remain on identifying and understanding this shared framework and how it is established and maintained. There was little focus on issues of power, or on the ways in which the everyday may also be a site for potential creative invention or resistance.

EVERYDAY LIFE AS INVENTION AND RESISTANCE

In line with those criticisms of everyday life as taken for granted noted above, there is also a strong tradition of studies of the everyday which conceptualise it as a realm of great heterogeneity, innovation, and potentially resistance. Rather than emphasising the importance of routine, repetition and habit, such perspectives seek to locate and explore fluidity, ambivalence, and creativity within everyday activities.

Maffesoli, for example, is deeply critical of the determinism implied in viewing everyday life as an axiomatic and homogenous realm of experience. This tendency, he argues, stems less from some empirical truth regarding the everyday and more from the modernist propensity to epistemologically privilege uniformity, consistency and singularity over diversity and plurality.[44] In effect, such an approach fails to understand or accommodate the 'polydimensionality of lived experience.'[45] Further, it also reduces the role of agency, meaning that 'man as master and agent of his own history gives way to man as the being who "is acted upon" or lost in the mass.'[46] For Maffesoli the everyday has a Dionysian quality.[47] It is a realm of playfulness, spontaneity and ultimately great heterogeneity and cannot be

[44] Michel Maffesoli, 'The Sociology of Everyday Life (Epistemological Elements)' (1989) 37(1) *Current Sociology* 1; Michel Maffesoli, 'Everyday Tragedy and Creation' (2004) 18(2) *Cultural Studies* 201.
[45] Maffesoli, 'The Sociology of Everyday Life (Epistemological Elements)' (n 44) 3.
[46] Ibid 2.
[47] Ibid 1.

encapsulated within a model which emphasises its routine and habitual characteristics.

The work of Michel de Certeau also sits within this tradition which emphasises the role of innovation and invention in everyday life. For de Certeau everyday life is a realm of experience deeply shaped by broader structural forces and relationships of power. In studying everyday practices he is not solely interested in their form and content, but rather in their relationship to, and interaction with these macro-cultural structures. While a focus on the relationship between power and everyday life has long been evident in many critical approaches to the everyday, it is usually understood through the framework of false consciousness. Lefebvre, for example, views everyday life as the primary site of alienation and hegemony. In Lefebvre's theory, everyday activities are indelibly marked by the mechanisms and ideology of capitalism. He argues that,

> [m]en have no knowledge of their own lives ... they see them and act them via ideological themes and ethical values. In particular, they have an inadequate knowledge of their needs and their own fundamental attitudes; they express them badly: they delude themselves about their needs and aspirations.'[48]

De Certeau rejects the determinism of such models. While he acknowledges that everyday life is a realm in which dominant messages are 'consumed', he strongly contends that this is rarely done in a passive or uncritical way. For de Certeau, everyday life is a site of invention and resistance in which people appropriate and use the cultural products and messages produced by systems of power. This occurs 'not by rejecting or altering them, but by using them with respect to ends and references foreign to the system they had no choice but to accept.'[49] Activities such as foot dragging, idleness, and even taking shortcuts while walking in the city are in de Certeau's model evidence that everyday life is constituted by tactics of resistance.

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[48] Lefebvre (n 15) 91.
[49] de Certeau (n 15) xiv.

In effect, everyday life is composed of 'clever tricks of the "weak" within the order established by the 'strong', an art of putting one over on the adversary on his own turf…'[50]

The understanding of everyday life as evidenced in the work of Maffesoli and de Certeau has been extremely influential. Much contemporary literature dealing with the everyday have adopted similar argument and privileged its innovative, creative, and resistant aspects.[51] Its influence has been particularly prominent in the field of resistance studies where it has been used to study the potential for, and ways in which, people respond to and subvert structures of power in their everyday lives. This growing interest has been led, in part, by a radical reinterpretation of what forms of conduct amount to resistance and, subsequently, at what level of society resistance can be located. Employing elements of poststructuralism (particularly Foucauldian concepts of power) and nuanced and culturally infused theories of hegemony and social reproduction, many theorists have turned their attention towards these 'everyday' forms of resistance. That is, they have attempted to understand the ways in which marginalised groups and people, on a daily level, rely on small scale, potentially uncoordinated, and often symbolic resistant practices to contest dominant power structures. This focus on the everyday, and, in particular, the space for creativity and innovation in the everyday, has allowed researchers to identify a far broader range of resistant activities. Resistance has been identified in behaviour that ranges from the overt and conscious, to the covert and unintentional. It has been located in conduct as varied as peasant rebellions;[52]

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[50] Ibid 40.

[51] See, for eg, Jocelyn A Hollander and Rachel L Einwohner, 'Conceptualizing Resistance' (2004) 19(4) *Sociological Forum* 533; Chris Bobel and Samantha Kwan (eds), *Embodied Resistance: Challenging the Norms, Breaking the Rules* (Vanderbilt University Press, 2011); Anna Johansson and Stellan Vinthagen, 'Dimensions of Everyday Resistance: The Palestinian *Sumūd*' (2015) 8(1) *Journal of Political Power* 109; Kevin Dunn, *Global Punk: Resistance and Rebellion in Everyday Life* (Bloomsbury, 2016); Kimberly Creasap, 'Social Movement Scenes: Place-Based Politics and Everyday Resistance' (2012) 6(2) *Sociology Compass* 182.

[52] James C Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* (Oxford University Press, 1990).

watching of soap-operas;[53] haircuts and style;[54] day-dreaming, humour, cynicism, and obduracy at work;[55] and vegetarianism.[56]

This scholarship on everyday forms of resistance has stemmed from a radical reassessment of power. Over the last half of the twentieth century a range of theories emerged which fundamentally altered understandings of how power and domination operate in society. Some key examples include Foucault's understanding of power as a productive force that operates at all levels of society,[57] the development of culturally infused notions of hegemony,[58] and Bourdieu's analysis of doxa and social reproduction.[59] While there is much to differentiate these approaches, they do share some common themes. Principally, they all emphasise the diffuse nature of power and its operation in cultural and symbolic spheres. That is, they bring to light the role of power, in all of its diverse manifestations, in shaping and constituting, at a basic level, people's sense of self and understanding of the world around them. Foucault makes this point when he asserts:

> [r]ather than ask ourselves how the sovereign appears to us in his lofty isolation, we should try to discover how it is that subjects are gradually, progressively, really, and materially constituted through a multiplicity of organisms, forces, energies, materials, desires,

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53 Mary Ellen Brown, *Soap Opera and Women's Talk: The Pleasure of Resistance* (Sage, 1994).

54 Rose Weitz, 'Women and Their Hair: Seeking Power through Resistance and Accommodation' (2001) 15(5) *Gender & Society* 667.

55 Pushkala Prasad and Anshuman Prasad, 'Stretching the Iron Cage: The Constitution and Implications of Routine Workplace Resistance' (2000) 11(4) *Organization Science* 387; Peter Fleming and Graham Sewell, 'Looking for the Good Soldier, Švejk: Alternative Modalities of Resistance in the Contemporary Workplace' (2002) 36(4) *Sociology* 857; Torin Monahan and Jill A Fisher, 'Surveillance Impediments: Recognizing Obduracy with the Deployment of Hospital Information Systems' (2011) 9(1/2) *Surveillance & Society* 1.

56 Samantha Kwan and Louise Marie Roth, 'The Everyday Resistance of Vegetarianism' in Chris Bobel and Samantha Kwan (eds), *Embodied Resistance: Challenging the Norms, Breaking the Rules* (Vanderbilt University Press, 2011) 186.

57 See Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Vintage Books, 1977) ('*Discipline and Punish*'); Michel Foucault, *The History of Sexuality: Vol 1 An Introduction* (Penguin, 1990) ('*The History of Sexuality*').

58 See Raymond Williams, *Marxism and Literature* (Oxford University Press, 1977) 108–115; Jean Comaroff and John L Comaroff, *Of Revelation and Revolution: Christianity, Colonialism, and Consciousness in South Africa* (University of Chicago Press, 1991).

59 See Pierre Bourdieu, *In Other Words: Essays Towards a Reflexive Sociology* (Stanford University Press, 1990).

> thoughts etc. We should try to grasp subjection in its material instance as a constitution of subjects. This would be the exact opposite of Hobbes' project in Leviathan.[60]

Importantly, however, while locating power and structures of domination at all levels of society, these theories also emphasised that such structures are never complete, are inherently unstable, and are constantly contested and resisted. As Williams states, every hegemonic order 'has continually to be renewed, recreated, defended, and modified. It is also continually resisted, limited, altered, and challenged by pressures not all its own.'[61]

Relying on this relational understanding of power and hegemony, theorists began to criticise traditional approaches to resistance. These traditional approaches, heavily influenced by Marxism, sought to locate and analyse resistance evidenced through organised, mass movements of subordinate groups exhibiting clearly defined goals and targets.[62] This approach was criticised for being excessively narrow and not fully comprehending the multiple, covert, and often private ways in which power relations are often challenged in everyday life. Locating resistance only in large-scale, coordinated protests unnecessarily limits an understanding of how power relations operate, as well as in what contexts they are contested. As El-Kohli has argued 'structures of dominance … [are not] independent and monolithic entities that are challenged only during dramatic instances of revolt, but rather … [are] a web of contradictory processes that are continuously being renegotiated and contested.'[63] It was argued that if the relationship between power, resistance, and political action is to be fully understood, it is important to study the everyday processes of contestation through which subordinate agents and groups, while

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[60] Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977* (Pantheon Books, 1980) 97.

[61] Williams (n 58) 112.

[62] For an overview see Heba Aziz El-Kholy, *Defiance and Compliance: Negotiating Gender in Low-Income Cairo* (Berghan Books, 2002) 114; Joel F Handler et al, 'Postmodernism, Protest, and the New Social Movements - Comment/Reply' (1992) 26(4) *Law & Society Review* 697, 710.

[63] El-Kholy (n 62) 15.

perhaps not invoking widespread rebellion, nonetheless attempt to resist and undermine dominant power structures. Resistance to power doesn't necessarily occur in uniform or singular ways or sites, as Foucault notes, 'there is no single locus of great Refusal, no soul of revolt, or pure law of the revolutionary. Instead there is a plurality of resistances…'[64]

An early example of this type of focus on everyday acts of resistance can been seen in James Scott's seminal *Weapons of the Weak*.[65] In this study, Scott set out to document the role of peasant rebellions, but noted that overt rebellions were actually very uncommon, and did not usually occur when and where expected. Rather than attempting to document organised forms of resistance, he turned to look at less visible, everyday forms of resistance. He noted the existence of such resistant practices as 'foot-dragging, dissimulation, desertion, false compliance, pilfering, feigned ignorance, slander, arson, [and] sabotage…'.[66] Importantly, these acts, while clearly resistant, required little coordination and planning, relying instead on informal networks and those implicit understandings and frameworks which underpin and enable everyday social interactions. In effect, these actions were often directed at undermining and contesting 'public transcripts' (publicly acknowledged prescribed roles and languages).[67] Through the clever use of things like rumour, gossip, euphemisms, and even storytelling, people were able to enact and share counter-narratives and develop counter-transcripts, undermining structures of power without the risk of sanction or violence which may result from direct confrontations. Unlike the taken-for-granted approach to the everyday which emphasises the maintenance of shared presuppositional frameworks, this is a vision of the everyday in which people demonstrate a real capacity for inventive and resistant practices, in which they are continuously aware of, engaged with, and will potentially contest the underlying shared framework

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64 Foucault, *The History of Sexuality* (n 57) 95–96.
65 Scott (n 52).
66 Ibid xvi.
67 Ibid 284–303.

The popularity of this understanding of the everyday as a site for innovation and resistance cannot be understated. In fact, Brown has cynically remarked, '[i]f there is any hegemony today, it is the theoretical hegemony of resistance.'[68] Part of the popularity of this approach, however, stems from the numerous theoretical advantages it can provide. Primarily, it reveals that the everyday is a contested and contentious site, power relations may circulate within the everyday, but they are never fixed or stable, and small-scale acts of defiance are able, and often do, present challenges to structures of domination.

REASSESSING RESISTANCE: SOME RISKS AND LIMITATIONS

Despite the popularity of this approach to the everyday, it has also been subject to a number of important criticisms, particularly in relation to the way it understands and employs the concept of resistance. One of the primary criticisms is the failure for a definitional consensus to emerge as to how and when the concept should be used. What amounts to an everyday act of resistance? What exact criteria make it 'everyday'? What exact criteria make it resistance? It is clear in the literature that this idea of everyday life as a space of resistance has been understood, and subsequently applied, in a variety of quite distinct ways. As Weitz argues, 'the term resistance remains loosely defined, allowing some scholars to see it almost everywhere and others almost nowhere.'[69] In an attempt to assess how the term was being employed, Hollander and Einwohner conducted a wide ranging survey of literature dealing with the concept.[70] The only common feature they were able to identify was that resistance involved some sort of positive action (whether verbal, behavioural or cognitive) that was oppositional in character.[71] Beyond that, there was little consensus with different analyses highlighting and emphasising different

[68] Michael F Brown, 'On Resisting Resistance' (1996) 98(4) *American Anthropologist* 729, 729.
[69] Weitz (n 54) 669.
[70] Hollander and Einwohner (n 51).
[71] Ibid 538.

characteristics ranging from the overt to the covert, the intentional to the unconscious.

While the failure for a clear consensus to arise may cause difficulties, it is not necessarily fatal. In fact, this may be a product of the very nature of the everyday. Perhaps this reflects, at least in part, Blanchot's argument that the everyday 'always escapes'. The nature of the everyday, including the activities it encompasses and the ways in which it is experienced, makes it extremely difficult to pin down with any certainty. Any attempt to find some 'pure' form of easily definable everyday act of resistance risks limiting the concept and blinding theorists to multiplicity of ways people, in their everyday lives, negotiate and challenge the conditions of their domination. This would seem to undermine the very reasons theorists turned to this more fluid concept of the everyday in the first place.[72]

The second major criticism is that much of the literature often lapses into a simplistic and romanticised vision of everyday as a space for creativity and resistance.[73] That is, it unreflectively celebrates everyday forms of resistance and the ability of subordinate groups, through ordinary everyday activities, to challenge dominant structures. In effect, the everyday becomes a space of agency and freedom, ontologically distinct from the macro-world of power, domination, and structure. The tendency to oversimplify the interaction between the micro world of the everyday and the macro world of structures and power manifests in a number of related ways. First, in an assumption that in the everyday, people are able to exercise a large degree of autonomy and political consciousness. Secondly, it arises through a reliance on a dichotomous model in which resistance/resistor and

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[72] Pink (n 5); Highmore (n 10).

[73] Lila Abu-Lughod, 'The Romance of Resistance: Tracing Transformations of Power Through Bedouin Women' (1990) 17(1) *American Ethnologist* 41; Julian Mcallister Groves and Kimberly A Chang, 'Romancing Resistance and Resisting Romance: Ethnography and the Construction of Power in the Filipina Domestic Worker Community in Hong Kong' [2016] *Journal of Contemporary Ethnography* 235.

domination/dominator are clearly differentiated and the deep interdependence of these concepts in social practice is understated. Finally, it can emerge from a failure to reflect upon the immense rhetorical and social power of the term resistance and, subsequently, the inherent political implication that arise when an activity is designated as 'resistance.'

At the most basic level, it is important to recognise that everyday acts, even if resistant, are not necessarily politically just or inherently good. As Merry has pointed out many acts which could be construed as everyday forms of resistance (for example theft or tax evasion) are potentially damaging to both the community and the resistor.[74] Further, the everyday is not the sole domain of subordinate groups. Everyday acts of resistance could arise and be directed against minority groups as much as they are directed against dominant classes in a community.[75] In addition, it is crucial that the resistor is not idealistically instilled with a level of autonomy and political consciousness that is unlikely to exist. Bosworth and Carrabine have recognised that 'all too frequently … [resistance] is characterised as a privileged quality of the human spirit that manages to evade relations of domination.'[76]

By treating resistance as inherently good and attributing resistors with high levels of autonomy, theorists risk understating the deep interdependence between power and resistance. This results in the employment of a dichotomous model in which power and resistance are treated as separate or distinct phenomena. Resistance does not (and cannot) emerge spontaneously from an autonomous, power-free space. Rather, it arises from, and is dependent upon, the broad range of power relations which structure society. Any act of resistance, therefore, always remains

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74 Sally Engle Merry, 'Resistance and the Cultural Power of Law' (1995) 29(1) *Law & Society Review* 11, 24–25.

75 Hollander and Einwohner (n 51) 536.

76 Mary Bosworth and Eamonn Carrabine, 'Reassessing Resistance: Race, Gender and Sexuality in Prison' (2001) 3(4) *Punishment & Society* 501, 506.

embedded in a complex relationship of domination and subordination.[77] This aspect of the operation of resistance gives rise to two related considerations. Firstly, it can never be assumed that resistance, even if successful, will result in freedom from domination, or for that matter, even be in the social or political interests of those resisting. In fact, as resistance always takes place within broader fields of power, there is every chance that it may actually lead to new forms of domination and subjection or reinforce existing ones. As El-Kholy argues 'the ability of subordinate groups to break through the walls of hegemony may be constrained by the very nature of existing power structures; everyday acts of resistance take place in the field of power and thus are themselves affected by the nature of hegemony.'[78]

Secondly, the interdependence of power and resistance means that it is often extremely difficult to clearly identify and differentiate a resistor and an oppressor. As power operates at all levels of society, positions of domination and subordination must be recognised as relational and contextually-based. It is crucial not to treat dominant or subordinate groups/agents as fixed, unified, or stable. As Ortner points out in relation to group-based resistance, 'there is never a single, unitary, subordinate, if only in the simple sense that subaltern groups are internally divided by age, gender, status…'[79] Additionally, individual agents themselves occupy a range of social positions and whilst a poor, working class man may be in a position of subordination in relation to his bosses at work, at home he may wield power and domination over his family. Accordingly, it must always be remembered that resistance operates in complicated, ambiguous, and often contradictory ways. An agent or group may resist certain cultural practices or structures of power in one arena, whilst simultaneously drawing on the same structures to reinforce or

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77 Groves and Chang (n 73) 237; Gwyn Williams, 'Cultivating Autonomy: Power, Resistance and the French Alterglobalization Movement' (2008) 28(1) *Critique of Anthropology* 63.

78 El-Kholy (n 62) 17. In fact, a key criticism of everyday forms of resistance is that such conduct operates more as a mechanism for coping with subordination rather than as a tool of political revolution. See Handler et al (n 62) 727.

79 Sherry B Ortner, 'Resistance and the Problem of Ethnographic Refusal' (1995) 37(1) *Comparative Studies in Society and History* 173, 175.

legitimise their domination in another.[80] If theorists are to move past simplified models of resistance then it is necessary for them to appreciate the relational nature of power and subordination and the broader social context in which resistant practices takes place.

Finally, resistance remains an extremely value-laden term, and this gives it much rhetorical power. In many ways, to designate a certain practice as 'resistance' infuses both the act and those engaged in the act with a level of political or social legitimacy. This act of designation may stem from either the resistor or the observer and it is crucial that the power inherent in this act is appreciated. Kellet's study of rapists describes an instance where a rapist draws on the concept of resistance to cast himself as a victim. In contemplating this Kellet asks '...has this rapist learned (perhaps unconsciously), like a sort of rhetorically savvy terrorist, that to present rape as an act of resistance — an attempt to assert voice in the face of his own experience of devalued otherness — is probably the best way to have the act accepted as defensible and even reasonable?'[81] Kellet's study reveals the need to carefully reflect upon and assess the way the term 'resistance' is often deployed after the fact as a rhetorical weapon to provide justifications for certain conduct.

This reliance on the rhetorical power of resistance does not solely lie with those being studied. It can also be strongly evident in the writing of those conducting the studies. Choosing to identify certain actions as resistance is a deeply political action. Social interaction is extremely complex and there may be numerous ways or frames available through which certain conduct can be analysed and understood. The decision to designate (or not to designate) certain conduct as resistance is, therefore, inherently political. It can provide both the writer and their work with a high level of moral legitimacy and worth. In reflecting on his own studies, Brown

[80] See generally Abu-Lughod (n 73); Ortner (n 79).

[81] Peter Kellet, 'Acts of Power Control and Resistance: Narrative accounts of convicted rapists' cited in Hollander and Einwohner (n 51) 549.

sees elements of this in his own work. He states that through his study of women working as spiritual mediums he was able to 'demonstrate [a] familiarity with, and sympathy toward woman-centred approaches to social phenomena while implicitly registering my opposition to the hegemonic forces … My subjects are … magically transformed into heroic soldiers in the antihegemonic struggle, and I, by extension, into their worthy scribe.'[82]

The inherently political nature of studies of everyday resistance is probably impossible to overcome. Nevertheless, this does not mean that such studies are not of value or cannot contribute to an understanding of how power, domination, and resistance operate in and through daily life. However, if such studies are to achieve this, they must continually reflect upon and recognise the existence of this rhetorical power of both 'the everyday' and of 'resistance' in both the actions of those under study and in their own work.

CRITIQUES OF THE EVERYDAY: EVERYDAY LIFE IN A RELATIONAL ONTOLOGY

It is clear, even in the brief overview given above, that everyday life is a deeply complex and at times contradictory concept. It displays characteristics of routine, habit and repetition, as well as dynamism, ambivalence, and innovation. It is hard to deny the importance of taken-for-granted assumptions in enabling social action, but at the same time, it is clear that many everyday activities display elements of invention and innovation and the everyday is a site where resistance can be enacted. Reconciling these complex tensions is extremely difficult and this has led to numerous criticisms of the concept. Perhaps the strongest criticism stems from a tendency to conceptualise a stark division between everyday life and other realms of experience. Crook argues that most theoretical approaches 'locate the everyday on

[82] Brown (n 68) 732.

one side of a distinction between two distinct modalities of order and practice … [and] … privilege the "everyday" modality, aligning it with most basic defining principle of social and cultural life.'[83]

Such a division is clear in all the approaches discussed above, and in practice rarely stands up to sustained analysis. For the theorists of the life-world, for example, everyday life is distinguishable due to its taken-for-granted nature. It is constituted by a presuppositional framework of reality which is rarely reflected upon, at least not in any significant way. However, while many aspects of everyday life may indeed operate and be experienced in this way, this is not necessarily unique to everyday activities. As Crook reveals, a reliance on assumptions and presuppositional frameworks can be evidenced in many regions of social life including medical examinations, scientific investigations, and court hearings.[84] Such a process, therefore, is not an exceptional or distinctive characteristic of everyday life but in fact can be evidenced, at least to some degree, in nearly all social activities. Crucially, it is also somewhat paradoxical that everyday life, often understood as a realm that is in opposition to more specialised activities, is conceptualised and understood through the deeply complex and abstract theoretical models of social theorists.[85]

This tendency to conceptually separate everyday life from specialised activities is also apparent in those approaches which stress its innovative characteristics and view it as a realm of great diversity, plurality and resistance. Although an interest in the relationship between broader social structures and the everyday is present in much of this work, everyday life is still set against and privileged over these structures. On one side, there is 'everyday life' — innovative, creative, and heterogeneous, on the other side the 'system' — abstract, totalising, formal and

[83] Crook (n 8) 529–530.
[84] Ibid 528.
[85] Pink (n 5).

static. Here this distinction perhaps owes much to the great rhetorical power of being able to position oneself on the side of 'life' as against the 'system' rather than on any real distinction between how these different realms of activity are experienced or understood.[86] As Marcus notes, in such studies,

> everyday life takes on a certain virtue and politics and finds hope in the quotidian against fears of a totally administered and commodified world. In everyday life the most abstractly conceived issues can seemingly be resolved in concreteness and the virtues of simple, unreflected upon existence.[87]

In practice it is almost impossible to draw any distinction between everyday knowledges and practices and more specialised knowledges and practices such as law. They are so deeply entangled and implicated within each other that any attempt to demarcate a boundary quickly falls down. Everyday life is fundamentally shaped by, and filled with, the language, images, and ideas of specialised practices. As Felski notes, '[t]he air we breathe is thick with the thoughts of others; daily life always comes to us from elsewhere, whether the stock beliefs … of past generations or the film sets of Hollywood dream factories.'[88] Of course, this does not necessarily occur in a uniform way, this is always a process which is open to interpretation resulting in great diversity. Philosophy, science, law, and religion are all cultural practices which are deeply embedded within everyday life. They provide the context and environment as well as much of the content of everyday activities. Such specialist practices, however, are themselves, also deeply dependent on everyday life. They are formed and constructed through mundane activity and work, and it is in the nominal 'everyday' that they are invoked, employed, challenged, and ultimately given meaning. Further, they too often embrace the language and images of the 'everyday.' It is also important to remember that within everyday life specialised practices are always intermingled, mediating both their form and

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[86] Valverde makes this argument strongly: See Valverde (n 7).
[87] Marcus (n 7) 244.
[88] Felski (n 6) 616.

influence. To claim, therefore, that everyday life can be understood in opposition to or against more specialised practices is to ignore their complex interdependence.

While such criticisms of the everyday are undoubtedly valid, this does not necessarily mean, as some have argued, that the concept should be rejected altogether. The quotidian aspects of life are, as noted throughout this chapter, a fundamental and critical part of our lives and our social interactions. The everyday can be a useful site of study but only if this tendency to conceptualise it in opposition to other realms of experience is discarded. Rather than attempting to seek out and describe the unique and distinct characteristics of the everyday, studies should trace the deep interdependence between, and mutual reliance of, everyday activities and broader social processes. As Frow argues, the everyday is far from redundant as it 'defines a transformational process by which macrostructural categories are ongoingly translated into manageable structures of sense at human scale.'[89] Studying everyday life, therefore, can provide key insights into the ways in which structural forces (such as law), and the relationships of power which underpin them, are understood, reinforced and even challenged in and through those mundane daily activities that play such a pervasive role in social life. And also, it can help us study how those structural forces and institutions are themselves formed and perpetuated.

One way to better capture this deep interdependence and entanglement is to embrace those materialist and non-representationalist perspectives discussed in the first chapter. A key reason much of the scholarship on the everyday lapses into treating it as a rarefied and unmediated realm of experience is because they rely on a series of problematic dualisms, most importantly, that between structure and

[89] John Frow, '"Never draw to an inside straight": On everyday knowledge' (2002) 33(4) *New Literary History* 623, 633.

agency and between the micro and the macro.[90] On one hand you have approaches which privilege structure, emphasising the deterministic role of norms and systems while eliding the opportunities for creativity, possibility, and change. On the other hand you have approaches which emphasise human agency, reason, and intentionality, ignoring, or at least downplaying, the socio-material context of interactions. Even those approaches which attempt to sideline the structure/agency debate, such as Gidden's structuration theory[91] or Bourdieu's theory of practice,[92] still reproduce the distinction, even if they provide a more relational understanding. Structure and agency still remain, on some level, distinct domains, even if both Giddens and Bourdieu illustrate and explain the pathway between them in more complex and nuanced ways.

A materialist understanding of this process, however, collapses this distinction. Its development of a relational and flat ontology, and commitment to immanence and becoming, brings everyday practices and broader structures into direct relation, emphasising their entanglement and their joint role in the production and unfolding of life. There are a few key aspects to these perspectives which enable us to rethink the everyday. First, they view the material world as relational and in constant state of emergence and flux, rather than fixed and stable.[93] Second, they make no ontological distinction between nature and culture (rejecting as well the distinction between natural and social sciences), linking together both nominally 'natural' and 'social' elements — the physical world, biological processes, social interaction, concepts, feelings etc — to the production of life (these categories of

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[90] Nick J Fox and Pam Alldred, 'Social Structures, Power and Resistance in Monist Sociology: (New) Materialist Insights' [2017] *Journal of Sociology* 1; Maria Hynes, 'Reconceptualizing Resistance: Sociology and the Affective Dimension of Resistance' (2013) 64(4) *The British Journal of Sociology* 559.

[91] Anthony Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (University of California Press, 1984).

[92] Pierre Bourdieu, *The Logic of Practice* (Stanford University Press, 1990).

[93] Diana Coole and Samantha Frost, 'Introducing the New Materialisms' in Diana Coole and Samantha Frost (eds), *New Materialisms: Ontology, Agency, and Politics* (Duke University Press, 2010) 1, 29; Tim Ingold, *Being Alive: Essays on Movement, Knowledge and Description* (Routledge, 2011) 130; Karen Barad, *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter and Meaning* (Duke University Press, 2007).

the 'natural' and the 'social' themselves a production).[94] And, as part of this, they make no ontological distinction between social agents and social structures. Social structures are themselves enacted through concrete practices, even if at some scales of analysis they already have the appearance of solidity, of an already sedimented (or perhaps, more accurately sediment-ing) structure. Finally, and in a related way, this relational unfolding of life is not reliant on human agency or human action. Instead, all matter has agency, all matter possesses the capacity 'to affect and be affected.'[95] This extends beyond humans, incorporating non-human natural entities (animals, microbes, rocks et cetera), as well as symbolic or cultural representations, and socio-structural concepts/categories such as class or gender, all of which have affective capacities. And, importantly, this capacity is not a trait or characteristic held by entities, but a product of their intra-active relations within broader networks.[96] Within this understanding, everyday practices are no longer separate or ontological distinct. They exist in and are produced by (as well as participating in the production of) a complex and relational network (or assemblage,[97] or meshwork[98]) that includes a broad range of social, biological and physical entities. Moore's study of the 'everyday life' of horseshoe crabs captures aspects of this complex network, she notes '[t]he crabs, humans, cars, sand, eggs, water, wind, live

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94 Bruno Latour, *Reassembling the Social: An Introduction to Actor-Network-Theory* (Oxford University Press, 2005) 13; Rick Dolphijn and Iris van der Tuin, *New Materialism: Interviews & Cartographies* (Open Humanities Press, 2012) 97; Rosi Braidotti, *The Posthuman* (Polity, 2013) 171.

95 Gilles Deleuze and Félix Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia* (University of Minnesota Press, 1987) 261. See also, Jane Bennett, *Vibrant Matter: A Political Ecology of Things* (Duke University Press Books, 2010); Coole and Frost (n 93) 7.

96 Barad makes an important distinction between interaction and intra-action. While interaction assumes the existence of independent entities coming into relation, intra-action 'recognises that distinct agencies does not precede, but rather emerge through, their intra-action.' She goes on to state that it 'is important to note that the "distinct" agencies are only distinct in a relational, not an absolute, sense, that is, *agencies are only distinct in relation to their mutual entanglement; they don't exist as individual elements*.' Barad (n 93) 33.

97 To use the Deleuze-Guattarian phrase: see Deleuze and Guattari (n 95). In an interview in 1980, Deleuze describes an assemblage in the following way: 'In assemblages you will find states of things, bodies, various combinations of bodies, hodgepodges; but you also find utterances, modes of expression, and whole regimes of signs'. *Two Regimes of Madness: Texts and Interviews 1975-1995* (Columbia University Press, 2006) 177.

98 Ingold (n 93) 63.

in a mesh intraacting with ecologists, politicians, pharmaceutical companies, and geomorphology.'[99]

While the everyday may not be an ontologically distinct realm of experience, to the extent that it encapsulates those routine, habitual, and everyday practices that make up so much of life, it still remains a useful analytical frame. It can allow us to trace the ways those practices participate in the ongoing creation of worlds, as long as we are attuned to the complex and relational way this occurs. It can make visible the processes of ontogenesis[100] through which bodies (human, social, physical, conceptual) are 'actualised and individuated through sets of diverse practical relations.'[101] This can include tracing the way structures and forces of power and resistance flow these relationships, but, importantly, these too must be understood in more flexible and contingent ways. Everyday acts of resistance must be understood as practices that are diverse and plural and are entangled with power(s) in contingent and heterogenous ways.[102]

One way to better conceptualise this contingency of everyday practices, especially as they potentially speak to creativity and resistance, may be through Hallam and Ingold's distinction between creative practices as improvisation and creative practices as innovation.[103] In exploring the concept of creativity, they interrogate the common distinction between innovation and improvisation. While 'innovation' is usually used to denote the creation of something new and the breaking of convention, 'improvisation' usually marks a making-do, a creative process, albeit

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99 Lisa Jean Moore, 'A Day at the Beach: Rising Sea Levels, Horseshoe Crabs, and Traffic Jams' (2015) 49(5) *Sociology* 886, 899.

100 Ingold (n 93) 126.

101 Ben Anderson and Paul Harrison, 'The Promise of Non-Representational Theories' in Ben Anderson and Paul Harrison (eds), *Taking-Place: Non-Representational Theories and Geography* (Routledge, 2010) 1, 8.

102 Anna Johansson and Stellan Vinthagen, 'Dimensions of Everyday Resistance: An Analytical Framework' (2016) 42(3) *Critical Sociology* 417, 418.

103 Elizabeth Hallam and Tim Ingold, 'Creativity and Cultural Improvisation: An Introduction' in Elizabeth Hallam and Tim Ingold (eds), *Creativity and Cultural Improvisation* (Berg, 2007) 1.

one which 'works within established convention.'[104] They argue, however, that this is an understanding of creative processes which always reads actions and practices backwards (from outcome to origins), and in so doing carves practices out of the world, making their processual and temporal characteristics invisible. It is a reading that

> finds in creativity a power not so much of adjustment and response to the conditions of a world-in-formation as of liberation from the constraints of a world that is already made. It ... celebrates the freedom of human imagination ... to transcend the determinations of both nature and society. In this reading creativity is on the side not only of innovation against convention, but also of the exceptional individual against the collectively, the present moment against the weight of the past, and of mind ... against inert matter.[105]

For Hallam and Ingold, creativity is better understood as improvisation. This encourages a forward reading that both reveals a 'world that is crescent rather than [already] created',[106] and brings to the fore the processes and practices that continuously produce that world. Creativity, understood in this way, is a performative practice that is generative (in that it gives rise to form rather than seeing it as already existing), relational (in that it emphasises people's embeddedness in socio-material relationships rather than sets them apart and against the worlds which they inhabit), and temporal (in that it is a part of the constantly unfolding of life rather than existing in a present disconnected from its past).[107]

As the literature on the everyday has revealed, quotidian social practices can exhibit great creativity, resourcefulness and even resistance. They can disrupt, in meaningful ways, processes and flows of power that seek to limit and control people. However, it may be useful to conceptualise these creative practices as forms

[104] Ibid 2.
[105] Ibid 3.
[106] Ibid.
[107] Ibid.

of *improvisation* rather than *innovation*. In doing this, we are able to avoid many of those issues and questions that have weighed down resistance studies — their effectiveness, their relationship to broader fields of power, and the relational status of resistor/oppressor. In other words, rather than 'reading these practices backwards' and attempting to discern whether they amount to resistance or not or whether they were successful or not, we can read them forward. We can position the practices more fully in the networks and relationships from which they emerge, paying attention to their temporal[108] and processual unfolding, to their generativity, and ultimately, to the (potentially new) opportunities and relations they produce.

An application of this understanding of the everyday, one which better encapsulates these neo-materialist insights, can be seen in the work of Davina Cooper. For example, in her study of everyday utopias she traces the enactment of utopian ideas and models in the everyday.[109] Importantly, though this is situated in a concept of the everyday that is more nuanced. She describes the everyday as follows: 'As the tissue of life socially lived, the everyday is something people and institutions (elite and nonelite) routinely and habitually *co-create* — forging routines and responding to recurrent needs through times of calm as well as times of social crisis.'[110] Thus through everyday practices in locations as diverse as bathhouses and schools, or even in activities such as 'local exchange trading schemes', we can see how people produce and enact visions of alternative forms of social organisation, as well as enact the relationships and spaces that form part of that vision.[111] This can also be seen in her more recent explorations of the state and its relations to prefigurative

[108] On the importance of temporality to understandings of law and resistance, see Lucy Finchett-Maddock, *Protest, Property and the Commons: Performances of Law and Resistance* (Routledge, 2016) ch 7.

[109] Davina Cooper, *Everyday Utopias: The Conceptual Life of Promising Spaces* (Duke University Press, 2014) (emphasis added).

[110] Ibid 6.

[111] Cooper (n 109). A similar approach can also be seen in Bird, Fransberg and Peipinen's study of spa culture in Finland which explores the use of alternative practices and appropriations of space in generating new ways of using space and new social practices: Susan Bird, Malin Fransberg and Vesa Peipinen, 'Hot in Helsinki: Exploring Legal Geographies in a DIY Sauna' (2016) 18(2) *Flinders Law Journal* 377.

social movements.[112] Here the state, often considered the exemplification of power of oppression, is not conceived of as a static, unitary structure or force. Rather, she explores the way people, both working in the state and outside, continuously constitute and produce a particular enactment of the state (as well as constitute its relationship to social movements), through their concrete practices.[113] In both of these examples, the emphasis is not on assessing how fixed or pre-existing entities relate, and the ways they either express or resist power. Rather, the focus is on the relational practices that generate and produce the entities, and in so doing, potentially produce new worlds.

Another example of the complex ways everyday practices, entangled with broader socio-material entities (including physical objects, socio-structural concepts, biophysical processes etc) come together to produce and construct knowledge in the world can be seen in Barad's discussion of the Stern-Gerlach experiment.[114] In this experiment, the cheap cigar of physicist Otto Stern played a fundamental role as the sulphuric fumes it left on his breath are what made the experimental effects visible. In this example you can see the intermingling and entanglement of a diverse range of entities. Science and the production of scientific knowledge, ostensibly a preeminent 'specialised' practice, is actually constituted through a diverse range of ordinary practices. It was not simply (or only) the lab and the equipment, or the knowledge of the researchers that was critical. These, combined and entangled with the ordinary routine behaviours (smoking a cigar, looking closely enough at the results that the breath interfered) of those involved also played critical roles. And, as Barad notes, there were also a range of forces that reflected broader social structures and power that contributed in this process of knowledge production. The fact, for

[112] Davina Cooper, 'Transformative State Publics' (2016) 38(3) *New Political Science* 315.
[113] Ibid.
[114] Barad (n 93) 161. Barad actually uses this as example to illustrate the fluidity of apparatuses, but I think it also provides a good illustration of the point I am making here.

example, that Stern was smoking speaks to gender, that the cigar was cheap (and therefore had higher levels of sulphur) speaks to class.[115]

CONCLUSION

These examples demonstrate both the importance and the complexity of everyday life and everyday practices. The world of the quotidian is a fundamental and integral aspect of human life, and everyday practices do play a crucial role in constituting and producing worlds. However, they always do as part of a larger heterogeneous network of socio-material entities. To study the everyday, therefore, means attending to that network and those relations.

This is not necessarily an easy task. As Rinkinen, Jalas, and Shove argue, many of our conventional research methods are often too 'too selective to grasp more than a fraction of the richness, the complexity, and the fleeting character of the everyday.'[116] To study the everyday, therefore, means accepting and embracing the provisional and contingent nature of the results. One of the main appeals of the 'everyday' as a site of study has always been that it, in many ways, challenges the division between the researcher and the people being studied. It provides insight into the rich world of the 'lay' person and, as Garfinkel noted, removes any pretence that the researcher has a privileged view or perspective on life. This continues even in this more nuanced version of the everyday. While we may be able to identify certain connections between the heterogeneous elements that compose the everyday, we must accept that these will always remain partial, and that we are never able to capture the everyday at every scale at which it operates.[117] Further, the partiality of these connections also means accepting that, in identifying and describing them, in selecting one scale over another, we too are participating in the

[115] Barad (n 93).
[116] Jenny Rinkinen, Mikko Jalas and Elizabeth Shove, 'Object Relations in Accounts of Everyday Life' (2015) 49(5) *Sociology* 870, 872.
[117] Marilyn Strathern, *Partial Connections* (Rowman Altamira, 2004).

production of the everyday (and the production of the world more generally), bringing some aspects into view, while pushing others into the background.

Like all social structures, law too is the product of diverse range of everyday socio-material practices. As I argued in the previous chapter, there is nothing essential or natural about any legal system, its boundaries are constructed through, and always remain embedded in, social relations. In the following chapter, I will bring the literature on pluralism into conversation with this understanding of the everyday and explore the material enactment of law. Studies of the relationship between law and everyday life have long been a central focus of much socio-legal scholarship, but what new insights can be produced by reading these through pluralist and material frameworks, and what new possibilities might this create for thinking and performing law differently?

5. ENACTING LEGAL WORLDS: LAW, EVERYDAY LIFE, AND LEGAL CONSCIOUSNESS STUDIES

INTRODUCTION

One of my central aims in this thesis is to critically interrogate the concept of law. I have argued that, in order to more effectively understand the political utility of law (and, ultimately, rethink the relationship between law and social change), it is crucial to reconceptualise how we understand 'law'. While many critical approaches to law have provided strong critiques of its operation and illustrated its complex connection to power and resistance, they haven't always been as effective in identifying or articulating avenues for enacting change through law. I have argued that this stems from a failure to consistently question key aspects of how law is conceptualised, particularly its sites, sources, and participants. In chapter 3, I argued that most conventional understandings reified law, treating it as singular, centralised, positivist, and prescriptivist. It was my assertion that the theory of legal pluralism offered a framework to avoid this trap. Legal pluralism, particularly in its critical iterations, offers a theory of law which emphasises law's emergent and performative aspects and which emphasised jurisgenesis — the ongoing creation of law. I argued that this understanding of law brought into vision a diverse range of related and entangled legal worlds, a legal fractiverse.

I now want to shift to exploring the practices through which these legal worlds, and the relations between them, are enacted. I began this process in the previous chapter by critically assessing the concept of everyday life, a key theoretical concept which underpins this scholarship. I argued that the everyday is a useful conceptual framework, at least to the extent that it grounds social interaction in those routine and ordinary activities and practices through which people engage with the world. In this way, it draws attention to the role these quotidian processes play in producing and constituting life, including the way power and resistance flow

through these. Rather than simply being an artefact of broader social structures, those structures are themselves created through everyday actions. However, it is critical that these everyday practices are understood through a relational and flat ontology that embeds them within complex and shifting socio-material networks or assemblages.

In this chapter, I will now turn directly to socio-legal scholarship and examine and assess how they have deployed the idea of everyday life and its relationship to law. Of particular importance in this context is legal consciousness studies. Legal consciousness, both as a theoretical concept and a site for empirical research, has become extremely influential within law and society research. Much of the popularity of this approach can be found in its conscious decentring of law and legal institutions. Drawing on a wide variety of social theory and relying on a model of law and society which emphasise their mutual constitution, studies of legal consciousness are directed towards understanding the complex ways in which individual and collective meanings of law are formed, employed, and contested by ordinary people in their everyday lives. Proponents of this approach argue that it provides a valuable theoretical and empirical framework through which the complex relationship between law, power, and society can be explained. I will argue that legal consciousness does provide a useful model for understanding the relationship between law and social change and is well positioned to accommodate the more radical and flexible model of law I have been building across this thesis. However, it must more fully accommodate some of the insights of legal pluralism and develops an approach which better deals with the performative and relational aspects of law.

This chapter begins by providing an introduction to the relationship between law and everyday life, exploring how this relationship has been understood and studied within socio-legal studies more generally. I will then explore legal consciousness studies more closely, outlining its theory of law (focusing in particular on its use of 'consciousness', its constitutive model of law, and its decentring of formal legal

institutions), before critically assessing some of the key studies conducted within this framework and discussing their findings and assertions. Finally, I will outline some of the tensions that have emerged in this scholarship before highlighting some possible ways to move forward.

EVERYDAY LIFE IN SOCIO-LEGAL STUDIES

Law, conventionally understood, is often viewed as remote from the everyday. And, on some levels, there is a certain logic to this. If law is defined in a way which restricts it to the rules, practices, and formal processes of state legal systems, then those outside the legal profession have very little interaction with it. However, even if you adopt this restricted understanding of law, it is not hard to locate its presence of law in everyday life. As people engage in the routine activities that make up their everyday experiences law always seems to be working in the background. In fact, there appears to be a legal aspect to almost all of our activities and interactions. In fact, generating rules which govern the conduct of communities if one of the central aims of state legal systems. As Engel notes

> [l]aw in the second half of the twentieth century has been used to an unprecedented extent to transform (and sometimes preserve) the values, beliefs, experiences, and behaviour patterns of ordinary people in their day-to-day activities: in schools, in work settings, and in the neighbourhoods and communities in which they live.[1]

Law plays a role in such mundane and routine activities as driving to work, paying bills, paying rent or mortgage, purchasing food and other goods, and even places limits on everyday interactions with colleagues, neighbours and strangers. Considering law's apparent ubiquity in everyday routines and behaviour, it appears a curious fact that most academic approaches to law are predominantly focused on understanding law in its formal sites — analysing the formal rules and legislation

[1] David Engel, 'Law in the Domains of Everyday Life' in Austin Sarat and Thomas R Kearns (eds), *Law in Everyday Life* (University of Michigan Press, 1995) 123, 124.

and their interpretation and enforcement by courts and other institutional bodies. Most people's experience of and engagement with law does not occur at this formal level. As Galanter astutely points out, '[j]ust as health is not found primarily in hospitals or knowledge in schools, so justice is not primarily to be found in official justice-dispensing institutions.'[2] Increasingly, therefore, there has been a growing recognition of the need to study law in everyday life.[3]

Understanding the relationship between law and everyday life, though, is not a simple or clear-cut task. It may be possible to identify law in many aspects of people's lives; however, as people engage in everyday activities, the role of law is not necessarily at the forefront of their minds. People obey road rules to ensure their own safety, they pay their rent and bills because they do not want to be evicted or have the power cut off, and they treat others with respect out of a sense of common courtesy. While it may be possible to draw legal implications from all of these activities, the legal relevance for those involved it not always clear. How, then, is this relationship between law and everyday life to be understood? Is it that law simply operates in the background, ineffectual and unimportant until some extraordinary circumstance occurs which brings it to the foreground? Alternatively, is it that legal concepts and categories have become so internalised that they are no longer seen as legal in origin but rather as natural and inevitable facts of life? In surveying the relevant literature, Sarat and Kearns note that most scholarship within the law and society tradition has tended to adopt one of these two propositions and can be divided between instrumentalist and constitutive approaches.[4] In essence, instrumentalist approaches adopt the first proposition and

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2 Marc Galanter, 'Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law' (1981) 13(19) *The Journal of Legal Pluralism and Unofficial Law* 1, 17.

3 For an overview of some of this work see Austin Sarat and Thomas R Kearns, *Law in Everyday Life* (University of Michigan Press, 1995); Farid Samir Benavides-Vanegas, 'Editor's Introduction: The Amherst Seminar and the Everyday Life of the Law' (2003) 16(4) *International Journal for the Semiotics of Law* 337; Anna-Maria Marshall, *Confronting Sexual Harassment: The Law and Politics of Everyday Life* (Ashgate, 2005).

4 Austin Sarat and Thomas R Kearns, 'Beyond the Great Divide: Forms of Legal Scholarship and Everyday LIfe' in Austin Sarat and Thomas R Kearns (eds), *Law in Everyday Life* (University of Michigan Press, 1995) 21, 57.

view law as a tool available to social agents. Conversely, constitutive approached adopt the second proposition and conceptualise law as deeply embedded within everyday life.

Both approaches can trace their roots to the work of the early legal realists and the sociological jurisprudence of Roscoe Pound.[5] These schools of thought emerged in America in the early part of the twentieth century as a reaction against the prevailing formalism which governed much legal theory and practice at the time.[6] The formalist position (often referred to as 'mechanical jurisprudence'), asserted that legal decision making should proceed via a deductive, syllogistic logic through which clear and unambiguous legal principles were applied in uncontroversial ways to the facts of the specific matter.[7] Underpinning this was a belief that 'the law is "rationally" determinate … [and] adjudication is thus "autonomous" from other kinds of reasoning … [and] nonlegal normative considerations.'[8] In other words, law and legal principles were clear and unequivocal, and their logical application will inevitably produce a single 'correct' outcome. Both legal realism and sociological jurisprudence thoroughly rejected this understanding of law, arguing that legal principles could not be understood in the abstract. They embraced an argument that law should not be seen as a transcendental system of norms existing outside society, but rather as an inherently social and political phenomenon.[9] The realist,

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5 Overviews of instrumentalist and constitutive perspectives and their links to legal realism and sociological jurisprudence can be found in Sarat and Kearns (n 4); Susan S Silbey, 'After Legal Consciousness' (2005) 1(1) *Annual Review of Law and Social Science* 323; Austin Sarat, 'Legal Effectiveness and Social Studies of Law: On the Unfortunate Persistance of a Research Tradition' (1985) 9(1) *Legal Studies Forum* 23; Bryant Garth and Joyce Sterling, 'From Legal Realism to Law and Society: Reshaping Law for the Last Stages of the Social Activist State' (1998) 32(2) *Law & Society Review* 409.

6 Mauricio Garcia-Villegas, 'Comparative Sociology of Law: Legal Fields, Legal Scholarships, and Social Sciences in Europe and the United States' (2006) 31(2) *Law & Social Inquiry* 343, 352.

7 Tamanaha has recently questioned the existence of such a 'widespread' belief in formalism at the time, and also in this construction of it as 'mechanistic', arguing this actually stemmed more from the writings of its critics and their pejorative characterisations rather than its proponents: Brian Z Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton University Press, 2010) 4.

8 Brian Leiter, 'Legal Formalism and Legal Realism: What Is the Issue?' (2010) 16(2) *Legal Theory* 111, 111.

9 The realist, Felix Cohen, famously critiqued the legal system's common reliance on, and ability to get caught up in 'transcendental nonsense', legal concepts and constructions (like the corporation

Llewellyn, for example embraced a position of 'rule scepticism', arguing that legal rules were never determinate, and we should be wary of 'traditional legal rules and concepts insofar as they purport to describe what either courts or people are actually doing.'[10] In effect, it was not the written law that was important but rather how these laws were used in practice. This was also captured in Roscoe Pound's famous distinction between 'law in books and law in action'.[11]

Pound and the American legal realists provided an early outline for a materialist and pragmatic approach to understanding law, one which emphasised law's emergence through social practices. Law was not an abstract system existing solely in written codes and previous decisions, clear and determinate, and able to be applied to the world logically without controversy. Rather, law was always in flux,[12] its shape and content only emerging when applied through concrete actions to concrete situations (and, even then, ultimately remaining contingent). Not only did this offer a radically different conceptualisation of law, it also opened new pathways for studying law and, in particular, studying the relationship between law and society. While both Pound and the realists remained primarily interested in studying the practices of legal officials and how these produced and created law, subsequent

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or property rights) with no basis in empirical fact. As he notes, they are 'supernatural entities which do not have a verifiable existence except to eyes of faith.': Felix Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35(6) *Columbia Law Review* 809, 821.

10 Karl N Llewellyn, 'Some Realism About Realism - Responding to Dean Pound' (1930) 44 *Harvard Law Review* 1222, 1237.

11 Roscoe Pound, 'Law in Books and Law in Action' (1910) 44(1) *American Law Review* 12. Pound's acknowledgement of this gap is also mirrored in the related work of Eugene Ehrlich (which I discussed in chapter 2) who made the distinction between 'norms for decisions' and 'living law', as well as in the (slightly later) position of Karl Llewellyn who argued that law emerged from the interaction between 'paper rules' (written law) and 'real rules' (the enactment and interpretation of those rules in legal practice). However, there is some tension between the American tradition exemplified by Pound (and the legal realists) and the work of Ehrlich. Within the early work in the American tradition there was an explicit emphasis on state law, a presupposition that Ehrlich was deeply sceptical of and which he sought to critique. See Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Routledge, 2001); Karl N Llewellyn, 'A Realistic Jurisprudence - The Next Step' (1930) 30(4) *Columbia Law Review* 431; David Nelken, 'Law in Action or Living Law? Back to the Beginning in Sociology of Law' (1984) 4(2) *Legal Studies* 157; Marc Hertogh, 'A "European" Conception of Legal Consciousness: Rediscovering Eugen Ehrlich' (2004) 31(4) *Journal of Law and Society* 457.

12 As Llewellyn argues, realism promotes a 'conception of law in flux, of moving law, and of judicial creation of law.' Llewellyn (n 10) 1236.

research would extend this focus outside of formal institutions. Drawing on these arguments, both instrumentalist and constitutive approaches within socio-legal studies have sought to trace and understand the role of law within daily life. However, in doing this they have relied on radically different conceptualisations of the role of law in everyday life.

In studying the relationship between law and society, instrumentalist approaches have been chiefly focused on tracing law's effectiveness. That is, they have sought to examine the extent to which law is employed or ignored in daily life.[13] In this way, instrumentalist approaches draw on that insight from Pound and the legal realists that there is often a distinction between 'law in books' and 'law in action'. However, rather than treating this 'gap' as an issue of judicial interpretation (the gap between the law-as-written and the law-as-applied by judges), they sought to explore the gap between legal rules and how these were actually understood and applied by people in their everyday life. A primary motivation behind many of these studies was assessing whether law was an effective mechanism for governing (or at least guiding) social behaviour. Were court decisions or new pieces of legislation complied with? [14] To what extent did businesses rely on and enforce the contracts they entered?[15] However, they weren't simply exercises in assessing the effectiveness of legal policy, they also had the effect of decentring law. By taking 'society' as a starting point rather than law, they were looking at 'law from the "bottom up" rather than from the perspective of the law giver or authority.'[16] In doing this, they were acknowledging, at least implicitly, that law had a life outside of formal legal institutions.

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[13] See, for eg, Sarat (n 5).

[14] Jon B Gould and Scott Barclay, 'Mind the Gap: The Place of Gap Studies in Sociolegal Scholarship' (2012) 8(1) *Annual Review of Law and Social Science* 323, 326–327.

[15] Stewart Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28(1) *American Sociological Review* 55.

[16] Malcolm M Feeley, 'Three Voices of Socio-Legal Studies' (2001) 35 *Israel Law Review* 175, 184.

Ultimately, however, these instrumentalist approaches did still treat law as a tool, something which people may choose to engage with or not. In conceptualising the relationship between law and everyday activities in this way, instrumentalist approaches clearly fall into the same trap of much everyday life scholarship. By constructing a model in which law can happily be ignored until it is invoked or enforced, it is treated as existing apart from daily life of social agents. As Gordon pointed out in his famous critique, instrumentalist approaches 'divide the world into two spheres, one social and one legal. "Society" is the primary realm of experience… "Law" or the "legal system" on the other hand is a distinctly secondary body of phenomena … [It] is auxiliary — an excrescence on social life, even if sometimes a useful excrescence.'[17] In this way, therefore, these instrumentalist perspectives were unable to accommodate the fact that law and legal concepts are deeply embedded within everyday life and contribute to the framework through which people construct, understand, and give meaning to their activities. It was this foundational and critical insight that led a shift towards constitutive approaches.

From a constitutive perspective, studies which treated law and society as relatively distinct phenomena (and as positive social facts) could not capture the complex ways that they influenced and shaped each other. Law was always shaped by broader social structures and cultural conventions and, correspondingly, the implementation of legal rules was never a simple or straightforward process. Any argument, therefore, that law could be used as a tool to shape and guide community behaviour and that it was possible to track its effectiveness empirically (an argument made by the legal realists for example[18]), had to be carefully interrogated. This relationship was not unidirectional, as law itself also played a role in forming,

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[17] Robert W Gordon, 'Critical Legal Histories Critical Legal Studies Symposium' (1984) 36(Issues 1 & 2) *Stanford Law Review* 57, 60.

[18] Llewellyn, in an article which provided a summary of realist precepts, argued that realists believe in a '… conception of law as a means to social ends and not as an end in itself; so that any part needs constantly to be examined for its purpose, and for its effect, and to be judged in the light of both and of their relation to each other … [And in] [a]n insistence on evaluation of any part of law in terms of its effects, and an insistence on the worthwhileness of trying to find these effects.' Llewellyn (n 11) 1236–37.

supporting, and reproducing crucial aspects of society more broadly. Law formed an important pillar in broader culture processes, contributing to a sense of community and reinforcing existing social structures. Capturing this second part of the process, Silbey has noted that

> by the 1970s and 1980s, it was becoming increasingly clear that viewing law primarily as a tool of public policy designed to achieve pre-established purposes, whether an effective or failed tool, obscured the aggregate and cumulative contributions law made to sustaining a common culture, historical institutions, and particular structures of power and inequality.[19]

This more nuanced understanding of law (and its relationship to society) shifted the focus of research increasingly away from institutions, rules, and policy and towards legal meaning, in particular, the subjective knowledge and understandings of law of social agents.[20] Connected to this was also an increasing concern within the broader sociolegal scholarship with law's relationship to power and hegemony.[21] Embracing the concept of 'legal ideology', this work sought to more explicitly tease out the critical potential of these materialist and practical understandings of law, especially the relationship between legal doctrines and power.[22] In this vein, constitutive approaches to law and everyday life sought to examine '[t]he role of law in constructing an authoritative image of social relations and shaping popular consciousness in accordance with that image'[23] and the ways that 'power is

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[19] Silbey (n 5) 324.

[20] This was mirrored in research on 'legal culture' which developed in the 1970s. For example, Friedman sought to study 'legal culture' which he used to refer to 'public knowledge of and attitudes and behaviour patterns towards the legal system.' See Lawrence M Friedman, *The Legal System: A Social Science Perspective* (Russell Sage Foundation, 1975). Cotterrell provides an extensive critique of this understanding of legal culture in Roger Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Ashgate, 2006) 83–86.

[21] Issues of power, especially as it related to class, had also been a focus of some earlier instrumentalist studies, but this research related more to questions of accessibility to the formal legal system for the working class and poor. For an overview see: David Engel, 'How Does Law Matter in the Constitution of Legal Consciousness?' in Bryant G Garth and Austin Sarat (eds), *How Does Law Matter?* (Northwestern University Press, 1998) 109, 121–124.

[22] See, for eg, Richard L Abel, 'Redirecting Social Studies of Law' (1979) 14(3) *Law & Society Review* 805; David M Trubek, 'Where the Action Is: Critical Legal Studies and Empiricism Critical Legal Studies Symposium' (1984) 36(Issues 1 & 2) *Stanford Law Review* 575; Alan Hunt, 'The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law Paper' (1985) 19(1) *Law & Society Review* 11.

[23] Amherst Seminar, 'From the Special Issue Editors' (1988) 22(4) *Law & Society Review* 629, 631.

organised and deployed through law, and through that organisation and deployment provides the inescapable fabric of social life.'[24] That is, law plays a fundamental and critical role in producing the conceptual and material categories which underpin life and social interactions. It defines how people understand the world, their role within it, and their relationship to others (and the power structures sitting beneath these). Gordon makes this argument clearly when he suggests that

> in practice, it is just about impossible to describe any set of 'basic' social practices without describing the legal relations among the people involved — legal relations that don't simply condition how the people relate to each other but to an important extent define the constitutive terms of the relationship, relations such as lord and peasant, master and slave, employer and employee, ratepayer and utility, and taxpayer and municipality.[25]

In acknowledging that law and legal concepts are always deeply embedded in everyday life, constitutive approaches avoid the fundamental flaws of instrumentalist studies. They do not falsely treat law and society as separate realms, only coming into contact when law is explicitly invoked or employed. However, in conceptualising the relationship between law and everyday life, they still tend to treat law as playing a strongly determinative role. Law shapes, at a fundamental level, the content and environment of the everyday. While law and society may not be separate, they are still conceptualised in way which treats them as relatively distinct — it is law which acts upon and structures everyday life. It is important to note that there is some acknowledgement of the role of material practices in this relationship, and of the potential for resistance and counter narratives.[26] In this way, therefore, constitutive approaches do not simply view law as a superstructural or epiphenomenal force. However, these practices are predominately treated as a source of observable, empirical evidence regarding the (pre-existing) underlying legal structure.[27] The 'law' already exists, and it always comes first. Notwithstanding occasional instances of resistance, it is always law that retains the power to

[24] Ibid 633.
[25] Gordon (n 17) 103.
[26] Amherst Seminar (n 23) 632.
[27] Ibid.

construct the world (including the meaning and role of law): 'law creates the social world by "naming" it'.[28]

While an advance on instrumentalist perspectives, constitutive understandings of law and everyday life still fail to fully capture the complex way social practices are entangled in the everyday. They may acknowledge that law is embedded in life, but they remain blind to the ways that law also *emerges* from life. They do recognise that law, itself, is produced through a range of material practices. In fact, this was one of the major insights of Pound and the legal realists that inspired this subsequent socio-legal research. Both Pound and the legal realists asserted that law was located in the concrete, routine, and ordinary practices of judges and other legal officials. But, despite the best intentions, this legal world was always treated as distinct (even if influential) from the world(s) outside. And, although aiming, at least in part, to decentre the study of law, by conceptualising law in this way, they further consolidated a vision of singular, state-based law. The messy entangled connections and networks that make up life were cut and pulled apart[29] as law was demarcated and carved out of everyday life. While this may be an inevitable consequence of any research, it does mean that the role of other practices and structures (themselves a product of complex networks of practice) in producing and constituting law is rendered invisible.

Some of this complexity and deep interdependence between law and everyday life, as well as the role of nominally non-legal sources in the production of law, has been compellingly explored in Hartog's study of Abigail Bailey's personal diaries written in the eighteenth century.[30] These diaries outline the life for a married woman in

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[28] Barbara Yngvesson, 'Inventing Law in Local Settings: Rethinking Popular Legal Culture' (1989) 98(8) *Yale Law Journal* 1689, 1691.

[29] Karen Barad, *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter and Meaning* (Duke University Press, 2007).

[30] Hendrik Hartog, 'Abigail Bailey's Coverture: Law in a Married Woman's Consciousness" in Austin Sarat and Thomas R Kearns (eds), *Law in Everyday Life* (University of Michigan Press, 1995) 63.

18th century New Hampshire. Through them, Abigail Bailey, married for twenty years and having fourteen children, shares her thoughts and struggles as she attempts to separate from her husband after he had sexually abused one of their daughters. In summarising her writings, Hartog concludes that

> Abigail Bailey's thoughts, prayers and arguments, were filled with law … Yet the nature of her consciousness was not determined by law… [T]he law in whose shadow she bargained was a complex and contradictory structure: experienced as an external control and constraint, reconstructed regularly in conversation and arguments, intertwined in significant tension with religious beliefs and norms.[31]

The diaries demonstrate the complex ways her daily activities and interactions, as well as social structures such as religion, gender and state legal rules, were entangled with, and participated in producing, her experience and understanding of law.

These sociolegal studies of the everyday have provided many valuable insights. Primarily, they conceive of law in material and pragmatic ways, drawing attention to the concrete practices which enact law. However, they do ultimately fail to accommodate the fact that law and everyday life do not exist in separate realms. Everyday life may be dependent upon and shaped by state law, but state law is also strongly dependent upon and shaped by everyday life. In practice, as Silbey and Ewick have recognised, law is 'both an embedded and *emergent* feature of social life.'[32] This failure within instrumentalist and constitutive studies of law and everyday life stems from tendency within both to treat law as a uniform and centralised force emanating down to, and acting upon, everyday life. This is clear in their adoption of a 'law-first' perspective (how is *law* used or ignored, how does *law*

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[31] Ibid 107.

[32] Patricia Ewick and Susan S Silbey, *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press, 1998) 22 (emphasis added).

shape and limit experience).[33] As Sarat and Kearns argue, rather than privileging law with paramount importance, studies should place their focus first and foremost on everyday life, '[b]y inviting legal scholarship to focus on everyday life, rather than on legal doctrine, we seek to bring into view, if not give primacy to, the lively normative resources of the everyday.'[34]

To adequately understand the relationship between law and everyday life, it is important to explore law in ways which can accommodate this complexity. This will involve both a reconceptualization of law, as well as a far more grounded approach which can trace the complex array of social (and material) practices which produce. One approach that has emerged from this earlier scholarship and gets closer to this goal is legal consciousness studies.

LEGAL CONSCIOUSNESS STUDIES: AN INTRODUCTION

First coming to prominence in the early 1990s through the work of American scholars associated with the Amherst Seminar,[35] legal consciousness studies built on the work and insights of those sociolegal traditions discussed above,[36] and have attempted to explore the ways in which people construct, understand, and engage with law in their everyday lives. Attempting to move beyond the law-first paradigm evident in the approaches above, they look past formal legal sites[37] and instead focus

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33 Ewick and Silbey (n 32); Sarat and Kearns (n 4) 57.

34 Sarat and Kearns (n 4) 56.

35 Early examples include Sally Engle Merry, *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans* (University of Chicago Press, 1990); Austin Sarat, '".. The Law Is All Over": Power, Resistance and the Legal Consciousness of the Welfare Poor' (1990) 2(2) *Yale Journal of Law & the Humanities*; Barbara Yngvesson, *Virtuous Citizens, Disruptive Subjects: Order and Complaint in a New England Court* (Routledge, 1993); Patricia Ewick and Susan S Silbey, 'Conformity, Contestation, and Resistance: An Account of Legal Consciousness' (1991) 26 *New England Law Review* 731.

36 For a comprehensive overview of the relationship between legal consciousness studies and early socio-legal work see Engel (n 21); Hertogh (n 11); Silbey (n 5).

37 It is worth noting, however, that many early studies of legal consciousness did look closely at the interaction between people and formal legal institutions. See, for eg, Merry (n 35); Yngvesson (n 35).

on 'how, where, and with what effect law is produced in and through commonplace social interactions within neighbourhoods, workplaces, families, school communities and the like.'[38] Importantly, not only does this mark a shift (and decentring) of the sites of legal research, it also takes seriously the idea that the social practices of all people participate in the production of law.[39]

Since its inception, this framework has grown in popularity and has recently been employed in research into phenomena as varied as same sex marriage,[40] Hawaiian cockfighting,[41] Islamic law and women's rights,[42] the accessibility and use of criminal records on the internet,[43] government officials and bureaucratic decision making,[44] and the sharing economy.[45] This breadth of research makes it a little difficult to make strong generalisations about the framework and its research aims. This is further compounded by the fact that there is much variety in how it is used,[46] as well as some contention regarding the meaning of key terms.[47] Nevertheless, central to this approach is the idea of 'legal consciousness' and its role in the production and constitution of law.

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38 Ewick and Silbey (n 32) 20.

39 However, whether this framework fully achieves that aim is a little questionable. I will explore this more later in the chapter.

40 Rosie Harding, *Regulating Sexuality: Legal Consciousness in Lesbian and Gay Lives* (Routledge, 2010).

41 Kathryne M Young, 'Everyone Knows the Game: Legal Consciousness in the Hawaiian Cockfight' (2014) 48(3) *Law & Society Review* 499.

42 Moustafa Tamir, 'Islamic Law, Women's Rights, and Popular Legal Consciousness in Malaysia' (2013) 38(1) *Law & Social Inquiry* 168.

43 Sarah Esther Lageson, 'Crime Data, the Internet, and Free Speech: An Evolving Legal Consciousness' (2017) 51(1) *Law & Society Review* 8.

44 Sally Richards, 'Unearthing Bureaucratic Legal Consciousness: Government Officials' Legal Identification and Moral Ideals' (2015) 11(3) *International Journal of Law in Context* 299.

45 Bronwen Morgan and Declan Kuch, 'Radical Transactionalism: Legal Consciousness, Diverse Economies, and the Sharing Economy' (2015) 42(4) *Journal of Law and Society* 556.

46 Halliday argues that despite the difficulties this may cause, it actually reveals a key strength, the framework's adaptability: Simon Halliday, 'After Hegemony: The Varieties of Legal Consciousness Research' (2019) 28(6) *Social & Legal Studies* 859, 872.

47 Dave Cowan, 'Legal Consciousness: Some Observations' (2004) 67(6) *Modern Law Review* 928; Engel (n 21) 126–129.

The concept of 'consciousness' has been employed in law and society research for some time.[48] Consciousness, in this context doesn't refer to a psychological awareness, it is used in the sociological sense in an attempt to capture the shared cultural and normative frameworks which underpin social life.[49] Most traditional approaches within socio-legal studies, however, have adopted one of two extremes. Liberal approaches rely on the classical liberal ideal that society is simply a collection of individuals who come together in order to fulfil self-interested and rational goals.[50] Consciousness, therefore, is treated simply as the attitudes and beliefs of free-acting individuals.[51] Alternatively, Marxist and structuralist accounts conceptualise consciousness as the product of broader structures and relationships of power which shape how people engage in and understand the world in hidden, or at least rarely reflected upon, ways. In other words, consciousness is reduced to an 'epiphenomenal by-product of social structures.'[52] Contemporary legal consciousness studies reject these two models, arguing both fail to encapsulate the complex ways consciousness emerges from concrete social practices, even if this always occurs in a context of, and is potentially limited by, broader social structures and relationships of power.

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[48] It has strong connections with the earlier understandings of 'legal ideology' and constitutive approaches to law and society I discussed previously in this chapter. See Silbey (n 5) 324; Engel (n 21) 126–129.

[49] The concept of consciousness has a long history in sociology and can be traced back to both Durkheim and Marxist perspectives. For example, collective consciousness was a a critical concept for Durkheim's understanding of society. He defined it in the following way: 'the totality of beliefs and sentiments common to average members of a society forms a determinate system with a life of its own. It can be termed the collective or common consciousness.' Emile Durkheim, *The Division of Labor in Society* (Simon and Schuster, 2014) 65. A similar understanding of consciousness as a shared social framework was also evident in Marxist theory, particularly as it reflected economic relations related to class. See, for eg, Georg Lukács, *History and Class Consciousness: Studies in Marxist Dialectics* (MIT Press, 1972).

[50] Ewick and Silbey (n 32) 36.

[51] Naomi Mezey, 'Out of the Ordinary: Law, Power, Culture, and the Commonplace' (2001) 26(1) *Law & Social Inquiry* 145, 151.

[52] Davina Cooper, 'Local Government Legal Consciousness in the Shadow of Juridification' (1995) 22 *Journal of Law & Society* 506, 510; See also, Patricia Ewick, 'Consciousness and Ideology' in Austin Sarat (ed), *The Blackwell Companion to Law and Society* (2004) 80, 80.Davina Cooper, 'Local Government Legal Consciousness in the Shadow of Juridification' (1995) 22 *Journal of Law & Society* 506, 510; See also, Patricia Ewick, 'The Blackwell Companion to Law and Society' in Austin Sarat (ed), *Consciousness and Ideology* (2004) 80. Some of the early approaches to legal consciousness studies did appear to adopt this understanding. For example, Merry writes, '[c]onsciousness, as I am using the term, is the way people conceive of the natural and normal way of doing things, their habitual patterns of talk and action, and their common-sense understandings of the world.': Merry (n 35) 5.

In order to capture this complexity, contemporary approaches to legal consciousness have developed and relied on an understanding of law and society as mutually constituted. This understanding of law is heavily indebted to poststructuralist theory, in particular, it draws significantly on poststructuralist insights into the conceptualisation of culture, the indeterminacy of meaning, and a dialectical relationship between structure and agency. This model steadfastly rejects the positivist reification of law (and of social facts more generally), and argues that law, properly conceived, is a system of polyvalent, indeterminate, and contested symbolic and cultural meanings that are constructed and (re)produced through social action. In this way, it highlights the social construction of law.[53]

This understanding of law does fundamentally shift the focus of study. It fundamentally questions the idea that law has any natural or essential features. Law emerges from the action of people in social relationships and this is always a multifaceted and contested process. However, this is not necessarily a simple or unidirectional process. While law (and legal meaning) may be socially constructed and inherently indeterminate, this does not mean that social agents are completely free to construct it exactly as they like. As Marx famously argued, people may 'make their own history, but they do not make it as they please; they do not make it under self-selected circumstances, but under circumstances existing already, given and transmitted from the past.'[54] People are not born into a world of their own making; they are born into an inherently social world in which certain practices and institutions already exist, including law (both in the sense of actual pre-existing legal institutions as well as pre-existing ideas, interpretations, and theories of law). Because these institutions and practices predate us, they are experienced as having a level of objective reality, that is, they are experienced as external structures which control, shape and limit the world. This deeply reciprocal relationship between

53 As I will discuss later in this chapter, and have hinted at previously in this thesis, there are some potential limitations in this conceptualisation and approach.

54 Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte* cited in Silbey (n 5) 330.

social action and limiting structures of power is captured clearly by John and Jean Comaroff when they note:

> Nowhere can anything or everything be thought or written or done or told. Most people live in a world in which many signs, and often the ones that count most, look as though they are eternally fixed … While signs, social relations, and material practices are constantly open to transformation — and while meaning may indeed become unfixed, resisted and reconstructed — history everywhere is actively made in a dialectic of order and disorder, consensus and contest.[55]

In this way, therefore, law and social action exist in a relationship of mutual constitution. As Ewick and Silbey argue, 'law is a product of the reciprocal nature of meaning-making: people create meaning as they engage in social practices, and at the same time, the social practices … in which people engage gain legal meaning and force as they calcify into familiar and repeated forms.'[56] In other words, law is simultaneously experienced as both relatively fixed (and, therefore, able to shape the world and those within it), as well as a relatively permeable (and, therefore, able to be produced, appropriated, contested, and even at times resisted).

The concept of legal consciousness emerges directly from this model of mutual constitution. Specifically, it is heavily dependent on its focus on the cultural construction of meaning and the dialectical relationship between law and social action. Silbey defines legal consciousness as the 'forms of participation and interpretation through which actors construct, sustain, reproduce, or amend the circulating (contested or hegemonic) structures of meanings concerning law.'[57] Importantly, these 'forms of participation' are not purely ideational. They potentially emerge through all forms of social action, can be conscious or

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55 Jean Comaroff and John L Comaroff, *Of Revelation and Revolution: Christianity, Colonialism, and Consciousness in South Africa* (University of Chicago Press, 1991) 18.
56 Ewick and Silbey (n 32) 22.
57 Silbey (n 5) 334.

unconscious, and can take either individual or collective forms.[58] In essence, therefore, studies of legal consciousness attempt to track three related processes. First, the ways in which social agents, collectively and individually, construct understandings of law and legal meaning through social action. Secondly, how these constructions relate to, draw upon, and potentially resist pre-existing meanings. And finally, how dominant constructions, through repetition, become objectified or institutionalised.[59] For proponents of legal consciousness studies, this understanding is able to capture the dynamic way in which law and legal meanings both enable and constrain social action and, therefore, marks a significant advance in upon both the liberal and Marxist studies of consciousness.

Although somewhat self-evident from the model and discussion above, it is crucial to remember that this approach marks a conscious decentring of law and legal institutions. In emphasising the fact that law and legal meaning are social constructions, this approach adopts the insights of earlier socio-legal research and situates its focus on ordinary people engaged in social action in their everyday lives. Importantly, however, they view the everyday (and those activities and practices which form the everyday) not simply as a site for research, but also as the source of law. This is particularly clear in the work of Ewick and Silbey who state, 'we use the phrase "legal consciousness" to name participation in the process of constructing legality.'[60] The term 'legality' also being specifically chosen in this context to clearly distinguish between state law and other forms of legal/normative ordering:

> Rather than 'law', we … use the word 'legality' to refer to the meanings, sources of authority, and cultural practices that are commonly recognised as legal, regardless of who employs them or for what ends. In this rendering, people may invoke or enact legality in ways neither approved nor acknowledged by the [state] law. … Legality [is] an emergent

[58] For an overview of these factors see Anna-Maria Marshall and Scott Barclay, 'In Their Own Words: How Ordinary People Construct the Legal World' (2003) 28(3) *Law & Social Inquiry* 617.
[59] Silbey (n 5) 332.
[60] Ewick and Silbey (n 32) 45.

> structure of social life that manifests itself in diverse places, including but not limited to formal institutional settings.[61]

Legal consciousness, as a theoretical framework, provides a number of significant advantages in understanding the relationship between law and everyday life. It manages to avoid many of the traps of earlier research socio-legal research by more thoroughly situating itself in the everyday. It is not focused on tracing the impact or effect of law on everyday activities and behaviours (whether there are gaps, the extent to which legal ideas construct the everyday), but rather on exploring how law emerges from the activities. In refocusing the lens in this way, it is able to capture the role people, through social practices, construct law. Law is no longer the realm of state institutions and legal officials. Rather, 'the commonplace operation of law in daily life makes us legal agents insofar as we actively make law, even when no formal legal agent is involved.'[62]

LEGAL CONSCIOUSNESS STUDIES IN ACTION

As stated in the introduction, legal consciousness is not simply a theoretical framework, it is also a site for empirical research. It is crucial, therefore, that consideration is given to some of the issues surrounding its empirical application and to some of the findings of empirical research (in fact, many of the criticisms that have emerged of legal consciousness stem from a perception that its empirical application has failed to live up its theoretical ambitions). To do this, I will begin by examining the study conducted by Ewick and Silby who analysed the legal consciousness of a broad selection of people living in New Jersey.[63] This study has been extremely influential on subsequent research that regularly draws upon its central propositions and findings. I will then examine some of the ways these findings were developed and built upon in more recent studies.

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[61] Ibid 22–23.
[62] Ibid 20.
[63] Ewick and Silbey (n 32).

By explicitly focusing on how law is perceived and understood by ordinary people in everyday life, legal consciousness studies are heavily dependent on qualitative research methods and most research relies heavily on semi-structured in-depth interviews and ethnographic observation. In Ewick and Silbey's study, those being interviewed were not explicitly told (at least initially) that the study is directed towards understanding law. Subjects were initially told that the study focuses on aspects of community, neighbourhood, identity, disputes or any number of more broadly conceived cultural processes.[64] Rather than introducing the concept of law, this allowed the subjects to identify and articulate their own understanding of law (if they chose to do so), and the role it may have played in understanding their interactions in these contexts. This aspect is crucial to legal consciousness studies — if the aim is to explain how ordinary people experience and understand law in their everyday life, then definitions of law must stem from the subject and not the researcher.

Through their study, Ewick and Silbey's identified three common prototypes or ideal typical forms of legal consciousness that they have labelled 'before the law', 'with the law' and 'against the law.'[65] These types of legal consciousness are not discrete, they operate as broad typologies or generalisations which encompass the multiple, varied, and changing forms of legal consciousness. In practice, people may draw on all three categories in different and contradictory ways. The forms through which legal consciousness is expressed by social agents is always deeply dependent on a broad range of social and cultural considerations and might be shaped by the specific issues at hand and the forum in which they are being addressed.[66] Nevertheless, these three categories offer a good starting point to draw out some key patterns and insights in how people participate in the construction of legality.

[64] Ibid 25.
[65] Ibid 47–49.
[66] Ibid 50–51.

The first category recognised by Ewick and Silbey is 'before the law'. This form of legal consciousness constructs and understands law as an abstract entity, remote from the everyday, and commanding and authoritative in its operation. It is an understanding of law in which it operates as a 'formally ordered, rational and hierarchical system of known rule and procedures.'[67] This version of legal consciousness reflects a construction of law which closely resembles liberal ideals. Law's remoteness, combined with its order and rationality, enables it to be untainted by the messiness of the everyday and by broader social and cultural practices that may pollute its purity. Law is a neutral institution able to impose a just order on a complex and chaotic world. As Harding notes in a later study that also drew on and applied this ideal type, 'here the use of 'law' operates as a claim to power in that it embodies a claim to a superior and unified field of knowledge.'[68] Ultimately, this is a reified understanding of law and one which reflects the hegemonic ideal of law as a superior arbiter of justice and truth.

The next category identified by Ewick and Silbey is 'with the law'. Where 'before the law' constructs law as magisterial and neutral, 'with the law' constructs a vision of law as a game or as a site for strategic action. In this type of legal consciousness, law is a 'terrain for tactical encounters'[69] and legal rules are viewed as malleable. In other words, law is 'an arena of contest' in which those most proficient at the game will emerge successful. As Ewick and Silbey argue, 'it is a world of competitive struggles … [people] are less concerned about law's power than about the power of self or others to successfully deploy and engage with law.'[70] Here legal consciousness is depicted in the form of contestation rather than conformity. In a similar way that 'before the law' reflects liberal ideals of law, this is consciousness that appears to mirror aspects of legal realism. Law isn't conceived as remote from life, nor is it ordered and rational. Law's boundaries emerge from the practices of its participants and it is the technical skill of the participants that will govern the outcomes.

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[67] Ibid 47.
[68] Harding (n 40) 20.
[69] Ewick and Silbey (n 32) 28.
[70] Ibid 48.

The final category identified by Ewick and Silbey is 'against the law.' From this perspective, subjects are cynical and wary of law's operation as it is conceived as a product, and site, of power and potential oppression.[71] Engagements with law, therefore, never take place on equal footing and people are forced to find ways to obscure and deflect the power of law. As Ewick and Silbey note, '[r]ather than objective, legality is understood as arbitrary and capricious. Unwilling to stand before the law and unable to play with the law, people act against the law … people talk about ruses, tricks and subterfuges they use to appropriate parts of law power.'[72] In many ways, this construction of law combines 'before the law's' understanding of law as remote with the cynicism of 'with the law'. Law may be a game, but it is not a game that is available for all to play. This is a form of consciousness where law is constituted as a site of power, but unlike 'before the law', this power does not stem from its order or logic, it is arbitrary. However, it also acknowledges space to resist this power. In this way, it strongly reflects that idea of everyday resistance discussed in the previous chapter, encompassing those small-scale forms of resistance, or 'weapons of the weak' as James Scott would refer to them.[73]

As stated above, these categories are not static or fixed. They are exhibited in deeply complex and often contradictory ways. Ewick and Silbey provide a good example of this complexity in their discussion of Millie Simpson's story.[74] Millie is a domestic worker who was arrested and lost her license after her car was involved in an accident (the accident actually caused by a family friend who had been staying with her). Her subsequent experience of the legal system exhibited all three forms of consciousness, different consciousness emerging at different times as she progressed through the legal process. In the first few instances, during which Millie was initially convicted of the offence, she was in awe of the law. She trusted that the system was

[71] Ibid 49.
[72] Ibid 28.
[73] James C Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* (Oxford University Press, 1990).
[74] Ewick and Silbey (n 32) 3–14.

governed by certain rules and logic, even if these constructed the events in a way which was remote from her own experiences. After her conviction she began to recognise the arbitrariness and unfairness of the process. While she did not feel she could directly confront this, she acted 'against the law', through a clever ruse. When forced to sign on for community service, she signed on to volunteer at her local church (an activity that she was already engaged in). Finally, after receiving the support of her employers who hired a lawyer to appeal the decision, she was 'with the law', able to recognise that it was a game (even if she was reliant on the technical capabilities of her lawyer). As Ewick and Silbey conclude:

> Millie Simpson's different experiences of law — her initial submissiveness before the law; her contest over her conviction; her acts of resistance — are all part of the project of describing legality. The discernible variations in legal consciousness represent the ambivalent and shifting experiences and understandings of … [people] as they move through legal institutions and other arrangements of power.[75]

The influence of this Ewick and Silbey's study cannot be understated. Subsequent projects have consistently reiterated the existence and importance of these three ideal types of legal consciousness (or slight variations on them), often using them as starting point. Nevertheless, Silbey and Ewick left some central questions unanswered and researchers have attempted to address these. Primarily, many argue that Ewick and Silbey failed to explicitly and systematically analyse the relationship between legal consciousness and social status.[76] In addressing this issue, successive research has endeavoured to explicitly contextualise and situate their research. This has been done by focusing on particular social sites such as workplaces[77] or bureaucratic institutions,[78] specific issues,[79] and particular social groups.[80]

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[75] Ibid 14.

[76] See, for eg, Harding (n 40) 28–29; Mezey (n 51).

[77] Elizabeth A Hoffmann, 'Dispute Resolution in a Worker Cooperative: Formal Procedures and Procedural Justice' (2005) 39(1) *Law & Society Review* 51; Elizabeth A Hoffmann, 'Legal Consciousness and Dispute Resolution: Different Disputing Behavior at Two Similar Taxicab Companies' (2003) 28(3) *Law & Social Inquiry* 691.

There have also been a number of studies which have attempted to build on the three forms of consciousness and explore them more directly as collective responses. One example is Fritsvold's study of the legal consciousness of environmental activists. In this study, Fritsvold applies the concept of legal consciousness to a broader social movement and identified an additional form of consciousness that he labelled 'under the law'.[81]

The radical activists studied by Fritsvold adopted a strongly oppositional understanding of law, viewing it as an active agent of injustice. This went beyond the cynicism of 'against the law' in which people are cynical of law's operation and seek small-scale ways to resist its power over their lives. These activists conceived law as inextricably connected to broader social structures of power (liberalism, capitalism etc) and, therefore, were not interested in small-scale acts of resistance or subterfuge, but rather sought outright rejection. They were not 'against' the law, they were 'under the law', subject to a fundamentally corrupt system. The law, as an instrument of the state, was illegitimate and unjust. As he argues, 'against the law observes that the law often fails as an asset to achieve justice; under the law views this failing as intentional and perceives law as an active agent of injustice.'[82]

This form of consciousness is fundamentally different than those identified and explored by Ewick and Silbey as it defines itself in direct opposition to law. The activists studied by Fritsvold might engage with state law, but this is done strategically and with little faith in the actual process. In essence, it is a legal

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78 Cowan (n 47); Richards (n 44); Cooper (n 52).
79 Harding (n 40); Young (n 41); Lageson (n 43).
80 Marshall (n 3); Laura Beth Nielsen, 'Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens about Law and Street Harassment' (2000) 34(4) *Law & Society Review* 1055.
81 Erik D Fritsvold, 'Under the Law: Legal Consciousness and Radical Environmental Activism' (2009) 34(4) *Law & Social Inquiry* 799.
82 Ibid 806.

consciousness based around *illegality* and a deliberate, concerted, and often public undermining of law. The activists would 'engage in flamboyant acts of instrumental law breaking for the purpose of symbolic or actual subversion. They purposively, and often very visibly, break the law and openly challenge the legitimacy of law and the social order.'[83]

This category of 'under the law' consciousness was also and identified and utilised in a similar study of environmental activists conducted by Halliday and Morgan.[84] They reiterated the activist's opposition to, and fundamental rejection of state law, but also explored elements of the alternative legalities which underpinned this rejection, and the way engagements with state law were used strategically to advocate for this alternative. Halliday and Morgan's research revealed a complex relationship between the activists and state law. While deeply critical of the state, the activists did acknowledge the usefulness of state law and its ability to provide some relief (even if this was relatively limited). There was an 'implicit recognition of the normative value inhering in a formal legality that is — if only sometimes and then unpredictably — holding to account the exercise of public power by public officials.'[85] However, they also noted the activists' strong sense of an alternative, more just legality beyond the state,[86] an alternative legality that informed their actions and practices in interactions both outside and within formal legal institutions. They saw these interactions as an opportunity to articulate 'an alternative moral, political, and social imaginary.'[87]

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[83] Ibid 807.

[84] S Halliday and B Morgan, 'I Fought the Law and the Law Won? Legal Consciousness and the Critical Imagination' (2013) 66(1) *Current Legal Problems* 1.

[85] Ibid 24.

[86] As they note, this alternative was often framed as a 'higher' and 'transcendent' law. For Halliday and Morgan, this connects these activists with other historical reform movements. Interestingly, however, they draw no links with broader legal-theoretical ideas of natural law: Ibid 17–19.

[87] Ibid 25.

This brief overview of some of the key findings from empirical applications of legal consciousness studies reveal somethings of both the potential advantages and disadvantages of this approach to law. Legal consciousness studies clearly provide insights into the complex and multifaceted ways that law flows through the everyday life-worlds of people. They bring to light the deep interdependence between individual (and collective) beliefs and social practices, and law, highlighting the way that engagements and understandings of law are continually shaped by the broader social and normative environment in which it operates. You can see this in the way the research subjects continuously move between alternative consciousnesses, in one moment law depicted as magisterial and remote, in the next a game, and in the next an agent of power and injustice. However, it is hard not to also notice a number of limitations in these studies. Despite the theoretical emphasis on the *production* of law (or legality) *through social practices* (and the explicit decentring of law this requires), there remains an overriding impression that these studies may have simply identified a range of everyday attitudes or beliefs about state law. In fact, this reflects two of the main criticisms of legal consciousness studies; first, it fails to get beyond liberal models of consciousness,[88] and second, it fails to adequately embrace legal pluralism and look beyond state legal institutions.[89] In the following section, I will examine these criticisms and make some preliminary suggestions regarding how they can be overcome.

LEGAL CONSCIOUSNESS STUDIES: LIMITATIONS AND POSSIBILITIES

In an article in 2005, Susan Silbey, one of the founders and key proponents of legal consciousness studies, declared the concept 'conceptually tortured, and ultimately … compromised'.[90] In Silbey's opinion, the approach was trapped in a theoretical

[88] See Mauricio Garcia-Villegas, 'Symbolic Power without Violence? Critical Comments on Legal Consciousness Studies' (2003) 16(4) *International Journal for the Semiotics of Law* 363; Silbey (n 5); Young (n 41).
[89] See Harding (n 40); Young (n 41); Silbey (n 5); Hertogh (n 11); Engel (n 21).
[90] Silbey (n 5) 323.

impasse and had potentially run its course. Perhaps, she remarked, 'it might be time to move on.'[91] Silbey's consternation was driven primarily by a belief that legal consciousness studies had failed to realise their theoretical ambitions. It wasn't the underlying conceptual framework that was problematic (at least not solely), but the ways in which it had been applied and understand within empirical studies. One of the central motivations behind the development of legal consciousness was to better understand the complex relationship between law, power and society. In particular, it was hoped it could provide a mechanism for understanding and exploring how certain hegemonic understandings of law were produced, sustained, and at times resisted. However, she asserted that:

> recent studies have broadened and narrowed the concept's reach, while sacrificing much of the concept's critical edge and theoretical utility. Rather than explaining how different experiences of law become synthesised in a set of circulating, often taken-for-granted understandings and habits, much of the literature tracks what particular individuals do and think.[92]

In effect, legal consciousness studies, while accumulating significant amounts of data regarding how people in their everyday life experienced law, failed to fully explain those underlying questions regarding power, reproduction, and resistance. She argues that in order to move beyond this it is necessary to track more closely the institutional production of legal consciousness, something that was lost at times due to consciousness studies' empirical method and strong emphasis on, and use of, interviews. Drawing on Bourdieu, Silbey recognises that documenting opinions and attitudes may be useful, but there remains a real risk that they 'mask the structures that are realised in them.'[93]

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[91] Ibid.

[92] Ibid 324.

[93] Pierre Bourdieu, *In Other Words: Essays Towards a Reflexive Sociology* (Stanford University Press, 1990) 126 cited in Silbey (n 5) 357.

Coming from one of the central figures in the movement, Silbey's assertions were undeniably provocative. Nevertheless, as is clear from my discussion above that these worries didn't dampen the broader enthusiasm for the general project. It is hard, however, to ignore the validity of aspects of Silbey's argument. The origins of legal consciousness studies lay in an attempt to get beyond the 'great divide',[94] both between conceptualisations of law and everyday life, as well as between instrumentalist approaches (which treated law as a tool or resource to be used or ignored and sought to explore the 'gap' between legal ideals as social practices) and constitutive approaches (which viewed law as embedded in the social world, but treat it as a central determining force of social life). In order to do this, legal consciousness studies developed a framework that viewed the relationship between law and the everyday as one of mutual constitution. That is, law emerges from diverse social practices. Through repeated enactments of law, however, specific conceptualisations 'solidify' or 'concretise' and obtain a level of structural consistency. These structural forms of law then feed back into everyday life, shaping (and limiting) social practices in ways which inevitably encourage (but don't necessarily determine) their own reproduction.

Underpinning this theoretical model are two key related insights. First, law is produced and constituted through socio-material practices. That is, it emerges from (and through) the concrete activities and actions (both physical and conceptual) of people in their everyday lives. Second, locating the site of law's production in everyday life necessarily entails a decentring of law. Law isn't located in the abstract codes and rules of official state-based legal systems, it is located in practices. And these practices occur within and enact (and thereby bring to life) not only state-based law, but also alternative forms of legal and normative ordering.

[94] Sarat and Kearns (n 4).

However, as Silbey recognised, many empirical applications of legal consciousness didn't quite manage to capture these aspects. While Silbey argued the main failing was an inability to adequately account for the role of structural forms of power, I would argue that the potential issues, although related, extend beyond this. First, in applying legal consciousness, studies have had real problems articulating the role of practices in *producing* law. That is, the empirical findings of legal consciousness studies do a great job of identifying people's understandings of, and attitudes towards, law, but struggle to trace or make visible the connection between these understandings and their role in enacting and constituting legal realities. I will argue that this issue stems in part from the underlying model and its application. Specifically, that it is reliant on a representationalist framework that separate meaning from the world. Secondly, despite an explicit focus on legalities (those practices and sources recognised as 'legal', regardless of their origins), not just 'law', most studies end up relying on state-centric model of law.[95] I will argue that a more thorough engagement with, and integration of, the insights from legal pluralism would be a useful correction. I will turn to this second criticism first.

As is clear from my previous discussion in this chapter, legal consciousness studies reject the law first paradigm and argue strongly for the need to study law as experienced by ordinary people in everyday life. A central component of this, at least ostensibly, is that it is an approach that takes seriously the idea that law is produced, negotiated, and contested outside of formal legal institutions. Accordingly, therefore, all social agents are active participants in the creation of law. However, within much of the empirical research law has remained implicitly tied to state-based institutions. People may be 'before the law', 'with the law' or 'against the law', but in each manifestation law is conceived as formal state-based legal rules and institutions.[96] Even in the work of Fritsvold or Halliday and Morgan[97] that hints at

[95] This is a criticism of legal consciousness studies that has existed for some time. See, for eg, Young (n 41); Harding (n 40); Hertogh (n 11); Engel (n 21).

[96] Arguably this may reflect a common perception amongst those studies of the centrality of state-law as much as a researcher's potential bias..

[97] See Fritsvold (n 81); Halliday and Morgan (n 84) and discussion above.

the existence of alternative sources of law, these are still ultimately used to explore aspects of the formal law of the state.[98] The subjects in these studies may refer to a sense of law/legality outside the state, but this is ultimately construed as producing a specific consciousness in relation to formal law (they are 'under the law'). While the relationship between alternative legalities and state law is undoubtedly important and worth exploring, legal consciousness studies often appear to ignore the numerous normative structures that exist in any community. Engel, drawing on the literature of legal pluralism to critique this aspect of legal consciousness studies, explains this plural normative order as follows: 'Different groups have different kinds of law, and internal structures of groups interact in complex ways with laws of a more formal kind … Even if one focuses on 'official' law, one still finds a significant dependence on unofficial or customary rule structures to determine norms of reasonableness or fairness.'[99] If legal consciousness studies are to fulfil their potential, it is critical that the existence of multiple normative orders is actively acknowledged and enactments of law outside the state are considered in detail.

Hertogh argues that this tendency to slip into state-centric understandings of law stems, at least in part, from legal consciousness studies' development within the American socio-legal tradition, and particularly the influence of Pound (and the legal realists on this tradition), specifically their distinction between 'law in books' and 'law in action'.[100] He argues that a distinction can be drawn between the Poundian tradition in the US, and the influence of Eugene Ehrlich's on sociological approaches to law in Europe.[101] While Ehrlich and Pound did share a lot, and were in communication with each other, there are significant differences in how they conceptualised law. Fundamental to Ehrlich's approach was the distinction

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98 This is clear, for example, in Fritsvold emphasis on illegality: Fritsvold (n 81) 799.

99 Engel (n 21) 140.

100 Hertogh (n 11) 465.

101 Pound and Ehrlich were contemporaries and were in correspondence. The relationship between their work has been a focus of a number of studies: see, for eg, Brian Z Tamanaha, 'A Vision of Social-Legal Change; Rescuing Ehrlich from "Living Law": Review Essay' (2011) 36(1) *Law & Social Inquiry* 297; Salif Nimaga, 'Pounding on Ehrlich, Again?' in Marc Hertogh (ed), *Living Law: Reconsidering Eugen Ehrlich* (Hart, 2009) 157; Alex K Ziegert, 'A Note on Eugen Ehrlich and the Production of Legal Knowledge' (1998) 20(1) *Sydney Law Review* 108; Nelken (n 11).

between 'norms for judgement' and 'living law.'[102] Norms for judgment encompasses those formal sites and processes of law, living law encompasses those more organic sources and sites of law. As Hertogh notes, Pound's law in books and law in action while clearly distinct (law in books being the generalised principles, law in action being how those principles are enacted in practice), would both fit in Ehrlich's 'norms for judgement.'[103]

The effect of this focus on state legalities is a reduced picture of the field of study. The formal legal institutions of the state are undeniably an important source and reference for law more generally, but it is easy to forget that 'law is not necessarily an instrument of state power … [and] its connection with the state is a problem to be studied rather than a fact to be assumed.'[104] If the ultimate goal is to understand and assess the ways in which law both emerges from, and is embedded within, everyday life, then it is critical to capture the broader normative processes and structures through which this occurs.

Harding's study of the legal consciousness of gay and lesbian couples in the United Kingdom provides an example of the insights pluralism can help produce.[105] She explicitly incorporates a framework of legal pluralism, arguing that it is impossible to understand the diverse expressions of legal consciousness for gay and lesbian couples without taking seriously the broader legal and normative framework that shapes their everyday life. Of particular importance for Harding in this context are normative structures around gender and sexuality. Taking her cues from Kleinhans and Macdonald's 'critical legal pluralism',[106] she asserts that 'a plural approach to legal consciousness studies can help to address some of the limitations of … legal

[102] Ehrlich (n 11). See also discussion in chapter 2.
[103] Hertogh (n 11) 473.
[104] Engel (n 21) 140.
[105] Harding (n 40).
[106] Ibid 31. See also Martha-Marie Kleinhans and Roderick Macdonald, 'What Is a Critical Legal Pluralism?' (1997) 12(2) *Canadian Journal of Law and Society* 25 and discussion in chapter 2.

consciousness research … [b]y explicitly recognising that the 'legal' part of legal consciousness can include structural or normative pressures, as well as 'official' law.'[107] In adopting this approach, Harding is able to identify and critically interrogate the ways in which broader normativity (including those associated with heteronormativity, gender, race, and class), are experienced as coercive and play integral roles in shaping the ways in which law is produced and engaged with in everyday life.

The explicit incorporation of legal pluralism within this research can provide some greater nuance and complexity to explorations of legal consciousness and there are several related advantages. First, it expands the concept of legal consciousness, allowing it to more adequately capture those diverse forms of law/legality it had always aimed to incorporate. Including, of course, drawing attention to the inherent plurality and indeterminacy of each nominally distinct variation. 'State law', for example, isn't somehow immune from broader normative structures itself. It is fundamentally shaped by them; it draws on them it assembles them in different ways. In other words, it can bring into view the diverse and lively legal worlds that make up the legal fractiverse, including drawing attention to the complex relationship between these different legal words. Secondly, and in a related way, it provides a way to better incorporate aspects of power (and resistance) in the production of legal worlds. By bringing into direct view the complex interdependence, and constant interaction between, varied normative worlds it allows researchers to trace the way these shape each other and the different ways they are 'stitched together' in the fractiverse, including the ways dominant constructions are enacted, and potentially resisted. Finally, it makes explicit the fact that not simply do law and legal worlds emerge from concrete practices, but that these practices are always embedded in broader socio-material networks, and that these networks themselves are in a constant state of movement and flux. That is, by emphasising the fluidity of the practices from which legal worlds emerges, it

[107] Harding (n 40) 32.

correspondingly emphasises the fluidity of these worlds. It brings law (and legal consciousness) to life, revealing its generative becoming and unfolding. This final point leads on to the second major criticism of legal consciousness studies, its inability to fully accommodate or capture the processual nature of legal consciousness, the way it *produces* law.

One of the central aims of legal consciousness studies was to explore the way that law was, as Ewick and Silbey asserted, both embedded in everyday life, but also *emerged* from everyday life.[108] That is, it wanted to investigate the way people, through their everyday activities and interactions, produced law/legality. However, empirical applications of legal consciousness appear to have struggled to capture this component. As noted above, research into legal consciousness has provided a lot of data regarding people's understandings of, and attitudes towards, law in different contexts, but hasn't consistently drawn attention to this more fundamental aspect. That is not to say that such studies are lacking in worth. Exploring how these attitudes are formed, exploring popular understandings of law (and of law's limits) exploring when and in what ways people decide to engage with law (and why they have chosen to engage or not), is important and deeply interesting. However, this approach to legal consciousness does arguably limit the framework to some extent, and it does obscure fundamental aspects of its underlying theoretical ambitions. In effect you end up with, as Young summarises, 'too much product; not enough process.'[109]

Silbey associates this oversight with a broader commitment to empiricism within the research. In particular, a bias towards the more tangible opinions and attitudes of participants as these are much simpler to identify and document empirically as compared to the underlying structures that might produce these attitudes.[110] I agree

[108] Ewick and Silbey (n 32) 22.
[109] Young (n 41) 500.
[110] Silbey (n 5) 357.

with Silbey that the empiricism underpinning much of the research causes issues. However, I argue that it is the research's latent representationalism which causes the most concerns. By relying on a representationalist form of social constructionism, and one heavily focused on linguistic and symbolic construction, legal consciousness studies end up drawing an ontological distinction between representations of the world and the world itself. The end result of this being, as I will shortly explain, that it struggles to accommodate or make visible the processual and generative elements of law.

As outlined in my discussion above, legal consciousness studies conceptualise law as a set of (contested) symbolic and cultural constructions. This understanding is partly indebted to the interpretivist anthropology of Clifford Geertz who famously described his project in the following way:

> The concept of culture I espouse … is essentially a semiotic one. … [M]an is an animal suspended in webs of significance he himself has spun, I take culture to be those webs, and the analysis of it to be therefore not an experimental science in search of law but an interpretive one in search of meaning.[111]

In this understanding, social phenomena and social institutions need to be understood as flexible and constructed systems of signs applied to the world in order to give it structure and meaning. For example, law, he argues, is 'not a bounded set of norms, rules, principles, values, or whatever from which jural responses to distilled events can be drawn, but part of a distinctive manner of *imagining the real*.'[112] This closely mirrors the theoretical understanding of law

[111] Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (Basic Books, 1973) 5. This understanding of culture was especially influential in the turn to 'legal culture' which legal consciousness studies took inspiration from. See, for eg, Sarat and Kearns (n 4) 29–30; Sally Engle Merry, 'What Is Legal Culture - An Anthropological Perspective' (2010) 5(2) *Journal of Comparative Law* 40, 45–46; Cotterrell (n 20) 86. For a more direct exploration of its use in legal consciousness studies see Garcia-Villegas (n 88).

[112] Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (Basic Books, 1983) 173 (emphasis added).

which underpins legal consciousness studies. As my previous summary makes clear, legal consciousness studies are primarily focused on the ways in which law, and in particular legal meaning, emerge from social practice, the way these meanings construct particular visons of law, and the extent to which these constructions reflect or resist prevailing understandings of law circulating within a society.

There are undeniable critical strengths and advantages to this understanding of law. Primarily, by viewing law as a cultural phenomenon, it thoroughly rejects the positivist reification of law, as well any sense that law can be understood in essentialist terms. In a related way, it also provides a relatively nuanced understanding of power, drawing direct attention to the fact that law is always a contested phenomenon and that there is always a plurality of competing perspectives. However, in treating law as system of symbolic and cultural (and largely linguistic) meanings applied to the world, there is a risk of lapsing into representationalism and idealism.[113]

As I discussed in the second chapter, representationalist approaches draw a sharp ontological distinction between the world and the ways it is represented. One of the critical implications of this is that cultural meanings are set apart from 'reality'. You have, '[o]n one side, over there, the world, the really real, all things "course and subtle", and on the other, in here, the really made-up, the representations and signs which give meaning and value.'[114] In effect, the physical and material world, the 'really real', is relegated to being a secondary partner to culture and meaning. This can occur in one of two different ways. The world can be conceived of as an inert and static bedrock upon which meaning is constructed and contested, or, alternatively, it can be conceived as a wholly cultural construction, the simple by-

[113] For a more general introduction and overview of representationalism and its ontological implications, see my discussion in chapter 1.

[114] Ben Anderson and Paul Harrison, 'The Promise of Non-Representational Theories' in Ben Anderson and Paul Harrison (eds), *Taking-Place: Non-Representational Theories and Geography* (Routledge, 2010) 1, 6.

product of representations.[115] In both iterations, the world remains lifeless, existing as either a stage for humanity's drama or as passive matter to be moulded into different forms.[116]

It is the second variation that is most common in contemporary social constructionist approaches. As Barad remarks, '[t]he linguistic turn, the semiotic turn, the interpretivist turn, the cultural turn: it seems that at every turn lately every "thing" — even materiality — is turned into a matter of language or some other form of cultural representation.'[117] Within these perspectives, in other words, cultural systems and structures (including law) are never *of* the world, they sit outside and construct the world.

Of course, this is not to deny the importance of representations (and representational thinking) more generally. There can be great critical power in examining and tracing the ways social and cultural systems participate in the construction of meaning. It allows us, for example, to challenge essentialised notions of gender or race (or even law). Further, as discussed earlier representational practices are storied performativities and part of the way we enact worlds. In this way, these representations need to be understood in ways which place them *in* the world. One of the central consequences of representationalism as an ontological presupposition is that it actually masks the very practices through which representations themselves emerge.[118] It is not just the world, therefore, that is constructed as inert and passive through this process. By treating representations and the world as ontologically distinct entities, representational practices are themselves stripped of life.

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[115] Brian Massumi, *Parables for the Virtual: Movement, Affect, Sensation* (Duke University Press, 2002) 39. Brian Massumi, *Parables for the Virtual: Movement, Affect, Sensation* (Duke University Press, 2002) 39.

[116] This also clearly reveals the implicit anthropocentrism at the centre of this ontological position. I covered this aspect in more detail in chapter 1 and will return to this issue again in chapter 6.

[117] Barad (n 29) 132.

[118] Ibid 53.

An implicit representationalism may go some way to explaining the failure of empirical applications of legal consciousness studies to fulfil their theoretical potential. The theoretical model underpinning legal consciousness studies was developed in an attempt to capture the practices which produced law. A central tenet of this was an acknowledgement of the diversity both of these practices and their locations. These practices were very much positioned (at least theoretically) in a lively social world. They were treated as emerging from complex social interactions and taking numerous forms (material and ideational). Despite this, however, most empirical applications of legal consciousness studies focused on the ideational aspects, extensively documenting people's understandings of, and attitudes to law as described to the researchers; in essence, documenting linguistic representations of law.[119] Sitting behind this was a strong social constructionist understanding of law. In conceptualising law, as Geertz suggested, as a cultural (and largely semiotic) resource for 'imagining the real' and constructing meaning, perhaps they lost sight of the 'really real' context through which, and in which, this imagining was taking place.[120]

In this way, many applications of legal consciousness studies struggled to capture or accommodate the processual nature of law's production. In effect, the representations of law evident in the studies were, to recall Hallam and Ingold's phrase from the previous chapter, 'read backwards',[121] masking the generative,

[119] This may stem in part from a heavy reliance on semi-structured interviews. There may be some advantage, therefore, in adopting a stronger enthnographic approach. This is something that Young did in her study of Hawaiian cock-fighting which I will discuss in more detail below. Young (n 41) 505–507.

[120] These were not simply symbolic or discursive practices, they were 'material-discursive', emerging from a material (and more-than-human world). As Barad states, '[t]he relationship between the material and discursive is one of mutual entailment. Neither discursive practices nor material phenomena are ontologically or epistemologically prior. Neither can be explained in terms of the other … matter and meaning are mutually articulated.' Barad (n 29) 152.

[121] Elizabeth Hallam and Tim Ingold, 'Creativity and Cultural Improvisation: An Introduction' in Elizabeth Hallam and Tim Ingold (eds), *Creativity and Cultural Improvisation* (Berg, 2007) 1, 3.

relational, and temporal practices that enacted them.[122] And, in starting at the end point, the outcome takes on a sense of inevitability, the multiple practices that gave rise to it, and heterogeneous networks in which those practices are embedded, are lost from the analysis. This may, in part, also explain some of the state-centric bias of much of this work. The diverse normative contexts through which the practices moved, and the nascent pathways to alternative legalities that may have emerged, were smoothed over as the movement was traced from two static points — outcome to origin — narrowing the practices and condensing their trajectory into a single, straight, plotted line.

For legal consciousness studies to avoid the issues, it is critical that a materialist perspective is adopted, one which promotes a relational/flat ontology. As I discussed in the previous chapter on everyday life, this would involve locating these practices in complex, relational, and shifting networks (or assemblages, or meshworks),[123] encompassing a broad range of social (cultural representations, language etc), physical, and biological entities. This would enable the diverse practices that form legal consciousness to be brought to the foreground. It would reveal the processual aspects of legal consciousness and highlight its temporal and relational unfolding. In putting legal consciousness into flux, in exposing its movement, this would also, correspondingly, highlight its generative capacities: the way law *emerges* and is enacted through these practices.

One application of legal consciousness studies that gets closer to this understanding is Young's study of Hawaiian cockfighting.[124] Although she doesn't explicitly adopt the materialist framework I have outlined above, she does explore legal

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[122] Ibid.

[123] As discussed previously, there are numerous ways of conceptualising this 'network', each capturing similar processes. See, for eg, Gilles Deleuze and Félix Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia* (University of Minnesota Press, 1987); Tim Ingold, *Being Alive: Essays on Movement, Knowledge and Description* (Routledge, 2011).

[124] Young (n 41).

consciousness in a far more grounded, relational, and processual way. Taking as a starting point the criticism that legal consciousness studies often treat legal consciousness as a residing primarily in individuals (and, in particular in individual accounts and attitudes), she attempts to track the underlying 'processes that concretize' consciousness.[125] She argues that law is 'endogenous' to these processes/practices, immanent to, and emerging from, them.[126] Importantly, she also takes special care to track the diverse normative environments in which these practices occur. Drawing an analogy to film, she argues we should 'think of [this broader normativity] as akin to the monochromatic layers of gelatin that comprise colour film. Only by laying them atop one another do we get a full picture.'[127] Young notes the 'inseparability' of these layers, and that while 'fighters might be able to pick out particular metaphorical "layers" of colour, they do not *experience* these phenomena as separate types of ordering.'[128]

Young's study of the legal consciousness in Hawaiian cockfights provides a far more nuanced application of legal consciousness, and gets far closer to fulfilling the theoretical potential of the framework. She explicitly and thoroughly locates legal consciousness in social and material practices, and in doing so is able to explore more fully their processual emergence. Further, through her analogy of film, she is able to highlight the relational nature of these practices, placing them in a multi-layered and multifaceted network encompassing a broad range of different participants, representations, locations, social structures, and normative frameworks, and demonstrating their deep interdependence. One aspect, however, that might benefit from a more explicit adoption of the materialist approach I have outlined is how best to conceptualise the issue of power and resistance.

[125] Ibid 501.
[126] Ibid 521.
[127] Ibid.
[128] Ibid.

A shift to a perspective which incorporates a materialist ontology has broader implications for understanding the complex way power (and resistance) work through and across legal consciousness. Not only does it allow us to explore the ways in which dominant forms of legality circulate and are reproduced or resisted,[129] it allows us to explore how new forms of legality might emerge. As I previously explored in this thesis, the immanent ontology implied in this framework articulates a world continuously in production. 'Things' don't simply exist, 'things' happen,[130] they are in a constant state of becoming, they are alive.[131] This fundamentally challenges the idea of a static, discrete, and atemporal world and, as part of this, gives rise to a fractiverse.[132] In this context, legal consciousness (especially as viewed through legal pluralist insights) doesn't simply enact multiple legalities, it enacts multiple legal worlds. This allows a political analysis through which we can explore the ways that these worlds are, through practices, brought together in different ways, and, more specifically, the extent to which their differences (and generativities) are smoothed over or allowed to flourish. Do we enact practices which attempt to reconcile these legal worlds, to elide their difference by forcing them into static and singular frames? Or do we promote their generative unfolding, and explore the alternative worlds and opportunities they might create?

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[129] However, as I discussed in the previous chapter, such analysis must take care to ensure power and resistance are understood in more flexible and contingent ways

[130] Steven Shaviro, *Without Criteria: Kant, Whitehead, Deleuze, and Aesthetics* (MIT Press, 2009) 17.

[131] Tim Ingold, 'Bringing Things Back to Life: Creative Entanglements in a World of Materials' [2010] *ESRC National Centre for Research Methods, Realities Working Papers Series* 6–7 <http://eprints.ncrm.ac.uk/1306>.

[132] As I discussed in chapter 1 and 2, one consequence of this ontological approach is that it becomes untenable to think of difference (particularly cultural difference) as simply being multiple perspectives on a singular, defined entity. There is not a single, static, already existing world and then multiple perspectives/views of that world (as defined). Rather, each perspective should be understand as a production of a different (albeit deeply related and connected) world. See Marisol de la Cadena and Mario Blaser (eds), *A World of Many Worlds* (Duke University Press, 2018); John Law, 'What's Wrong with a One-World World?' (2015) 16(1) *Distinktion: Journal of Social Theory* 126; Christopher Gad, Casper Bruun Jensen and Brit Ross Winthereik, 'Practical Ontology: Worlds in STS and Anthropology' [2015] (3) *NatureCulture* 67.

CONCLUSION

Legal consciousness studies demonstrate great promise in helping us to trace and explore the different ways law(s) is produced and enacted. Its emphasis on law's emergence from, and location within, practices occurring in diverse locations, offers a powerful rebuttal to singular, centralised, and essentialised models of law. Nevertheless, it is critical that studies of legal consciousness embrace a relational/flat ontology to ensure that it is understood in relational and generative ways. The practices must be sufficiently grounded and connected to the complex relational networks from which they emerge.

This is not always an easy task to achieve, particularly from an empirical perspective. Not only does the processual and generative nature of practices make them extremely difficult to trace, but collapsing the distinction between representations and the world, between matter and meaning, directly calls into question our ability to make unproblematic and detached observations of that world. The materialist critique of representationalism means we can no longer treat data as 'an inert and indifferent mass waiting to be in/formed and calibrated by our analytic acumen or coding system.'[133] We need to acknowledge that in studying these processes, we too are participating in their unfolding and becoming, we too are participating in the production of law. Perhaps, in the end, however, that is less problematic than lapsing into old models which strip the life out of law (and the world more generally). It frees us, as researchers, to engage in the world in productive ways. Why not actively participate, through our work, in the creation of new worlds (especially considering we already are, whether we are aware or not)? This is something I will explore more directly in the next section of the thesis in which I will set out and interrogate a specific political and ethical framework that can promote the flourishing of diverse legal worlds, and provide some insight into how we might be able to construct law in less hierarchical or exclusionary ways.

[133] Maggie MacLure, 'Researching without Representation? Language and Materiality in Post-Qualitative Methodology' (2013) 26(6) *International Journal of Qualitative Studies in Education* 658, 660.

6. POLITICS AND LAW BEYOND THE STATE: ANARCHISM AND THE CRITIQUE OF REPRESENTATION

For the anarchists, 'Il ya seulement la vie, et la vie suffit' ('there is only life, and it is enough').[1]

INTRODUCTION

I have been arguing across this thesis that law, appropriately conceptualised, should be understood in non-essentialist terms. Law is not a system of transcendent or idealised norms that exist outside society or social action. Law emerges through, and is embedded in, complex socio-material practices and networks. This understanding of law draws attention to both its generativity and plurality. Law doesn't simply exist; it is constantly produced or enacted. And, because these enactments are always embedded in broader relational networks, this always occurs in diverse and multifaceted ways.

The processual nature of law revealed in this understanding entails that law can never be reduced or unified into a singular system. It is always in a state of becoming, continuously unfolding in, and through, concrete material practices. Law is alive; it is always in a generative state of flux, and always, therefore, overflows any constructed boundaries. Of course, this is not to suggest that law is never depicted or enacted in static or singular ways. In fact, a singular (and centralised) model of law remains the conventional understanding and is a powerful ideological underpinning of state legalities' claim to be the sole source and purveyor of law and justice. However, as this model of law demonstrates, any systemic or conceptual closure is only ever contingent, and it always remains, to use the Deleuzean-Guattarian phrase, subject to forces of 'deterritorialization'.[2] That is, it always

[1] Nathan Jun, *Anarchism and Political Modernity* (A&C Black, 2011) 127.

[2] Gilles Deleuze and Félix Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia* (University of Minnesota Press, 1987) 8–9, 88–89. Deleuze and Guattari describe assemblages as always

remains at risk of being undone, and of being reconstituted in new or different ways.

Some of the complexity of this process can be seen in the socio-legal studies of legal consciousness I discussed in the previous chapter. By focusing on the ways in which people, through their everyday practices, participated in the construction of law and legal meaning they were able to provide insight into the different ways law was enacted. Legal consciousness studies' emphasis on law's emergence from concrete social practices, and the related decentring of law this necessarily implies, provides a powerful framework for thinking about and studying law in non-essentialist ways. It is also a framework that includes a strong analytical focus on power and resistance, and studies of legal consciousness have provided real insights into the way everyday engagements with law can operate to both reproduce, and at time, contest hegemonic understandings of law. Nevertheless, as I argued, these studies were less successful at tracking the potential for alternative practices of law to emerge.[3] Their implicit representationalism meant that most studies remained at the level of description and critique. However, by bringing this scholarship into conversation with neo-materialist frameworks, and by seeking to identify the diffractive patterns that emerge from their juxtaposition, it is possible to see a path beyond this.

This materialist approach, built upon an ontological perspective that emphasises the immanent and generative features of life, allows us to move beyond description and critique and to explore how the world can be potentially thought (and enacted) otherwise. Read together with legal consciousness studies, it brings into view the diverse legal worlds produced through socio-material practices, and in so doing

containing forces of both territorialization (or reterritorialization) and deterritorialization. That is, they have both '*territorial sides*, or reterritorialized sides, which stabilize it, and *cutting edges of deterritorialization*, which carry it away.' Ibid 88.

[3] Some studies, such as Halliday and Morgan's research into environmental activists, did briefly refer to the presence of, and potential for, alternative legalities but this was always read back through state law. See S Halliday and B Morgan, 'I Fought the Law and the Law Won? Legal Consciousness and the Critical Imagination' (2013) 66(1) *Current Legal Problems* 1.

provides opportunities to rethink the relationship between law, power, and social change. Specifically, it draws attention to the ability of people to enact law in novel and radical ways; enactments which may create new opportunities and pathways for challenging existing social structures and the relationships of power which underpin them. And, further, such novel enactments also have the potential to confront and extend conventional boundaries of law, potentially enabling people to experiment with, and inhabit, legal worlds that might be less exclusory or hierarchical.

It is these issues regarding the relationship between law, power, and social change that I will engage with more directly in this final section of the thesis. My focus will now shift from a legal-theoretical (chapters 2 and 3) and sociological (chapters 4 and 5) exploration of law to a more explicitly political analysis. Over the next two chapters I will explore these political aspects and will propose and outline a specific ethical and political framework for thinking about them, namely social anarchism. In essence, I will argue that anarchism's deep scepticism of hierarchy and representation (both political and philosophical), and its promotion of a prefigurative politics[4] — which emphasise both means over ends, as well as praxis over revolutionary utopianism — provides both a broader ethical framework and a mechanism for change. That is, it can offer a (non-transcendent) foundation for more inclusive and participatory forms of law, encourage and promote the flourishing of diverse legal worlds, and specify strategies for achieving these goals.

This explicit shift to political theory may, at first instance, appear to sit a little uneasily with some of the other material I have engaged with as part of my broader project. While I have made it clear throughout this thesis that a political analysis is at the core of my wider argument, articulating and endorsing a specific political

[4] On the anarchist endorsement of prefigurative politics, see Ruth Kinna, 'Utopianism and Prefiguration' in SD Chrostowska and James D Ingram (eds), *Political Uses of Utopia: New Marxist, Anarchist, and Radical Democratic Perspectives* (Columbia University Press, 2016) 198; Benjamin Franks, 'Prefiguration' in Benjamin Franks, Nathan Jun and Leonard Williams (eds), *Anarchism: A Conceptual Approach* (Routledge, 2018) 28. I will discuss the concept of prefiguration in more detail in the following chapter.

framework is not necessarily a common method or technique within many of the socio-legal frames I examined previously. These tend to lean more towards descriptive rather than normative analysis. While they clearly are engaged with (and motivated by) politics — evident, for example, in their strong emphasis on power, ideology, and resistance — their commitment to empiricism means they tend to focus more on recognising and critiquing power, rather than on exploring or proposing alternative forms of ordering.[5] Further, and as I touched on in earlier chapters, the promotion of an immanent ontology, and the strong anti-essentialism this entails, also raises some potentially difficult political issues and tensions. It forcefully rejects any transcendent foundation or position outside socio-material relations that could operate as a site for grounding claims of 'truth' or 'virtue' and, as I explored in my discussion of critical legal perspectives in chapter 2, this does raise some real tensions. Further, its emphasis on flattening social relations may entail an inability to adequately deal with asymmetrical power relations.[6]

However, as I have indicated throughout this thesis, the focus on generativity and vitality within this perspective does position it well to engage with a more affirmative politics. A politics, as I envision it, that is centred on 'productivism' rather than (social) 'constructivism', that makes life's generative unfolding visible and, thereby, opens pathways for creative political (and legal) experimentation (this thesis itself, essentially being an exercise in productive politics). And, as I will argue across the next two chapters, anarchism sits particularly well with this understanding, especially as it endorses a fluid, non-prescriptive, and prefigurative politics. I do not mean to suggest that a generative ontology *demands* an anarchist politics. Such an argument would fall into the same trap as those essentialist and representational perspectives I have been critiquing. However, I do believe that

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5 This is perhaps truer of the socio-legal approaches, than some of the literature on the everyday. De Certeau and Maffesoli, for example, appear much more comfortable articulating a strong politics.

6 See, for eg, Bonnie Washick et al, 'Politics That Matter: Thinking about Power and Justice with the New Materialists' (2015) 14(1) *Contemporary Political Theory* 63; Simon Choat, 'Science, Agency and Ontology: A Historical-Materialist Response to New Materialism' (2018) 66(4) *Political Studies* 1027.

anarchism does provide a politics that *corresponds* with a generative and immanent ontology. And, in this way, it can provide us with guidance regarding how to ethically engage with the world(s), even if this always inevitably remains a partial, contingent, and evolving project.

My endorsement of anarchist frameworks also resonates with some of my earlier discussions regarding what it might mean to think about law operating outside state frameworks. While I addressed this question from a socio legal and legal theoretical perspective, there is also the potential to explore this in the context of political theory. While most political theory takes the existence of a state or sovereign as given (and, in fact, view a centralised state with strong corresponding government and legal institutions as necessary in order to have a viable and just society), anarchism is a political philosophy which rejects the state and state institutions (including state-law) outright. If we are interested in exploring the relationship between law, power, and social change — particularly change directed at the exclusory practices of state law, perhaps this could be helpful.

While this may provide some interesting insights, my primary aim isn't to develop or outline a specifically anarchist, non-state legal system in detail. I am relying on anarchism more for its underlying framework. In particular its scepticism of hierarchy and authority, and its related endorsement of prefigurative approaches to change. Of course, as currently conceptualised and enacted, the state is deeply problematic, but, like law, perhaps the state can also be thought in anti-essentialist ways.[7] My emphasis, therefore, is more on how, as an ethical and practical framework, anarchism can help in the process of imagining and enacting new social and legal worlds. Realistically this is a process that will happen in multiple ways and with multiple relationships to the state — alongside the state, in interstitial spaces

[7] See, for eg, Davina Cooper, 'Transformative State Publics' (2016) 38(3) *New Political Science* 315; James Ferguson and Akhil Gupta, 'Spatializing States: Toward an Ethnography of Neoliberal Governmentality' (2002) 29(4) *American Ethnologist* 981.

within the state, as well as outside the state. The ultimate aim may be to create forms of law which are antithetical to the state (at least in its current hierarchical and exclusionary form), but this is a longer process.

The anarchist critique of representation originally emerged in the nineteenth century, a time in history during which modernist paradigms were reaching their height of influence. In the natural and social sciences, for example, positivist methods were achieving an unqualified dominance, and in political theory, the high modernism of Marxism and liberalism effectively defined the parameters of political debate. Revisiting the historical anarchist tradition, as well as tracking it subsequent development, therefore, provides a unique (and often ignored) perspective on some of the broader theoretical themes I have been examining across this thesis.

In this first chapter, I will provide an introduction to the political theory of anarchism. I will begin with a brief exploration of the representational nature of much conventional political theory and briefly sketch out the ways in which anarchist theory operates a challenge to this. I will then more directly examine the key tenets of anarchism, tracing its roots, history, and development. Finally, I will examine the anarchist position on law, exploring both the anarchist critique of state law, as well as some of the alternative understandings of legality proposed by different anarchist thinkers.

In the following chapter, I will build on this analysis and more fully develop my argument that anarchism provides a useful ethical and political framework for engaging with law in the fractiverse. This will be an opportunity to revisit the central themes from the thesis more generally and explore some of the insights and possibilities that emerge from placing these into productive relationships.

FROM *ARCHĒ TO AN-ARCHĒ*: SOME INTRODUCTORY COMMENTS ON NATURE, POLITICS, AND LIFE

Most Western political theory, especially that conducted within a classical or modernist framework, involves attempts to reconcile a range of related questions and tensions — how should we understand the relationship between the individual and the community? In what ways and to what extent should this relationship be regulated and managed? On what basis can authority be claimed for doing this? While different theories have answered these questions differently, they all presuppose a range of foundational issues. First and foremost, they presuppose the idea of government.[8]

The existence of government appears to be a fundamental precondition for conceiving of community or society in political theory. As Jun has argued, '[l]ike the axioms of Euclid's geometry, government has been an implicit starting point, always assumed and never justified — the transcendental condition of possibility for thinking, writing, and talking about human social organization.'[9] Government in this context does not refer to specific institutional systems or orderings (monarchical, democratic etc), at least not directly. It refers to the idea that there is some a priori structure or authority, a 'natural' order that transcends and exists independently of the people and institutions developed to manage those tensions and questions highlighted above, a natural order which *governs* all things including relations between people. The constituent categories of political theory — the individual, the community, the state — are brought into existence and made meaningful as categories of social organisation through this governing structure. Its form determines the boundaries of these categories and structures them relationally (usually hierarchically), and, in so doing, presupposes how they should be managed. Whether specific political arrangements are justified through divine right, or through the existence of social contract (or whatever else), at a more foundational

8 Jun (n 1) 1.
9 Ibid.

level it is government which has brought people together; without government there is no community or social organisation, simply chaos. Within this framework, the appropriate form of *political* governance is that which best represents and accommodates that *ontological* natural order which governs us all.

This idea is perhaps most clearly illustrated in the classical political philosophy of Aristotle.[10] For Aristotle, the *telos* of humanity (that is, its purpose or the end it naturally strives for) is to form political associations.[11] While he acknowledges that political associations can take many forms, he argues that it is the city-state (the dominant form of political organisation at the time) which best represents the natural end or goal of political associations. He states

> every [city] state exists by nature, as the earlier associations too were natural. This association is the end of those others, and nature is itself an end; for whatever is the end-product of the coming into existence of any object that is what we call its nature — of a man, for instance, or a horse or a household. … It follows that the state belongs to the class of objects which exist by nature …[12]

According to Aristotle, therefore, the city-state is a thoroughly natural phenomenon. It is no different than any other natural phenomena. Like a tree, which naturally develops from a seed to a sapling to fully grown tree, so do humans and their political associations naturally develop from pairs of people (master and slave, husband and wife etc), to households, to villages, and finally to their final, natural end, the city state.[13]

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[10] For a more detailed analysis of Aristotle's politics understood in this way see Ibid 3–7.

[11] As he famously argued, 'man is by nature a political animal': Aristotle, *The Politics*, tr Trevor J Saunders (Penguin Books, 1981) 59.

[12] Ibid.

[13] Ibid 57–59. He argues that the city state is the natural end of humanity as it is best able to fulfil all human needs (sociality, material security etc) and therefore allows humanity to flourish.

This idea that government and political associations inevitably spring forth from a discernible natural order is also present in many medieval and modernist forms of political theory, particularly those which adopt a form of the social contract (particularly relevant here are Hobbes, Locke, and Rousseau).[14] For these theorists, a hypothesised 'state of nature' and a series of discoverable 'natural laws' form the ontological ground for their politics.

Hobbes, for example, begins his defence of strong, centralised state power by arguing that the 'state of nature' is one of war and conflict.[15] He asserts, 'during the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war, as is of every man, against every man.'[16] This state of constant war means that people live in 'continual fear, and danger of violent death'.[17] However, he argues that there are a series of natural laws, ascertainable through reason,[18] which if followed will lead humans out of this uncertainty and insecurity. The first natural law identified by Hobbes is a desire among all people to seek peaceful relations (as far as possible): 'it is a precept, or general rule of reason: that every man ought to endeavour peace, as

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[14] See generally Thomas Hobbes, *Leviathan* (Oxford University Press, 1998); John Locke, *Two Treatises of Government* (Cambridge University Press, 1988); Jean-Jacques Rousseau, *The Social Contract and The First and Second Discourses* (Yale University Press, 2002). For the sake of brevity, my discussion will focus predominantly on Hobbes.

[15] On this central issue of how the state of nature should be understood there is significant differences in the theories of Hobbes, Locke, and Rousseau. For Locke, the state of nature is not defined by continuous war (although there is always a risk of war) but is governed by natural laws, '[t]he state of nature has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions': Locke (n 15) 271. Rousseau's understanding of the state of nature and its relationship to political forms is far less prescriptive than either Hobbes or Locke. For Rousseau, both Hobbes and Locke make the error of projecting 'civil' humans back into a state of nature. He argues, 'all of them … have transferred to the state of nature ideas picked up in the bosom of society. In speaking of savages they have described citizens.': Rousseau (n 15) 88. He argues humans, in the 'pure' state of nature, exist in a pre-moral and pre-social state, living solitary lives focused on fulfilling basic physical needs.

[16] Hobbes (n 15) 84.

[17] Ibid.

[18] He describes these laws of nature (or *lex naturalis*) as a 'precept, or general rule, found out by reason, by which a man is forbidden to do, that which is destructive of his life': Ibid 86.

far as he has hope of obtaining it.'[19] For Hobbes, this is a logical consequence of that state of nature (as he conceives it). Without a drive to establish peaceful relations, people's innate instinct to preserve their own life would be lost. They would remain trapped in the state of nature and life would be 'solitary, poor, nasty, brutish, and short'[20]

From this foundational natural law, Hobbes argues it is possible to discern a second natural law, 'that a man be willing, when others are so too, as far-forth as for peace and defence of himself he shall think it necessary, to lay down [a] right to all things; and be contented with so much liberty against other men as he would allow other men against himself.'[21] In other words, in order for people to escape a life of uncertainty and obtain peace, they must reciprocally agree to come together. This inevitably means giving up the rights and absolute freedom they may have held in the state of nature. As this agreement can only be effective if it is reciprocal, Hobbes argues a third natural law logically emerges, the need for an independent body that holds the coercive power to enforce these agreements. He asserts, 'there must be some coercive power, to compel men equally to the performance of their covenants, by the terror of some punishment, … and such power there is none before the erection of a commonwealth.'[22] For Hobbes, therefore, the emergence of a strong centralised political authority is the inevitable outcome of a logical application of the laws of nature.[23]

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[19] Ibid 87.
[20] Ibid 84.
[21] Ibid 87.
[22] Ibid 95–96.
[23] For Hobbes, however, this does not necessarily mean that all communities have arrived at this 'logical' conclusion and enacted a strong, centralised state. In fact, he sees a lack of clear government institutions as a sign of remaining closer to a state of nature. He asserts, 'there are many places, where they live so now. For the savage people in many places of America, except the government of small families, the concord whereof dependeth on natural lust, have no government at all; and live at this day in that brutish manner, as I said before': Ibid 85.

In the political theories of both Aristotle and Hobbes we can see examples of how assertions regarding the ontological status of nature are used to underpin and justify different forms of political governance. In Aristotle, specific political associations were an inevitable outcome of the ordering of the cosmos, emerging in a manner no different than any other natural entity. In Hobbes, the emergence of a centralised political structure was the logical consequence of a fixed human nature. Nevertheless, in their different ways, they both rely on a transcendent theory of nature (whether located in the cosmos or the individual) to provide the foundations for their normative arguments regarding political organisation. This reliance on an a priori natural structure is extremely widespread in political philosophy, even if there is significant disagreement regarding its content. For Locke, for example, it is the natural right to property that justifies government,[24] for Rawls, his hypothetical 'veil of ignorance' (the basis for his assertions regarding justice and the distribution of rights) is dependent on assumptions regarding people's innate rationality and 'mutual disinterest'.[25] In fact, Hollis has argued that questions of nature, including human nature, are at the core of all political theory. He states, 'all political and social theorists … depend on some model of [nature] in explaining what moves people and accounts for institutions. Such models are sometimes hidden but never absent … There is no more central or pervasive topic in the study of politics.'[26]

This idea of government as an ontological precondition for conceiving of society and politics, and especially the merging of natural and political structures implied within it, is interestingly captured in the etymology of the classical Greek term *archē*. In ancient Greek, this term had two related meanings. As Long explains, 'on the one hand, *archē* designated the beginning, the first, incipience; on the other hand, it designated the supreme commander, that which holds dominion and

[24] Locke (n 15) 271.

[25] John Rawls, *A Theory of Justice* (Belknap Press, 1971) 13. See also, Mari Matsuda, 'Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice' (1986) 16(3) *New Mexico Law Review* 613.

[26] Martin Hollis, 'Preface' in Ian Forbes and Steve Smith (eds), *Politics and Human Nature* (Bloomsbury Publishing, 2016) i, ix.

power.'[27] These two meanings of *archē* are still evident in contemporary usage. It is from the root *archē* that we have derived many of our words for different types of governmental regimes, two prime examples being monarchy and oligarchy.[28] Additionally, *archē* also remains a key philosophical concept used to denote metaphysical first principles.[29] It is the relationship between these two meanings, however, that I am most interested in here. As I have been arguing, conventional political theory has often relied on a merging of these ideas. That is, political theory has relied on a metaphysical concept of nature — an asserted *archē,* an originary sovereign principle — to provide the ontological foundation for specific regimes of political sovereignty. In this way, political arrangements take on a sense of inevitability. They always remain defined by their relationship to a fixed ideal form.

The effect of this is a politics informed by representationalism. The ideal shape of political structures is predetermined and governed by transcendent principles, and, subsequently, the appropriateness of specific enactments (or representations) become assessable through essential (and fixed) criteria.[30] Like all representational frameworks, this approach creates a model, and subsequently a politics, that is both hierarchical and sedentary. Difference is measured and ranked based on its proximity to an established standard or principle, and movement (if there is any at

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[27] Christopher Long, *The Ethics of Ontology: Rethinking an Aristotelian Legacy* (SUNY Press, 2012) 1.

[28] Interestingly, the Greek terminology for regime types can be split into two main groups — those that rely on the *archē* root (like monarchy, oligarchy etc), and those that employ the *kratos* root (democracy, autocracy etc). Ober argues that this distinction speaks to a slight variation in the underlying concepts. Where *archē* speaks more directly to rulers/office holders, kratos speaks more to the *empowerment* of broader groups. For example, monarchy refers to *rule by* a single sovereign, whereas democracy refers to the *empowerment of* the demos: Josiah Ober, 'The Original Meaning of "Democracy": Capacity to Do Things, Not Majority Rule' [2007] *Princeton/Stanford Working Papers in Classics* <https://www.princeton.edu/~pswpc/pdfs/ober/090704.pdf>.

[29] This use originally stems from aspects of Aristotle's argument in *Metaphysics*, however, variations on this meaning have also played important roles in the work of Heidegger (among others). See Long (n 28); Martin Heidegger, *Basic Concepts* (Indiana University Press, 1993) 92–97; Reiner Schürmann, *Heidegger on Being and Acting: From Principles to Anarchy* (Indiana University Press, 1987).

[30] For example, within this conceptualisation some political forms, like those adopted by the 'savage Americans' referred to by Hobbes, may fail this assessment.

all), is reduced to a predetermined path or trajectory.[31] Answers to those fundamental questions of political theory — what is the best way to conceptualise the relationship between the individual and the community? On what basis can political authority be claimed and exercised? — are prescriptive. They are drawn from fixed principles that always operate as the definitive and final point of reference. In effect, they are approaches that, to draw on Deleuze, are unable to conceive of difference *in itself*.[32] Difference 'becomes an object of representation always in relation to a conceived identity, a judged analogy, an imagined opposition or a perceived similitude.'[33] In this way, difference is always captured by, and reduced to an effect of, the established system, limiting our ability to think life otherwise and to effect real change. It is an abstracted politics that is detached from the broader socio-material flux of life and to its generative potential. Similar to the way essentialist conceptualisations of law stripped the life from legal arrangements, this approach to political theory strips the life from politics.

What might it mean to think about politics outside this representationalist framework, to resist this sedentary and hierarchical approach and embrace a politics of life? What is the role of law within this? These are the central questions I will be exploring across this chapter and the next. In order to do this, I will be engaging with the political theory of anarchism. Deriving its name from the same Greek root word discussed above, '(*an-)archē*', it is a political philosophy that strongly asserts social order without a state, or other hierarchical governmental structures (that is, to revisit Long's definition of *archē*, without a central authority holding 'dominion and power'[34]), is both achievable and desirable. Deeply sceptical of all forms of authority, anarchism promotes a vision of societies structured around voluntary, cooperative, and non-coercive forms of social organisation.

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[31] See Gilles Deleuze, *Difference and Repetition* (Columbia University Press, 1994) 37, 55–56, 138. I discuss these aspects of representation in more detail in chapter 2.

[32] Ibid 138.

[33] Ibid.

[34] Long (n 28) 1.

In rejecting centralised political institutions, anarchism offers a fundamentally different type of politics to those theories outlined above. And, importantly, these differences extend beyond specific political arrangements regarding who will hold authority (*archē* as ruler/leader). Anarchism is also a political philosophy which forcefully resists predetermined frameworks and foundational principles (*archē* as metaphysical first principles).[35] In fact, in defining anarchy Colson states,

> anarchy is first of all the refusal of any first principle, of any first cause, of any primary idea, any dependence of beings with respect to a single origin … Anarchy, as origin, goal, and means …, is the *affirmation* of the multiple, the unlimited diversity of beings and their capacity to compose a world without hierarchy, domination, or forms of dependence other than the free association of radically free and autonomous forces.[36]

These aspects of anarchism are clear in its emphasis on freedom and non-coercion, as well as its related commitment to a prefigurative politics which places strong emphasis on means over ends, and entails a real scepticism towards any prescribed solutions or goals (including, if not especially, those considered axiomatic or natural). As Newman has noted, '[a]narchists were always wary about laying down precise blueprints for future social arrangements, emphasising instead revolutionary spontaneity and free acts of creation.'[37] Anarchist politics, at their core, challenge representation, both political and philosophical.

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[35] The extent to which anarchism, particularly in its classical forms, has been able to resist philosophical representationalism is somewhat contentious. While some argue classical anarchism relied on essentialised notions of human nature (although in radically different ways to the other political theories I have discussed), others suggest those arguments rely on reductive and ungenerous readings. See Andrew M Koch, 'Post-Structuralism and the Epistemological Basis of Anarchism' in Duane Rousselle and Süreyyya Evren (eds), *Post-Anarchism: A Reader* (Pluto Press, 2011) 23; Jesse Cohn, 'What Is Postanarchism "Post"?' (2002) 13(1) *Postmodern Culture*; Jesse Cohn and Shawn Wilbur, 'What's Wrong with Postanarchism?', *The Libertarian Library* (2007) <http://tal.bolo-bolo.co/en/j/jc/jesse-cohn-and-shawn-wilbur-what-s-wrong-with-postanarchism.pdf>. I will discuss aspects of this argument in more detail later in the chapter.

[36] Daniel Colson, *A Little Philosophical Lexicon of Anarchism from Proudhon to Deleuze* (Autonomedia, 2019) 31.

[37] Newman, *The Politics of Postanarchism* (n 8) 39.

ANARCHISM: AN OVERVIEW AND POTTED HISTORY

> [T]oday, one might claim to be a liberal, a conservative, a socialist, or even a utilitarian, but the person who embraces anarchism is likely to be regarded as a crank at best and a terrorist at worst.[38]

Anarchism, as a distinct political theory, emerged in the nineteenth century and its early development and refinement is usually attributed to the writings of William Godwin, Pierre Joseph Proudhon, Mikhail Bakunin, and Peter Kropotkin (among numerous others).[39] While it has always remained somewhat at the margins of political theory (especially within the academy), it has played a significant role in radical political movements since its inception and has recently had something of a resurgence with anarchist influences evident in recent protest movements including the alter-globalisation movement in the early 2000s and the 'occupy' movement in the early 2010s. This influence has also filtered into academic writing more generally with scholars increasingly interested in exploring anarchist theory and strategy. In fact, some have even claimed we are witnessing an 'anarchist turn'.[40] Anarchism's focus on decentred, non-hierarchical, and participatory forms of organisation and practice, as well as its emphasis on prefigurative politics appears far better suited to politics in the contemporary world than the more rigid, narrow, and centralised Marxist approaches to social change which dominated radical politics throughout most of the twentieth century.

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[38] David Weir, *Anarchy & Culture: The Aesthetic Politics of Modernism* (Univ of Massachusetts Press, 1997) 12.

[39] Of course, anti-authoritarian and anti-state ideas predate these writings. Peter Marshall, for example, identifies traces of libertarian philosophies in strains of Stoicism, Taoism, Buddhism, and Christianity, as well as in earlier radical movements including numerous peasant revolts in the middle ages and in the English revolution: Peter Marshall, *Demanding the Impossible: A History of Anarchism* (PM Press, 2009) 53–107. It is also worth noting that, outside of the tradition of western political theory, state-less communities have existed (and continue to exist) in many areas of the world. A number of anthropologists have used anarchist frameworks when studying these communities (using anarchism to inform their study, as well as using their study to inform anarchism). Perhaps the most famous example is the work of Pierre Clastres: see generally Pierre Clastres, *Society Against the State: Essays in Political Anthropology* (Zone Books, 1987). See also, David Graeber, *Fragments of an Anarchist Anthropology* (Prickly Paradigm Press, 2004).

[40] Jacob Blumenfeld, Chiara Bottici and Simon Critchley (eds), *The Anarchist Turn* (Pluto, 2013). See also Randall Amster et al, *Contemporary Anarchist Studies: An Introductory Anthology of Anarchy in the Academy* (Routledge, 2009).

Anarchism is an extremely diverse tradition and the label 'anarchism' has been used to encompass an enormously varied range of political and theoretical positions ranging from non-hierarchical collectivism[41] to radical individualism.[42] This diversity has meant that, beyond a range of central ideas and beliefs, it is very difficult to provide a comprehensive definition or overview of anarchist politics or strategies. Arguably, this difficulty is exacerbated by the very nature of anarchist beliefs themselves. As George Woodcock has aptly noted, anarchism's 'rejection of dogma, its deliberate avoidance of rigidly systematic theory, and, above all, its stress on extreme freedom of choice and the primacy of individual judgements — creates immediately the possibility of a variety of viewpoints inconceivable in a closely dogmatic system.'[43] Nevertheless, a good starting point for understanding some of the central tenets of anarchism is Peter Kropotkin's entry on anarchism for the Encyclopaedia Britannica written in 1910:

> [Anarchism is] the name given to a principle or theory of life and conduct under which society is conceived without government — harmony in such a society being obtained, not by submission to law, or by obedience to any authority, but by free agreements concluded between the various groups, territorial and professional, freely constituted for the sake of production and consumption, as also for the satisfaction of the infinite variety of needs and aspirations of a civilized being.[44]

Anarchism, therefore, is a social and political philosophy which, at its core, provides a radical critique of centralised forms of power and promotes a vision of a non-hierarchical society organised around the voluntary association of free individuals. Proudhon, writing in the first half of the nineteenth century, was the first to adopt the label 'anarchism' to refer to this form of politics, playfully drawing on the term

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41 See generally Peter Kropotkin, 'The Conquest of Bread' in Marshall S Shatz (ed), *The Conquest of Bread and Other Writings* (Cambridge University Press, 1995) 1.

42 See generally Max Stirner, *The Ego and Its Own* (Cambridge University Press, 1995).

43 George Woodcock, *Anarchism: A History of Libertarian Ideas and Movements* (Penguin, 1986) 17.

44 Peter Kropotkin, '"Anarchism", from The Encyclopaedia Britannica' in Marshall S Shatz (ed), *The Conquest of Bread and Other Writings* (Cambridge University Press, 1995) 233.

anarchy which was (and often still is) conventionally used to denote chaos, and social and political disorder.[45] Anarchism, however, is not a philosophy of chaos or nihilism. In adopting the label, Proudhon asserted that 'anarchy is order; government is civil war.'[46] For Proudhon, as for other anarchists, governmental rule is not necessary for the preservation of order. This argument radically inverts the Hobbesian position that a stateless community is 'nothing else but a mere war of all against all',[47] insisting instead that people can create peaceful and ordered relations outside the state and, in fact, it is government which is the true source of conflict and disorder.

In this respect, therefore, anarchism's critique of authority is strongly focused towards the political state, and anarchists insist that social organisation without a state is both desirable and achievable. They argue that the state is exploitatively coercive; that, at its worst, it exists to entrench and perpetuate the power of elites, and, at its best, it places unnecessary restrictions on, and thereby impedes, the development and functioning of communities. As the nineteenth century Russian anarchist, Bakunin, declared, '[t]he state is like a vast slaughterhouse or an enormous cemetery, where all the real aspirations, all the living forces of a country … [are] slain and buried.'[48] For anarchists, the state always operates against the

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[45] At the time it had been used as a derisive attack on different political groups following the French revolution. See Marshall (n 40) 4; Woodcock (n 44) 10. See also Marshall (n 40) 3; Jesse S Cohn, *Anarchism and the Crisis of Representation: Hermeneutics, Aesthetics, Politics* (Susquehanna University Press, 2006) 14; Colin Ward, *Anarchism: A Very Short Introduction* (Oxford University Press, 2004) 1.

[46] This phrase is frequently attributed to Proudhon: see, for eg, Paul McLaughlin, *Anarchism and Authority: A Philosophical Introduction to Classical Anarchism* (Ashgate, 2007) 11; Marshall (n 40) 239; Saul Newman, *From Bakunin to Lacan: Anti-Authoritarianism and the Dislocation of Power* (Lexington Books, 2001) 163. However, reference to the original source is not always provided. It may be that this is a common misattribution, as the phrase can be found in an essay by Anselme Bellegarrigue written in 1850: Anselme Bellegarrigue, 'Anarchy Is Order (1850)' in Robert Graham (ed), *Anarchism: A Documentary History of Libertarian Ideas* (Black Rose Books, 2005) 58, 59. This confusion may have emanated from the fact that Proudhon did make a similar assertion in his book, *What is Property*, in which he stated, '[a]s man seeks justice in equality, so society seeks order in anarchy.' Pierre Joseph Proudhon, *What Is Property?* (Cambridge University Press, 1994) 209.

[47] Thomas Hobbes, *De Cive* (Clarendon Press, 1983) 34.

[48] Mikhail Bakunin, 'The Paris Commune and the Idea of the State (1871)' in Sam Dolgoff (ed), *Bakunin on Anarchy* (Vintage Books, 1972) 259, 269.

interests of the community and its citizens. A state's intervention in people's lives is predominantly motivated by an attempt to control them and suppress the possibility for political action. Proudhon captured this understanding of the state in his famous statement regarding government:

> To be GOVERNED is to be watched, inspected, spied upon, directed, law-driven, numbered, regulated, enrolled, indoctrinated, preached at, controlled, checked, estimated, valued, censured, commanded, by creatures who have neither the right nor the wisdom nor the virtue to do so. To be GOVERNED is to be at every operation, at every transaction noted, registered, counted, taxed, stamped, measured, numbered, assessed, licensed, authorized, admonished, prevented, forbidden, reformed, corrected, punished. It is, under pretext of public utility, and in the name of the general interest, to be place under contribution, drilled, fleeced, exploited, monopolized, extorted from, squeezed, hoaxed, robbed; then, at the slightest resistance, the first word of complaint, to be repressed, fined, vilified, harassed, hunted down, abused, clubbed, disarmed, bound, choked, imprisoned, judged, condemned, shot, deported, sacrificed, sold, betrayed; and to crown all, mocked, ridiculed, derided, outraged, dishonored. That is government; that is its justice; that is its morality.[49]

While anti-statism is a core component of anarchist philosophy, its critical gaze also extends to other forms of domination and anarchists have long been interested in identifying and challenging power and authority in a variety of locations and relationships. They share with Marxism a fundamental and strident opposition to capitalist economic relations and private property,[50] they have long advocated for open and progressive attitudes to gender and sexuality,[51] there is a long anarchist

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[49] PJ Proudhon, *General Idea of the Revolution in the Nineteenth Century* (Haskell House, 1923) 294. Interestingly, Proudhon's inclusion of the many administrative and bureaucratic mechanisms used to monitor and 'account' for the population appears to pre-empt some of Foucault's later arguments regarding governmentality. See Michel Foucault, 'Governmentality' in James D Faubion (ed), *Power: Essential Works of Foucault 1954-1984* (Penguin, 2002) 201.

[50] I will discuss the relationship between Marxism and anarchism in more detail shortly.

[51] For a discussion of the relationship between anarchism and sexuality (which covers both historical and contemporary work) see Jamie Heckert and Richard Cleminson, 'Ethics, Relationships and Power: An Introduction' in Jamie Heckert and Richard Cleminson (eds), *Anarchism & Sexuality: Ethics, Relationships and Power* (Routledge, 2011) 1.

history of engagement with education and the development of radical pedagogy,[52] and environmental concerns have been prominent in the work of key anarchist figures.[53] As John Clarke has recognised

> anarchist theory does not stop with a criticism of political organization, but goes on to investigate the authoritarian nature of economic inequality and private property, hierarchical economic structures, traditional education, the patriarchal family, class and racial discrimination, and rigid sex and age-roles, to mention just a few of the more important topics.[54]

Although, as I have acknowledged, anarchism is a diverse tradition, one broad, but centrally important, distinction should be drawn between *social* anarchism (or libertarianism socialism) and the extreme individualistic liberalism which is commonly referred to, particularly in the United States, as libertarianism.[55] While both approaches espouse anti-statism, they fundamentally differ on how they understand the role of the market and private property. For libertarians, the

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[52] Education was a key focus of many key anarchist writers including Godwin, Proudhon, Stirner, Kropotkin, and Goldman, and anarchist writings on education have influenced a range of educators including Ferrer and Goodman. In fact, Mueller has argued that '[e]ducation has played a particularly important role in the history of anarchist thought and practice, perhaps more so than any other political philosophy aimed at social transformation': Justin Mueller, 'Anarchism, the State, and the Role of Education' in Robert H Haworth (ed), *Anarchist Pedagogies: Collective Actions, Theories, and Critical Reflections on Education* (PM Press, 2012) 14, 14. See also Ward (n 46) 62–69.

[53] An early example of anarchist writings on the environment is the work of geographer Elisée Reclus. For an overview of his understanding of the relationship between the environment and humanity see John Clark, 'The Dialectic of Nature and Culture' in Camille Martin and John Clark (eds), *Anarchy, Geography, Modernity: Selected Writings of Elisée Reclus* (PM Press, 2013) 16. More recently, Murray Bookchin has written extensively on the connection between hierarchical relationships and environmental degradation: Murray Bookchin, *The Ecology of Freedom: The Emergence and Dissolution of Hierarchy* (Cheshire Books, 1982).

[54] John P Clark, *The Anarchist Moment: Reflections on Culture, Nature, and Power* (Black Rose Books, 1984) 128.

[55] Historically (and outside the US) libertarianism was/is considered as being relatively synonymous with anarchism. This point has even been recognized by leading US libertarian Murray Rothbard who wrote:

> One gratifying aspect of our rise to some prominence is that, for the first time in my memory, we, 'our side,' had captured a crucial word from the enemy. Other words, such as "liberal," had been originally identified with laissez-faire libertarians, but had been captured by left-wing statists, forcing us in the 1940s to call ourselves rather feebly "true" or "classical" liberals. "Libertarians," in contrast, had long been simply a polite word for left-wing anarchists, that is, for anti-private property anarchists, either of the communist or syndicalist variety.

Murray Newton Rothbard, *The Betrayal of the American Right* (Ludwig von Mises Institute, 2007) 83 (citations omitted).

removal of the state is necessary to better allow the functioning of the market and to ensure that innate (and natural) property rights are protected from government interference.[56] By contrast, anarchism, as I mentioned above, is deeply critical of capitalist economic relations and private property. It views both as coercive institutions that, far from deriving from some natural right and needing protection from the state, actually emerge from, and are completely dependent on, the state. [57] For anarchists, therefore, economic relations and property are deeply entangled with the state's broader authoritarian apparatus and should themselves be resisted and reformed.

As is clear from my discussion so far, anarchism is deeply sceptical of all forms of hierarchy and authority, arguing that these often lead to relationships of domination and, therefore, tend to stifle human capacity, creativity, and freedom. However, this scepticism to authority should not necessarily be understood as an outright rejection of all forms of authority in all situations. Many advocates of anarchism accept that relationships of authority may be justified (at least in limited and contingent forms), but assert that they should always be questioned. [58] Social critic and anarchist author Noam Chomsky explained this position in an interview (also acknowledging, in typical anarchist manner, that this scepticism of authority necessarily includes a wariness towards any fixed or definitive doctrinal position):

> [Anarchism seeks] to identify structures of authority and hierarchy … and to challenge them; unless a justification for them can be given, they are illegitimate … That includes political power, ownership and management, relations among men and women, parents and children … and much else. That is what I have always understood to be the essence of anarchism: the conviction that the burden of proof has to be placed on authority, and … [structures of authority] should be dismantled if that burden cannot be met. Sometimes

[56] Perhaps the most famous statement of this position is Robert Nozick, *Anarchy, State, and Utopia* (Basis Books, 1974).

[57] Max Stirner, for example, argued that: '[p]rivate property lives by grace of the law. Only in the law has it its warrant — for possession is not yet property, it becomes 'mine' only by assent of the law; it is not a fact, … but a fiction, a thought. This is legal property, legitimate property, guaranteed property. It is mine not through me but through the law.' Stirner (n 43) 223.

[58] For a detailed exploration of the relationship between anarchism and authority and the difficulties of defining anarchism as simply 'anti-authoritarian', see McLaughlin (n 47) 28–36.

> the burden can be met. … [L]ife is a complex affair … and grand pronouncements are generally more a source of harm than of benefit.[59]

One area in which some anarchists do accept a limited role for authority is in the potential administrative bodies that will be required for effective community organisation in a stateless society. While, as I have suggested, anarchists are deeply suspicious of any strongly prescribed political blueprint, many proponents inevitably have provided some indication of what they envision will replace state authority and governments. While there is great variation in proposals (anarchism, as I have indicated, encompasses a diverse range of perspectives including syndicalism, (anarcho)-communism, mutualism, collectivism and many others), they can all be loosely generalised as amounting to a form of egalitarian and devolved federalism.[60] That is, they all seek to find a balance between devolving power and decision making as far as possible against the need to coordinate on a larger scale in order to ensure a community can meet its administrative needs. Finding a solution to achieve this in a way that avoids political representation raises some real tensions. The prominent anarchist Murray Bookchin argues that it is possible to do this, but it is crucial to carefully distinguish between *administrative power* and *political power*. He argues:

> No policy, in effect, is democratically legitimate unless it has been proposed, discussed, and decided upon by the people directly — not through representatives or surrogates of any kind. The *administration* of these policies can be left to boards, commissions, or collectives of qualified, even elected, individuals who, under close public purview and with full accountability to policy-making assemblies, may execute the popular mandate.[61]

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[59] Kevin Doyle, 'Noam Chomsky on Anarchism, Marxism, and Hope for the Future', *Red & Black Revolution* (May 1995) <http://www.wsm.ie/c/noam-chomsky-anarchism-marxism-future-interview>.

[60] Todd May, *The Political Philosophy of Poststructuralist Anarchism* (Penn State University Press, 1994) 55.

[61] Murray Bookchin, *Remaking Society: Pathways to a Green Future* (South End Press, 1990) 174–175. Bookchin calls his proposal 'confederalism'. This involves 'popular face-to-face democratic assemblies' and 'administrative councils'. In such a system, '[p]olicymaking is exclusively the right of popular community assemblies' and 'the administration and coordination are the responsibility of confederal councils.' Murray Bookchin, 'The Meaning of Confederalism' [1989] (20) *Green*

Of course, effectively managing this balance between political power and administrative power is not without difficulty and risks.[62] But, it is always worth remembering that much social coordination actually occurs through social convention as much as external direction. In fact, this was one of the central lessons of the early socio-legal research I discussed in the previous chapter.[63] And, further, as with all anarchist projects and strategies, there is a sense that managing any difficulties, whether these are the exact lines to be drawn or the precise practical mechanisms to be employed, are perhaps best left to those directly involved. They are the ones who will be in the best position to experiment, refine, and adapt the organisational principles in ways that suit their requirements.

While anarchism provides a powerful anti-authoritarian critique of social and political institutions, it remains a commonly misunderstood and much maligned theory, both within public consciousness as well as within the academy. Such misunderstandings take a number of forms and often appear quite contradictory. One of the primary misunderstandings relates to the issue of violence. In the popular imagination anarchism is often associated with chaos, disorder, nihilism, and violence. Historically, it conjured images of radical and violent revolutionaries committed to wreaking havoc and chaos. As Woodcock notes, '[t]he stereotype of the anarchist is that of the cold-blooded assassin who attacks with dagger or bomb the symbolic pillars of established society. Anarchy, in popular parlance, is malign chaos.'[64] This association still continues to some extent in contemporary portrayals with the media, for example, often drawing attention to the 'violent' actions of

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Perspectives <https://theanarchistlibrary.org/library/murray-bookchin-the-meaning-of-confederalism>.

62 May, for example, points out a number of potential issues and tensions: May, *The Political Philosophy of Poststructuralist Anarchism* (n 61) 57.

63 For example, Stewart Macauley's study of contract law which identified the tendency of businesses to seek informal resolutions over relying on enforcing their legal entitlements. Stewart Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28(1) *American Sociological Review* 55. On the primacy of social convention in coordination, see also Jonathan Crowe, 'Natural Law Anarchism' (2014) 7 *Studies in Emergent Order* 288, 290.

64 Woodcock (n 44) 9.

masked anarchist protestors (commonly referred to as 'Black Blocs'), in otherwise peaceful public demonstrations.[65]

While violent insurrection has, at times, been promoted (and enacted) by some proponents of anarchism, the relationship between violence, anarchism, and social change is far more nuanced than suggested in this popular imagining. Many classical anarchists were extremely wary of recourse to violence and of the risks of promoting (violent) means over ends.[66] The Italian anarchist, Malatesta, for example, argued that violence is 'eminently corrupting' and that it 'tends, by its very nature, to suffocate the best sentiments … [even] when … used for a good end.'[67] Emma Goldman, while acknowledging the necessity of violence in limited circumstances, was also deeply concerned about its impact. She argued, '…it is one thing to employ violence in combat, as a means of defence. It is quite another thing to make a principle of terrorism, to institutionalise it … Such terrorism begets counter-revolution and in turn itself becomes counter-revolutionary.'[68] Further, it is worth remembering that anarchism is a tradition that also encompasses the radical pacifism of Leo Tolstoy, whose writings were deeply influential on Mahatma Gandhi and informed central aspects of his strategy of nonviolent resistance against British colonial rule in India.[69]

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[65] A recent example are reports from May Day protests in Paris in 2018. See, eg, 'Hundreds Arrested as Riot Police, Anarchists Clash at Paris May Day Rally', *ABC News* (2 May 2018) <http://www.abc.net.au/news/2018-05-02/may-day-rallies-france-police-use-teargas-against-anarchists/9717966>. For a more nuanced analysis which attempts to track the relationship between the 'performative violence of demonstrators' and the ways the police, government, and media use images of protestor violence, see Jeffrey S Juris, 'Violence Performed and Imagined: Militant Action, the Black Bloc and the Mass Media in Genoa' (2005) 25(4) *Critique of Anthropology* 413.

[66] The relationship between means and ends is centrally important in anarchist theory with most proponents endorsing a form of prefigurative politics. I will discuss this in the following chapter.

[67] Errico Malatesta, 'Violence as a Social Factor (1895)' in Robert Graham (ed), *Anarchism: A Documentary History of Libertarian Ideas* (Black Rose Books, 2005) 160, 160.

[68] Emma Goldman, *My Disillusionment in Russia* (Dover, 2003) xv.

[69] Woodcock (n 44) 20. See also Leo Tolstoy, *Government Is Violence: Essays on Anarchism and Pacifism* (Phoenix Press, 1990).

Somewhat ironically, anarchism is also commonly dismissed and criticised for promoting a naïve utopian fantasy that fails to account for the self-interest and propensity for violence at the heart of human nature. The anarchist assertion that society could be organised without hierarchy or coercion is often considered at best optimistic and at worst an idealistic and ingenuous fiction. Wolff in his introductory text on political theory, for example, has argued that, 'to rely on the natural goodness of human beings to such an extent seems utopian to the extreme.'[70] A similar sentiment is also evident in Benjamin Barber's famous critique of anarchism that its 'view of actual men is wildly romanticized. Hunger, greed, ambition, avarice, the will to power, to glory, to honour, and to security which have played some role in all traditional ethnologies find no place in the anarchist portrait of man.'[71] Anarchist understandings of 'human nature', however, are far more complicated than these criticisms suggest.

In the work of a number of classical anarchists, a tendency to rely on some innate human virtue or instinct is at times evident. Godwin is perhaps the most obvious candidate in this respect. For Godwin, the organization of communities outside the state could be justified based on the innate rationality of all humans (the state operating as a block on the exercise of this rationality).[72] There are also hints of a comparable essentialism in both Bakunin and Kropotkin. Bakunin, for example, often relied on a distinction between the 'laws of nature' which encouraged freedom and cooperation, and the laws of the state, which encouraged oppression and domination.[73] Similarly, Kropotkin's perspective was partially based on an argument regarding the innate, biological tendency towards mutual aid and cooperation

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[70] Jonathan Wolff, *An Introduction to Political Philosophy* (Oxford University Press, 2006) 34. See also McLaughlin (n 47) 11–14.

[71] Benjamin Barber, *Superman and Common Men* (Harmondsworth, 1972) 18 cited in Samuel Clark, 'Anarchism and the Myth of the Primitive: Godwin and Kropotkin' (2017) 26 *Studies in Social and Political Thought* 95, 96.

[72] William Godwin, *Enquiry Concerning Political Justice: And Its Influence On Morals And Happiness* (Penguin UK, 2015).

[73] Mikhail Bakunin, *The Political Philosophy of Bakunin: Scientific Anarchism*, ed GF Maximoff (Free Press, 1964) 237–247.

identifiable in many different animal species, including humans. [74] However, this isn't indicative of all anarchist writings, and, even within these works (especially those of Bakunin and Kropotkin), these 'innate' tendencies were treated as deeply complex and never absolute as they were always embedded in, and expressed through, relatively fluid material social relations.

Generally, however, anarchists do argue that humans have the capacity to cooperate and live in relative harmony without external coercion, and this necessarily entails a level of optimism regarding human relations. In this sense, they are deeply critical of philosophies which view humans as innately selfish or self-interested. Goldman makes this point artfully stating, '[e]very fool, from king to policemen, from the flatheaded parson to the visionless dabbler in science, presumes to speak authoritatively of human nature. The greater the mental charlatan, the more definite his insistence on the wickedness and weakness of human nature.'[75] However, this does not mean that anarchism uncritically subscribes to a vision of innate human goodness (even if, as mentioned above, some anarchist writings are suggestive of this at times)[76]. In fact, most anarchists readily accept that humans have the capacity for conduct which is both nominally 'good' as well as 'bad'. Their argument is simply that structures of authority (particularly the state) tend to encourage and exacerbate traits such as self-interest, while also hindering opportunities for cooperation. This point was made clearly in an editorial for the anarchist journal *Freedom* in 1888:

> when we hear men saying that Anarchists imagine men much better than they really are, we merely wonder how intelligent people can repeat that nonsense. Do we not say continually that the only means of rendering men less rapacious and egotistic, less

[74] Peter Kropotkin, *Mutual Aid: A Factor of Evolution* (New York University Press, 1972).

[75] Emma Goldman, 'Anarchism: What It Really Stands For' in Alix Kates Shulman (ed), *Red Emma Speaks: An Emma Goldman Reader* (Schocken Books, 1983) 71.

[76] As noted previously, the extent to which classical anarchism relies on a conception of innate human goodness is a main area of discussion within much postanarchist literature. I will turn to the issue of postanarchism shortly. See, for eg, Koch (n 36); Newman, *From Bakunin to Lacan: Anti-Authoritarianism and the Dislocation of Power* (n 47).

> ambitious and less slavish at the same time, is to eliminate those conditions which favour the growth of egotism and rapacity, of slavishness and ambition?[77]

Not only is anarchism subject to these common misconceptions, it is also a theory that is regularly dismissed and disparaged, especially within academic scholarship. Anarchism has always remained within the margins of the academy. And, somewhat oddly, this marginality doesn't simply stem from its niche appeal or application, but rather is expressed as a dismissive, and at times strangely hostile, attitude towards the concept and broader project itself. McLaughlin provides an apposite summary of this predicament:

> As any scholar of anarchism (other than the most hostile) can testify, inquiry into the subject is greeted by colleagues, more than not, with prejudicial incredulity, condescension, and even hostility — beyond the normal ignorance of the over-specialized. Intellectual curiosity and rigour, the principle of charity, and all manner of noble academic characteristics — aside from basic human respect — go out the window and sheer intolerance and not a little stupidity become standard.[78]

While it is hard to exactly pinpoint the basis for this pejorative stance, perhaps one of the most common accusations in academic literature is that anarchism is theoretically light and naively utopian. The famous Marxist historian, Eric Hobsbawm, for example, described anarchism as theoretically 'primitive.'[79] Claiming that anarchism's central insights and tenets (including its rejection of centralised forms of government, as well as its aspiration to establish self-governing cooperatives) have been articulated more fully in other political philosophies, he asserted that '[w]ith the exception of Kropotkin, it is not easy to think of an anarchist theorist who could be read with real interest by non-anarchists.'[80] He subsequently goes on to conclude that, '[i]n terms of ideology, theory and

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77 Cited in Cohn (n 46) 156.
78 McLaughlin (n 47) 14.
79 EJ Hobsbawm, *Revolutionaries: Contemporary Essays* (Weidenfeld and Nicolson, 1973) 86.
80 Ibid 83.

programmes, [anarchism's] value remains marginal.'[81] For Hobsbawm, outside of anarchism's revolutionary zeal and spirit, it provides little benefit or insight into political theory or revolutionary strategy.

Notwithstanding the antagonism that has historically plagued the relationship between anarchism and Marxism,[82] there are a few points that can be addressed in response to these criticisms. As I have indicated previously, not only is anarchism an extremely diverse tradition, it is a tradition that *actively* resists systematisation. On this point, McGeough has noted that, '[u]nlike Marxism, anarchism ostensibly remains too hybrid, too contradictory, too aesthetic and too interested in the possible to achieve the vaunted status of a political science'[83] In fact, many anarchist writers have held out this resistance to systematisation as one of the perspective's central advantages, even viewing it as emblematic of their broader project. Anarchism has always been suspicious of any prescriptive blueprint or program to guide political struggle, and, for this reason, its proponents have long been wary of the high theory of 'Marxist science', including the implicit (and at times explicit) vanguardism that often informs and underpins it.[84] Anarchism has always prided itself on its emphasis on praxis over theory, and on its commitment to participatory forms of political organising and political action. As Graeber summarises, 'Marxism has tended to be a theoretical or analytical discourse about revolutionary strategy … [whereas] … anarchism has tended to be an ethical discourse about revolutionary practice.'[85] For better or worse, anarchism's focus has always been on putting its

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[81] Ibid 87.

[82] See, for eg, Paul Thomas, *Karl Marx and the Anarchists* (Routledge, 2010).

[83] Jared McGeough, 'Romanticism after the Anarchist Turn: Romanticism and Anarchy' (2016) 13(1) *Literature Compass* 3, 4.

[84] Graeber captures this sentiment well in his discussion of the distinctions between Marxism and anarchism. He writes:

> Marxist schools have authors. Just as Marxism sprang from the mind of Marx, so we have Leninists, Maoists, Trotskyites, Gramscians, Althusserians … Now consider the different schools of anarchism. There are Anarcho-Syndicalists, Anarcho-Communists, … Cooperativists … None are named after a great thinker; instead they are invariably named either after some kind of practice, or most often, organisational principle. … Anarchists have never been much interested in the kinds of broad … philosophical questions that have historically preoccupied Marxists —questions like: Are the peasants a potentially revolutionary class? (Anarchists consider this something for the peasants to decide).

Graeber (n 40) 5–6.

[85] Ibid 6.

ideas into practice, viewing practice as the most appropriate source and site for the development of meaningful theory.

Despite these misconceptions and misgivings, anarchism and anarchist ideas have played an important role in social and political struggles since its inception. For example, many prominent anarchists were actively involved in the Paris Commune in 1871. The radical devolution of political power and the wide establishment of workers cooperatives that were a core component of this movement were, at least in part, inspired by anarchist ideas, particularly the mutualism of Proudhon.[86] Further, anarchist organisations were also centrally important in the Spanish Civil War (during which, somewhat paradoxically, the anarchist CNT party was elected and served in the Republican government).[87] There were also strong anarchist tendencies in the Situationist movement in France during the 1960s, including the May 68 protests,[88] as well as, arguably, in aspects of the autonomist movement in Western Europe during the 1970s (this was essentially a Marxist movement, albeit one whose strategies resonated very strongly with anarchism).[89] Additionally, anarchist ideas and influences are clearly evident in many contemporary political and social movements. For example, the Zapatista movement in the Chiapas region of Mexico is often described as 'libertarian-socialist' and relies heavily on decentralised forms of organisation.[90] Further, a number of cantons in the Kurdish

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[86] Woodcock (n 44) 288–291; Ward (n 46) 16.

[87] As Emma Goldman later remarked in a speech, 'with Franco at the gate of Madrid, I could hardly blame the CNT-FAI for choosing a lesser evil — participation in the government rather than dictatorship, the most deadly evil.' Emma Goldman, 'Address to the International Working Men's Association Congress' in Alix Kates Shulman (ed), *Red Emma Speaks: An Emma Goldman Reader* (Schocken Books, 1983) 421, 426.

[88] See Marshall (n 40) 549–553.

[89] See Heather Gautney, 'Between Anarchism and Autonomist Marxism' (2009) 12(3) *Journal of Labor and Society* 467.

[90] The movement itself has rejected a description of themselves as anarchist (in fact, they actively refuse any political or ideological classification viewing this as ultimately limiting their broader project): Ejército Zapatista de Liberación Nacional, 'A Zapatista Response to "The EZLN Is NOT Anarchist"', *The Anarchist Library* (2002) <https://theanarchistlibrary.org/library/ejercito-zapatista-de-liberacion-nacional-a-zapatista-response-to-the-ezln-is-not-anarchist>. For a general overview of the movement, see Simon Tormey, '"Not in My Name": Deleuze, Zapatismo and the Critique of Representation' (2006) 59(1) *Parliamentary Affairs* 138; Todd May, *Contemporary Political Movements and the Thought of Jacques Rancière: Equality in Action* (Edinburgh University Press, 2010) ch 4.

controlled Rojava region of northern Syria have expressly adopted a version of Bookchin's anarchist confederalism.[91] And, finally, both the alter-globalisation movement and the occupy movement have been described as exhibiting anarchist influences, at least in their promotion of horizontal and consensual forms of decision making and their commitment to mutual aid.[92]

Finally, as I noted in the introduction to this section, anarchism has also recently had something of a resurgence in broader academic and theoretical work. Increasingly, anarchist theorists and activists, as well as social theorists more generally, have been examining the links between anarchism and more contemporary social theories. Usually adopting the nomenclature 'postanarchism', [93] these approaches have drawn predominantly on poststructuralist perspectives (but are increasingly embracing other contemporary theoretical paradigms),[94] in order to reinvigorate the anarchist project and explore new concepts for understanding power, hierarchy, and domination, and, correspondingly, new mechanisms for achieving social change.

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[91] Damian Gerber and Shannon Brincat, 'When Öcalan Met Bookchin: The Kurdish Freedom Movement and the Political Theory of Democratic Confederalism' [2018] *Geopolitics* 1.

[92] Ruth Kinna, 'Anarchism and the Politics of Utopia' in Laurence Davis and Ruth Kinna (eds), *Anarchism and Utopianism* (Manchester University Press, 2009).

[93] Key proponents include Todd May, Saul Newman, and Lewis Call amongst others. While different labels for this approach have been used (May refers to 'poststructuralist anarchism', Newman refers to 'postanarchism', and Call adopts 'postmodern anarchism'), for the sake of simplicity I will simply refer to it as postanarchism. See, generally, May, *The Political Philosophy of Poststructuralist Anarchism* (n 61); Newman, *The Politics of Postanarchism* (n 8); Lewis Call, *Postmodern Anarchism* (Lexington Books, 2002); Koch (n 36); Rousselle and Evren (n 8).

[94] This is particularly true of early postanarchist work in which most proponents drew on differing combinations of Foucualt, Deleuze (and Deleuze and Guattari), Derrida, Lacan and Lyotard. More recently, writers have expanded the focus somewhat and have also closely examined the links between anarchism and the ethical framework of Levinas, the radical political theory of Ranciere, and even Bryant's variation of object orientated ontology. Examples of this more recent work include Simon Critchley, *Infinitely Demanding: Ethics of Commitment, Politics of Resistance* (Verso, 2013); Todd May, *Contemporary Political Movements and the Thought of Jacques Rancière: Equality in Action* (Edinburgh University Press, 2010); Duane Rousselle, 'What Comes After Post-Anarchism? Reviewing the Democracy of Objects' (2012) 2(2) *continent.* 152; Levi R Bryant, *Onto-Cartography: An Ontology of Machines and Media* (Edinburgh University Press, 2014).

While there is some debate within this literature about whether this project marks a substantial break with the classical anarchist tradition or is simply an update and refinement (some have even gone as far as to argue that anarchism is, in fact, the first postmodern political philosophy),[95] there is agreement that anarchist political philosophy can be brought into a productive tension with these more contemporary theoretical projects. Even at a cursory level, this is clear in a number of ways. First, it is hard to deny that there are strong resonances between aspects of anarchist philosophy and the theoretical concerns of those theories listed above. For example, both anarchism and poststructuralism share a deep scepticism of representation (both at a conceptual and political level) and seek to draw attention to the presence of domination and subjugation whenever people claim authority to speak for others. As Deleuze famously remarked regarding the work of Foucault, '[he taught us] something absolutely fundamental: the indignity of speaking for others.'[96] Related to this, both also call attention to and privilege non-hierarchical and decentralised forms of knowledge and social organisation.

Beyond these basic resonances, however, there is also a sense that both anarchism and poststructuralism (as well as other contemporary theoretical projects) have something to learn from each other. Anarchism can draw on their unrelenting critique of essentialism and universalism. In particular, it should pay heed to their steadfast rejection of humanism, and stronger emphasis on the diffuse and productive nature of power. Alternatively, these contemporary theoretical projects can draw on anarchism's unfaltering commitment to ethical praxis and its insistence that theory and practice are inseparable and interdependent. It is not, necessarily, that these aspects are missing from each respective approach. That is, that there is no critique of essentialism embedded in anarchism already, or that anarchism does not fully appreciate the way power and domination circulate throughout all social institutions; or, alternatively, that poststructuralism (or other contemporary

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95 Jun (n 1). See also Cohn (n 46); Cohn and Wilbur (n 36).

96 Michel Foucault, 'Intellectuals and Power: A Conversation between Michel Foucault and Gilles Deleuze' in *Language, Counter-Memory, Practice: Selected Essays and Interviews* (Cornell University Press, 1977) 205, 209.

theoretical positions) have no normative or ethical grounding (even if both have been subject to significant criticisms on these grounds).[97] Rather, it is more an issue of emphasis and degree. And perhaps, therefore, this project is best understood diffractively, a way of bringing these texts and theorists together constructively in order to produce and bring forward new insights and concepts.[98]

As can be seen from this overview, anarchism provides an extremely heterodox and somewhat unique perspective on political theory. It actively resists many assumptions that other political theories take for granted (not least the belief that order and stability are dependent on some form of hierarchical governmental structure) and asserts that it is both possible and desirable for communities to organise in non-hierarchical ways. In arriving at this position, it challenges the representationalist basis of other political theories, particularly their reliance on fixed, ontological foundations. Although often ignored and marginalised, anarchism has played an important in political thought and political practice, and offers important theoretical insights into the relationship between power and social organisation.

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[97] Interestingly, this critique of anarchism is most strongly advanced by early postanarchist writers (as indicated, this is a key point of contention in the broader literature on postanarchism and something I will address in more detail below). For an example of this critique, see Newman, *From Bakunin to Lacan: Anti-Authoritarianism and the Dislocation of Power* (n 47) 5–6. Poststructuralism has long been accused of promoting an ethical relativism and lacking critical power. Two classic examples of this argument are Nancy Fraser, *Unruly Practices: Power, Discourse, and Gender in Contemporary Social Theory* (University of Minnesota Press, 1989) 56–66 ('*Unruly Practices*'); Michael Walzer, 'The Politics of Michel Foucault' in David Couzens Hoy (ed), *Foucault: A Critical Reader* (Basil Blackwell, 1986) 51.

[98] Karen Barad, *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter and Meaning* (Duke University Press, 2007) 30; Iris Van Der Tuin, '"A Different Starting Point, a Different Metaphysics": Reading Bergson and Barad Diffractively' (2011) 26(1) *Hypatia* 22. Also see my comments in chapter 1.

ANARCHISM AND LAW

> Never can a new idea move within the law. … The law is stationary, fixed, mechanical, 'a chariot wheel' which grinds all alike without regard to time, place and condition … Progress knows nothing of fixity. It cannot be pressed into a definite mould. … Progress is ever renewing, ever becoming, ever changing — *never is it within the law*.[99]

In this final section, I will explore the relationship between anarchism and law. As I mentioned in the introduction to this chapter, while I am interested in exploring what it may mean to think about law outside of representational frameworks (including state-based frameworks), as well as what it might mean to conceptualise and enact law in less exclusory or hierarchical ways, my overriding aim is not to design or promote a detailed anarchist model of law. That is, my primary goal is not to identify an explicit series of rules, process, and institutional arrangements that are based on or reflect anarchist principles, at least not directly. I am more interested in anarchism for its broader political and ethical implication. In particular, the ways it might provide an ethos or orientation to the world that is able to more meaningfully accommodate and encourage plurality and difference. Nevertheless, I do think that it is still useful to explore the way anarchists have actually understood and dealt with questions of law and legality. Not only does anarchism provide an interesting, and somewhat unique, critique of law, but further, by examining that critique we might also be able to obtain some clues as to how this broader ethical scheme can help us understand, as well as inform, our engagements and practices within diverse legal worlds.

A direct engagement with law and legal theory has never been a central focus of most anarchist literature. Considering anarchism's strong critique of authoritarian

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[99] Emma Goldman, 'Address to the Jury' in Alix Kates Shulman (ed), *Red Emma Speaks: An Emma Goldman Reader* (Schocken Books, 1983) 359, 369. In 1917 Goldman, and her colleague, Alexander Berkman, were charged with a range of offences after handing out pamphlets opposing conscription in the US during the First World War. This passage is taken from Goldman's address to the jury during her trial.

structures, this does appear to be something of a blind spot. This is not to suggest that anarchists have simply ignored law altogether, there are countless discussions of law and legal institutions throughout the anarchist oeuvre. However, most commonly, law is simply reduced to an expression of broader state or government apparatuses. In this way, the critique of the state also essentially becomes a de facto critique of (state) legal institutions. By collapsing the state and law together in this way, the complex relationship between law and the state is elided, and the opportunities to explore law outside state-based systems is diminished. This reductive approach isn't true of all anarchist writings. Within the 'classical' canon Godwin, Proudhon, and Kropotkin all dealt with law and justice in some detail. In fact, of all the classical anarchists, Kropotkin perhaps engaged with law in the most sustained and direct manner.[100] Further, there have been numerous contemporary explorations of the relationship between anarchism and law, many of these more directly investigating and studying alternative non-hierarchical forms of legal ordering.[101]

Despite this lack of sustained engagement with law, anarchism does provide a deeply interesting critical angle on the relationship between law and the state, and between law and authority more generally. Traditionally, law has often been justified on the basis that it protects us from 'anarchy' — without law, society would descend into violence and chaos. As I have discussed, this vision of the lawless society is one of the founding myths of liberalism (and social contract theory) and is perhaps best exemplified by the Hobbesian image of the state of nature as a war of

[100] Most notably in Peter Kropotkin, 'Law and Authority' in Roger N Baldwin (ed), *Kropotkin's Revolutionary Pamphlets: A Collection of Writings by Peter Kropotkin* (Dover, 1970) 195; Petr Kropotkin, *The State: Its Historic Role (1897)* <https://theanarchistlibrary.org/library/petr-kropotkin-the-state-its-historic-role>.

[101] See Zenon Bankowski, 'Anarchism, Marxism and the Critique of Law' in David Sugarman (ed), *Legality, Ideology, and the State* (Academic Press, 1983) 267; Randall Amster, 'Restoring (Dis)Order: Sanctions, Resolutions, and "Social Control" in Anarchist Communities' (2003) 6(1) *Contemporary Justice Review* 9; Gary Chartier, *Anarchy and Legal Order: Law and Politics for a Stateless Society* (Cambridge University Press, 2013); Matthew Stone, 'Law, Ethics and Levinas's Concept of Anarchy' (2011) 35(1) *Australian Feminist Law Journal* 89; Saul Newman, 'Anarchism and Law: Towards a Post-Anarchist Ethics of Disobedience' (2012) 21(2) *Griffith Law Review* 307.

'every man, against every man.'[102] Anarchists reject this justification for law outright. In fact, they argue that, far from protecting society from violence, law (particularly state law) is both founded on and perpetuates violence.[103]

Bakunin, for example, saw the basic idea of a social contract as flawed and, ultimately, illogical. Critiquing Rousseau he asserted the social contract was, '[a] revolting nonsense! An absurd fiction, and what is more — a wicked fiction! … For it presupposes that while I was in the state of not being able to will, to think, to speak, I bound myself and my descendants — simply by reason of having let myself be victimised without raising any protests — into slavery.'[104] For Bakunin, the myth of social contract hides the reality of state law: that it emerged from, and is held in place by, violence. And, further, that the only thing it protects, is the interests of the powerful.[105]

In a similar vein, Kropotkin associates the emergence of law in Europe (at least hierarchical expressions of law) with the growth of centralised state power, a process defined by violence far more than by the reciprocity envisioned by the social contractarian liberals. Examining the existence in the middle ages of small villages and cities organised around 'free associations' (including village or parish communes, guilds, and other 'brotherhoods'), he notes their slow disappearance as they were colonised, and often violently so, by increasingly centralised structures of power. While this process was primarily driven by religious, political and military elites, law — especially the growth of canon law and re-emergence of Roman law —

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[102] Hobbes (n 15) 84.

[103] In this aspect they echo some of the later critiques of Benjamin, Derrida, and others. See Walter Benjamin, 'Critique of Violence' in Michael W Jennings (ed), *Walter Benjamin: Selected Writings* (Harvard University Press, 1996) 237; Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority"' in Drucilla Cornell, Michel Rosenfeld and David Carlson (eds), *Deconstruction and the Possibility of Justice* (Routledge, 1992) 3.

[104] Bakunin, *The Political Philosophy of Bakunin: Scientific Anarchism* (n 74) 165.

[105] As he asserts, '…we reject all legislation, all authority, … and legal influence … convinced that it can turn only to the advantage of a dominant minority of exploiters…' Mikhail Aleksandrovich Bakunin, *God and the State* (Courier Corporation, 1970) 35.

played a crucial role. It provided both a justification and a mechanism for the deference of power to authority figures.[106] As he argued, 'in the shadow of this double indoctrination, of the Roman Jurist and the priest, the federalist spirit which had created the free commune, the spirit of initiative and free association was dying out and making way for the spirit of discipline, and pyramidal authoritarian organisation.'[107]

However, it is not simply the founding (and continuing) violence of state law that anarchism objects to and calls into question. Law's authority is also expressed in its claim to provide final authoritative judgment. For anarchists, one of the defining features of law is it fixity and closure. As Kropotkin summarises, '[t]hey study the characteristics of law, and instead of perpetual growth corresponding to that of the human race, they find its distinctive trait is to be immobility, a tendency to crystallise what should be modified and developed day by day.'[108] Law, therefore, is always backwards looking, and it always operates to entrench the status quo. The cumulative effect of this being that it places unnecessary blocks on the development and progress of communities. Within anarchist perspectives, this falls foul of one of their core tenets, the idea of individual autonomy and freedom, especially as it relates to exercising, as Godwin puts it, 'private judgment' in matters of conscience or morality.[109] Further, in entrenching the status quo, law also promotes a general passivity and deference to authority. In acceding to law, people are dissuaded from exercising their own self-direction and responsibility and, thereby, discouraged from taking an active and participatory role in the community. For Kropotkin, this taps into humanity's already prominent 'tendency to run in a groove…',[110] and he asserts:

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[106] Kropotkin, *The State: Its Historic Role (1897)* (n 101).

[107] Ibid part VI. See also Ruth Kinna and Alex Prichard, 'Anarchism and Non-Domination' (2019) 24(3) *Journal of Political Ideologies* 221, 231; Newman, 'Anarchism and Law: Towards a Post-Anarchist Ethics of Disobedience' (n 102) 312.

[108] Kropotkin, 'Law and Authority' (n 101) 200.

[109] William Godwin, *Enquiry Concerning Political Justice: And Its Influence On Morals And Happiness* (Penguin Classics, 2015) Book II Ch VI. See also Newman, 'Anarchism and Law: Towards a Post-Anarchist Ethics of Disobedience' (n 102) 310.

[110] Kropotkin, 'Law and Authority' (n 101) 204.

> We are so perverted by an education which from infancy seeks to kill in us the spirit of revolt, and to develop that of submission to authority; we are so perverted by this existence under the ferrule of law, which regulates every event in life — our birth, our education, our development, our love, our friendship — that, if this state of things continues, we shall lose all initiative, all habit of thinking for ourselves.[111]

In a related way, law's fixity is also evidenced by its application of abstract and generalised rules to specific circumstances. For anarchists, this is indicative of its arbitrariness and evidence of its fundamental incompatibility with liberty. Godwin, for example, refers to the positive law as being akin to the 'fable of Procrustes' in that 'it endeavours to reduce the actions of men, which are composed of thousand evanescent elements to one standard.'[112] Similarly, Goldman, as per the quote at the beginning of this section, views the law as a "'a chariot wheel" which grinds all alike without regard to time, place and condition."[113] In these ways, within an anarchist perspective, law's finality and arbitrariness reflects a form of symbolic violence not dissimilar to its propensity for actual, physical violence. It represents a conceptual closure and, therefore, an inability to account for or accommodate difference. In other words, law kills off opportunities for change and growth. Far from promoting the core anarchist values of creativity, progress, and life, it is, in fact, the exemplification of stasis and death.

This critique of law and legal authority has meant the role of law in anarchist theory is somewhat problematic. Its obvious end point appears to be the rejection of law altogether, and while this has been the position of many anarchist writers,[114] it is not necessarily a satisfactory outcome, especially not conceptually. Such a perspective would effectively treat law as being synonymous with state law, a position that, as I have been at pains to point out across this thesis, leads to serious

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111 Ibid 197.
112 Godwin (n 110) 689.
113 Goldman, 'Address to the Jury' (n 100) 369.
114 Stone refers to this as the 'expulsionist' position. Stone (n 102) 90–91.

conceptual and political difficulties. Not all anarchist approaches to law, however, have reduced law to state-law in this way. There is an alternative perspective which, rather than rejecting law outright, seeks to identify and explore non-exploitative forms of law. While agreeing that state law is inherently oppressive, these perspectives either seek to locate already existing sources of non-state normativity that could potentially form the basis for law (for example, social customs or natural law[115]) or, alternatively, seek to develop new legal structures and processes which are non-hierarchical.

Kropotkin's theory of law is an example of a perspective that locates alternative sites of normativity outside the state. As I indicated above, of all the classical anarchists Kropotkin was the one who engaged in the most explicit and direct analysis of law. Kropotkin had a very mixed, and at times contradictory, attitude to law. He rejected state-based forms of legality outright, viewing them as inherently and ineluctably oppressive.[116] However, he did exhibit a lot of faith in non-state normative systems based on custom or habit (which he referred to as either 'customary law' or 'common law'), while also remaining extremely wary of their tendency to transform into, or be captured by, more centralised forms of ordering. Further, there were even hints of a 'semi-formal' (albeit voluntary) normativity in some of his writings, especially with respect to organisation and coordination in anarchist communities.[117]

Kropotkin's understanding of law was thoroughly embedded within his larger conceptual framework. A central aspect of this, and particularly relevant in this

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[115] Gary Chartier has recently provided an extremely detailed and interesting model of anarchist law underpinned by natural law theory. However, in relying on natural law as foundational principle, it does slip into a level of essentialism. See Chartier (n 102).

[116] As he famously proclaimed, 'instead of inanely repeating the old formula, "Respect the law," we say, "Despise law and all its attributes!" In place of the cowardly phrase, "Obey the Law," our cry is "Revolt against all laws!"' Kropotkin, 'Law and Authority' (n 101) 201.

[117] For example, in *The Conquest of Bread*, Kropotkin provides the example of how an association might establish explicit 'contracts' with their members, prescribing a set number of hours worked in exchange for membership. Kropotkin, 'The Conquest of Bread' (n 42) 137. See also C Cahm, 'Kropotkin and Law' in Thom Holterman and Henc van Maarseveen (eds), *Law and Anarchism* (Black Rose Books, 1984) 106, 119.

context, was his Manichean assertion that humans were driven by two countervailing tendencies: one focused towards cooperation and mutual aid, and one focused towards domination and subjugation. He states, there are 'two sets of diametrically opposed feelings which exist in man … In one set are the feelings which induce man to subdue other men in order to utilise them for his individual ends, while those in the other set induce human beings to unite for attaining common ends by common effort'.[118] This argument was explicitly underpinned by Kroptokin's broader theoretical commitment to a biological scientism and he identified these human traits as having a biological and evolutionary basis. [119] However, he also asserted that the expression of these traits was always shaped by socio-historical factors. In this way, he did remain committed to a relatively thorough materialism, and he did, for example, argue that '[t]he end of morals cannot be "transcendental" as the idealists desire it to be: it must be real. We find moral satisfaction *in life* and not in some form of extra-vital condition.'[120] In fact, much of Kropotkin's work is focused on tracing the different ways these tendencies have been expressed throughout history, and the complex, dynamic, and shifting ways they have shaped, as well as have been shaped by, broader socio-material conditions.

For Kropotkin, law (and normativity more generally) was expressed in ways which reflected one or the other of these core traits. He identified two main types of law — customary law which was indicative of, and therefore reflected, humanity's tendency towards cooperation; and state law (sometimes referring to it as 'written law') which was indicative of, and therefore reflected, humanity's tendency towards domination. According to Kropotkin, the history of law is essentially the history of conflict and tension between these two types of laws (and the underlying traits that informed them). He described this process in *Modern Science and Anarchism*, stating that while people 'were developing in the form of customs a number institutions which

[118] Petr Kropotkin, *Ethics: Origin and Development* (The Dial Press, 1924) 22.
[119] See, for eg, Kropotkin, *Mutual Aid: A Factor of Evolution* (n 75); Kropotkin, *Ethics: Origin and Development* (n 119).
[120] Kropotkin, *Ethics: Origin and Development* (n 145) 12.

were necessary to make social life at all possible — to insure peace amongst men, to settle any disputes that might arise, and to help one another in everything requiring cooperative effort' there was, simultaneously religious, political, and military elites 'who endeavoured to establish and to strengthen their authority over the people.'[121]

In a way that would mirror the later functionalist pluralism of Malinowski,[122] Kropotkin identified the source of customary law as the reciprocal relations that form the basis of any community. Drawing on the work of anthropologists, he observed that in all communities 'behaviour is regulated by an infinite series of unwritten rules of propriety which are the fruits of [people's] common experiences …'[123] These unwritten rules persist and develop not through structures of authority, but through 'usage [and] custom.'[124] Importantly, a central component of these customary laws was that they tended to operate in ways which encouraged cooperation and mutual aid, as well as actively resisted any centralisation or concentration of power.[125] In making this point, Kropotkin provides the example of the way customary laws were relied upon for community control in medieval villages, he asserted, '[i]n all its affairs the village commune was sovereign. Local custom was the law, and the plenary assembly of all heads of family, men and women, was the judge, the only judge, in civil and criminal matters.'[126]

According to Kropotkin, a series of socio-historical factors and events (including the increased private accumulation of wealth and a series of wars and conflicts) slowly led to a hardening and transformation of customary law. This process was driven in part by the co-option of customary law by forces exhibiting humanity's opposite

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[121] Peter Kropotkin, 'Modern Science and Anarchism' in Roger N Baldwin (ed), *Kropotkin's Revolutionary Pamphlets: A Collection of Writings by Peter Kropotkin* (Dover, 1970) 146, 146–147.
[122] Bronislaw Malinowski, *Crime and Custom in Savage Society* (Routledge and Kegan Paul, 1978). I cover Malinowski's conceptualisation of law in detail in chapter 3.
[123] Kropotkin, *Mutual Aid: A Factor of Evolution* (n 75) 110.
[124] Kropotkin, *The State: Its Historic Role (1897)* (n 101) part II.
[125] Kropotkin, *Mutual Aid: A Factor of Evolution* (n 75) 140.
[126] Kropotkin, *The State: Its Historic Role (1897)* (n 101) part III.

traits — domination and subjugation — and ultimately ended with its displacement by more authoritarian legal structures.[127] Here we have the emergence of centralised and state-based forms of law. Critical to the success of this process, according to Kropotkin, was the way state-law drew upon customary law in order to provide it with justification and legitimacy within the broader community. As Kropotkin argues,

> the legislators confounded in one code the two currents of custom … Customs absolutely essential to the very being of society, are, in the code, cleverly intermingled with usages imposed by the ruling caste … "Do not steal," says the code, and immediately after, "He who refuses to pay taxes shall have his hand struck off." Such was [state] law … Its origin is the desire of the ruling class to give permanence to customs imposed by themselves for their own advantage. Its character is the skilful commingling of customs useful to society, … with customs useful only to rulers.[128]

For Kropotkin, this 'commingling' of state law with customary law also gave rise to a central irony. Any law reform that appeared to limit state power (like the great liberal law reforms that swept across Europe in the late eighteenth and nineteenth centuries), actually just reinforced the centrality and legitimacy of the state more generally. These reforms were held up as evidence of the state's adaptability, as proof that it protects the liberties of the population. However, the fact was that the state was simply returning, while still retaining ultimate control over, a few of the liberties that people had previously enjoyed before the state had wrested them away.[129]

Kropotkin's understanding of law provides a number of interesting insights. Putting to one side for a moment his somewhat problematic 'Victorian scientific

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[127] Cahm provides a good summary of Kropotkin's detailed account of this process: Cahm (n 118) 109–111.
[128] Kropotkin, 'Law and Authority' (n 101) 205–206.
[129] Ibid 211.

naturalism',[130] he does actually provide a relatively nuanced conceptualisation of law and normativity. For Kropotkin, law isn't simply defined or determined by state-based legal institutions. Law emerges from, and is expressed through, social action, particularly the complex reciprocal relations that form the basis of any community. Further, in recognising the co-dependence of state-based forms of legality on these broader networks of normativity, he provides a picture of a complex, shifting, and plural normative world, not dissimilar to Ehrlich's later conceptualisation of living law (which I discussed in chapter 3).[131] However, unlike Ehrlich, Kropotkin does make a number of axiomatic assumptions regarding this broader normativity.

As I noted above, for Kropotkin, customary law is a particular expression of underlying biological and evolutionary traits that direct humans (and other social animal species), towards cooperation and mutual aid.[132] In other words, customary law might emerge from social relations, but its content and form is relatively predetermined (even if this is always balanced by countervailing tendencies and shaped by broader social factors). This understanding of customary law might partially explain why Kropotkin never examined its workings in extensive detail. While he did provide numerous examples of its historical operation, including discussing aspects of its features, he never fully unpacked its processes or mechanics.[133] Nevertheless, in identifying an alternative site of normativity outside the state, he was able to articulate something of an anarchist model of law.

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[130] A Bradney, 'Taking Law Less Seriously—an Anarchist Legal Theory' (1985) 5(2) *Legal Studies* 133, 137.

[131] See Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Routledge, 2001).

[132] His argument on this point was explicitly directed at the pernicious social Darwinism that was prominent at the time and he wrote, '[i]n the animal world we have seen that the vast majority of species live in societies … The animal species, in which individual struggle has been reduced to its narrowest limits, and the practice of mutual aid has attained the greatest development, are invariably the most numerous, the most prosperous.' Kropotkin, *Mutual Aid: A Factor of Evolution* (n 75) 246.

[133] There have been a number of contemporary studies of examining in a more direct manner the ways anarchist (or anarchist influenced communities) rely on similar informal normative mechanisms and restorative justice principles in order to manage disputes and sanction inappropriate behavior. See Amster (n 102); Nathan Tamblyn, 'The Common Ground of Law and Anarchism' (2019) 40(1) *Liverpool Law Review* 65.

Rather than focus on custom (or other informal normative structures), a number of anarchist scholars have explored the possibility of establishing formal legal structures, but designing them in ways that ensure they are consensual and that power is sufficiently devolved. Thom Holterman's work provides an example of this approach.[134] Relying on a conceptualisation of law that he asserts is both relative and always embedded in a social context, he argues it is possible to develop a participatory and responsive legal system that can help coordinate anarchist communities.[135] This conceptualisation of law is, in many aspects, quite similar to the framework employed by the American legal realist. It explicitly embraces an instrumentalist understanding of law, focused on law as mechanism for achieving (and coordinating) specific purposes, rather than as an abstract series of rules.[136]

Holterman strongly believes that it is possible to establish basic guidelines and parameters that can be used to coordinate and facilitate the activities of communities, without lapsing into hierarchical or authoritarian structures. The key to achieving this, he argues is simply to follow some basic principles. Primarily, that all legal rules are developed from the bottom-up (that is, emerging from the most devolved community level), and are always directed towards maximising mutual aid.[137] In many respects, this argument mirrors my earlier discussion regarding Bookchin's distinction between political power and administrative power. The outcome for Holterman's theory of law is essentially the same; legal rules could be developed directly by people, but then be administered by councils (assuming there is sufficient oversight and transparency). Of course, this also means that similar tensions and issues emerge regarding exactly how this division of power will operate, where lines will be drawn, and how limits on authority can be ensured. It is worth remembering, however, that anarchism doesn't necessarily reject all authority in all circumstance. There are many instances where authority may be justified

[134] Thom Holterman, 'Anarchism and Legal Science' (1993) 79(3) *ASRP: Archives for Philosophy of Law and Social Philosophy* 349.
[135] Ibid 352.
[136] See my discussion in chapter 5 for a more detailed account of legal realism.
[137] Holterman (n 134) 350–351.

(expertise, parent-child etc). However, explicitly placing the burden of justification on structures of authority, forces a continuous and active questioning, and encourages participation from the community more generally. Further, and as I suggested above, it usually tends to be the case that these are things best worked out in practice. One of the central insights of anarchism is that an obsessive focus on prescriptive blueprints is rarely a productive exercise.

CONCLUSION

Anarchism provides a radical and somewhat unconventional critique of authority and forms of political and legal governance. Unlike most traditional political philosophy its starting point is a rejection of traditional forms of political organisation, and a rejection of representation (both political and conceptual) more generally. In a way that resonates extremely closely with the processual and materialist philosophies I have been exploring across this thesis, it seeks to privilege — and remove any obstacles to — vitality, generativity, and change. The idea that future possibilities should be restrained and controlled, or that they are predictable through ungrounded and abstract hypothetical models is anathema. Further, anarchism provides an extremely interesting and unique critique of law and its relationship to authority. It highlights, in a very direct and sustained manner, the violence which underpins state-law, as well as its conceptual closure and subsequent inability to effectively deal with difference or change, and (at least in some iterations), it seeks to identify and enact non-state forms of normativity. In this way, anarchism encourages us to stop deferring to authority and to start thinking about law (and communities more generally) in more participatory ways. The hypothetical models of anarchist law I discussed in this chapter have provided us with some clues about what this could look like. However, in the end, we must accept that we can't ever know exactly what shape they could take. This is one of the central insights of anarchism more broadly: the aim is not to begin with a predetermined theoretical model of politics (or law), and then carve up and reduce

the world to fit within it; the aim is to actively and continuously experiment to see what may emerge.

7. MORE THAN ONE, LESS THAN MANY: ANARCHISM, PREFIGURATIVE SOCIAL CHANGE, AND THE LEGAL FRACTIVERSE

> *To affirm is not to take responsibility for, to take on the burden of what is, but to release, to set free what lives*. To affirm is to unburden: not to load life with the weight of higher values, but to *create* new values which are those of life, which make life light and active.[1]

> 'Those who build walls are their own prisoners. I'm going to fulfil my proper function in the social organism. I'm going to go unbuild walls.'
>
> 'It may get pretty drafty,' Takver said, huddled in blankets. She leaned against him, and he put his arm around her shoulders. 'I expect it will,' he said.[2]

INTRODUCTION

In the previous chapter, I introduced and examined the political theory of anarchism. This involved providing an overview of its emergence as a political theory in the nineteenth century, exploring its core tenets, tracing its development, and examining its perspective on law. As I argued, anarchism offers an extremely heterodox and radical approach to political theory. Its strong anti-authoritarianism, as well as its emphasis on a non-coercive and participatory form of politics clearly sets it apart from most conventional political theory. Underpinning these beliefs is a thorough and forceful rejection of both political and theoretical representationalism. While perhaps most commonly known for its assertion that the state (and state institutions like law) are unnecessary for — and are, in fact, an obstacle to — the effective coordination and organisation of communities, it also offers a theoretical framework that resists any notion that politics and ethics are identifiable in, or can emerge from, fixed or transcendent foundations.

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[1] Gilles Deleuze, *Nietzsche and Philosophy* (Continuum, 2006) 174 (emphasis in original).
[2] Ursula K Le Guin, *The Dispossessed* (Harper, 1994) 332–333.

In this concluding chapter, I begin with a closer examination of the alternative political and ethical framework offered by anarchism and, in particular, anarchism's promotion of prefigurative forms of political action. This will include a critical consideration of anarchism's relationship to the other great modern political theories, liberalism and Marxism. In fact, it is from within their critique of these two political theories that its commitment to a prefigurative, fluid, and non-prescriptive politics is most apparent. Finally, I will examine some of the implications of this political and ethical framework in the context of the legal fractiverse more generally. This will also be an opportunity to revisit the central themes from the thesis and explore the connections, pathways, and possibilities that these may open when read diffractively.

ANARCHISM'S CRITIQUE OF LIBERALISM AND MARXISM: LIBERTY, EQUALITY, AND PREFIGURATIVE POLITICS

> The State is a condition, a certain relationship between human beings, a mode of behaviour; we destroy it by contracting other relationships, by behaving differently toward one another … We are the state, and we shall continue to be the state until we have created the institutions that form a real community …[3]

Throughout this thesis, I have been exploring the implications of adopting a materialist, relational, and non-representationalist ontological framework. As I have argued, one of the key advantages to this approach is its promotion of generativity, vitality, and difference; features that emerge as a direct consequence of its emphasis on relationality and immanence. Combining these components, however, requires a means of conceptualising multiplicity without foregoing immanence. In chapter 2, I introduce the idea of the fractiverse, a way of expressing fractal relations which can be understood, as being 'more than one, [but] less than many.'[4] In a slightly

[3] Gustav Landauer, 'Weak Statesmen, Weaker People! (1910)' in Chris Dunlap (ed), *Anarchism in Germany and Other Essays* (Barbary Coast Collective, 2005) 4.

[4] Annemarie Mol, *The Body Multiple: Ontology in Medical Practice* (Duke University Press, 2002).

different vein, anarchism has also long been engaged in a project that seeks to accommodate both the one and many. And, similarly to these more contemporary theoretical projects, it seeks to do so without lapsing into, or drawing upon, a transcendent framework that reduces multiplicity to sameness. In the context of anarchist theory, this project relates to its attempt to develop a politics which bring together autonomy and community (or liberty and equality), but resists reducing one to the other. In doing this, it provides strong critiques of both liberalism and Marxism, critiques which form the basis for its promotion of prefigurative forms of political action.

One of the central and foundational features of anarchist politics is its dual emphasis on liberty and equality. In fact, Newman has argued that it is this aspect of anarchism which best encapsulates its broader project and aims. Coining the phrase 'equal-liberty', he argues, 'what I think is … fundamental to anarchism is the idea of equal-liberty — a proposition through which all forms of domination and hierarchy come under interrogation. Equal-liberty is simply the idea that liberty and equality are inextricably linked, that one cannot be had without the other.'[5] This interest in both equality and liberty means that, in many senses, anarchism can be seen as offering something of a bridge between the two great political philosophies of the nineteenth and twentieth centuries, liberalism and Marxism.[6] On the one hand, its strong focus on equality and the importance of material social relations entails something of a socialist critique of liberalism; and on the other hand, its insistence on freedom and autonomy offers something of a libertarian critique of Marxism.[7] This dual aspect of anarchist thought is captured well in Bakunin's assertion that

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5 Saul Newman, *The Politics of Postanarchism* (Edinburgh University Press, 2010) 20.

6 The relationship between anarchism, liberalism, and Marxism has been explored extensively. For an overview, see, for eg, Todd May, 'Is Post-Structuralist Political Theory Anarchist?' (1989) 15(2) *Philosophy & Social Criticism* 167, 168–169; Paul McLaughlin, *Anarchism and Authority: A Philosophical Introduction to Classical Anarchism* (Ashgate, 2007) 35–36, 52–53; Nicolas Walter and Natasha Walter, *About Anarchism* (PM Press, 2019) 4–7; Ruth Kinna, *Anarchism: A Beginners Guide* (One World, 2005) 26–38.

7 As McLaughlin notes, this does not necessarily imply that anarchism simply represents a 'synthesis' of liberalism and Marxism. Anarchism's deep scepticism of authority, for example, would not fit well within either liberal or Marxist frameworks: McLaughlin (n 6) 53.

anarchists 'are convinced that liberty without socialism is privilege, injustice; and that socialism without liberty is slavery and brutality.'[8]

Therefore, while anarchism may share with liberalism a focus on liberty and, consequently, a distrust and suspicion of authority, the way they understand this issue is fundamentally different. First, for anarchists it is impossible to conceive of or enact liberty without also accounting for equality. They reject liberalism's construction of society as simply an aggregation of self-interested atomistic individuals, instead drawing attention to the role of the broader community in constituting, and giving meaning, to the individual.[9] As Bakunin remarked, '[s]ociety, so to speak, individualizes itself in every individual.'[10] This recognition of a deep connection between the individual and the broader community means that freedom without a corresponding equality makes no sense. Malatesta, quoting Bakunin, makes this point strongly:

> [n]o individual can recognise his own humanity, and consequently realise it in his lifetime, if not by recognising it in others and cooperating in its realisation for others. No man can achieve his own emancipation without at the same time working for the emancipation of all men around him. … I remain always the product of what the humblest among them are: if they are ignorant, poor, slaves, my existence is determined by their slavery.[11]

In this respect, anarchism offers a vision of liberty and freedom that is very much grounded in the broader material conditions of life. Unlike liberalism's conception of liberty which is usually located in, and expressed through, abstract legal rights and principles (equality in such an understanding taking on a formal status, reduced

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8 Mikhail Bakunin, 'Federalism, Socialism, Anti-Theologism (1867)' in Sam Dolgoff (ed), *Bakunin on Anarchy* (Vintage Books, 1972) 102, 127.

9 Nathan Jun, 'Anarchist Philosophy: Past, Problems and Prospects' in Benjamin Franks and Matthew Wilson (eds), *Anarchism and Moral Philosophy* (Palgrave Macmillan, 2010) 45, 55; Chiara Bottici, *Imaginal Politics: Images beyond Imagination and the Imaginary* (Columbia University Press, 2014) 185–186.

10 Mikhail Aleksandrovich Bakunin, *God and the State* (Courier Corporation, 1970) 240.

11 Errico Malatesta, *Anarchy* (Freedom Press, 1974) 27.

to the extension of these abstract rights to all within the community),[12] anarchism promotes instead a form of liberty (and ultimately equality) that is focused on autonomy. That is, if liberty is to exist in an actual rather than hypothetical sense, this must mean having the freedom and autonomy to make decisions (and exercise choice) regarding one's own life in real, tangible, and effective ways.[13]

Liberalism's reliance on formal legal rights also draws attention to another key distinction with anarchism. While both liberalism and anarchism promote liberty, and, therefore, are suspicious of authority, this suspicion is far less pronounced in liberalism. Liberalism (outside of the radical libertarian variety briefly outlined in the previous chapter) does accept, and in fact strongly endorses, the existence of the state and its institutions (at least in limited forms). This reveals a real tension at the heart of liberalism between liberty and security.[14] Within liberalism, individual liberty must always be protected and secured. This, in part, stems from its focus on the atomistic individual and insistence on the 'natural' existence of property rights and market relations. These natural rights, which are at the heart of freedom and liberty as conceived within liberal frameworks, must be safeguarded for fear that they are at risk from others. Within liberalism, as Newman has recognised, 'individual liberty must be guarded and protected, fenced off from the appetites and aggressive drives of others, and this security can be provided only by a sovereign state and through the application of law.'[15]

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[12] See Bruce Buchan, 'Anarchism and Liberalism' in Nathan J Jun (ed), *Brill's Companion to Anarchism and Philosophy* (Brill, 2017) 51, 55; May, 'Is Post-Structuralist Political Theory Anarchist?' (n 6) 171.

[13] May, 'Is Post-Structuralist Political Theory Anarchist?' (n 6) 171. It is worth noting that some more contemporary versions of liberalism, for example the work of Rawls and Sen, equality understood as autonomy does play a far more important role, albeit in a very passive manner. See my discussion of liberalism in chapter 1 for more detail. See also Todd May, *The Political Thought of Jacques Rancière: Creating Equality* (Edinburgh University Press, 2008) 6–26.

[14] Buchan (n 12) 56; Newman, *The Politics of Postanarchism* (n 5) 17.

[15] Newman, *The Politics of Postanarchism* (n 5) 17.

In this respect, liberalism's scepticism of authority, particularly governmental authority, is ultimately expressed as a question of limits, rather than the more radical anarchist critique which speaks directly to basic legitimacy. The state remains an important and inevitable feature of life in liberalism; its underlying authority accepted as an essential component of peaceful human relations. Stirner, in his typically idiosyncratic way, describes the relationship between liberalism and the state as similar to that of parent and child. He remarks, '[t]he state is sacred even to them; … They behave toward it only … as artful children who seek to utilize the weaknesses of their parents. Papa State is to permit them to say many things that do not please him, but papa has the right, by a stern look, to blue-pencil their impertinent gabble.'[16] For anarchists, this compromise between liberty and security is fundamentally flawed. As I noted, they view the state as a coercive and divisive institution. Far from securing freedom, the state operates as a primary barrier to both liberty and equality.

Anarchism's critique of liberalism, particularly its failure to adequately account for equality, or recognise that equality is reflected in the actual material condition of life, does draw it far closer to Marxism. In fact, the histories of anarchism and Marxism as forms of radical politics are deeply entwined (if at times somewhat antagonistic).[17] Anarchism shares with Marxism a critique of private property and capitalism, as well as a vision of a stateless society in which communities are organised around egalitarianism and free association.[18] However, they fundamentally differ in their understanding of the nature and site of power in society, and, subsequently, they have very different perspectives on how this

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[16] Max Stirner, *The Ego and Its Own* (Cambridge University Press, 1995) 178.

[17] Marx was famously in dispute with a range of key anarchist thinkers including Proudhon and Bakunin, even infamously leading a successful vote to have Bakunin expelled from the International Workingmen's Association in 1872. For a general overview of the relationship between anarchism and Marxism, especially in a historical context, see Paul Thomas, *Karl Marx and the Anarchists* (Routledge, 2010); Daniel Guérin, 'Marxism and Anarchism' in David Goodway (ed), *For Anarchism* (Routledge, 2013) 109.

[18] As Engels argued, '[a]s soon as there is no longer any social class to be held in subjection … a special repressive force, a state, is no longer necessary. … the government of persons is replaced by the administration of things.' Friedrich Engels, 'Socialism: Utopian and Scientific' in Robert C Tucker (ed), *The Marx-Engels Reader* (Norton, 1978) 683, 713.

stateless society will emerge and what the best strategy for achieving it may be. For anarchists, Marxism's focus on economic relations as the key determinant of social relations entails a failure to adequately comprehend the diversity of power relations, including, importantly in this context, the relative autonomy of state power.

Marxism, particularly in its classical iterations,[19] viewed the political state primarily as an effect or expression of a society's underlying economic relations. This is encompassed in Marx's famous distinction between base and superstructure. The base, the underlying economic system and relations of production, plays a central role in determining and constituting the overlying political and legal superstructure.[20] As Marx wrote, the 'relations of production constitutes the economic structure of society, the real foundation, on which rises a legal and political superstructure. … The mode of production of material life conditions the social, political and intellectual life process in general.'[21] In essence, as the state is a product of underlying economic relations, it reflects and protects the economic interests of those who control the means of production. As Marx and Engels famously asserted in the *Communist Manifesto,* '[t]he executive of the modern state is but a committee for managing the common affairs of the whole bourgeoisie.'[22] This reduction of the state to a site for the expression of class interests is fundamentally important to broader Marxist revolutionary strategy. It means that by seizing government power, it is possible to direct the state towards transforming the real site of power, economic relations. This is captured in the Marxist idea of the 'dictatorship of the proletariat', an ostensibly transitional period in any revolution during which the working class will take control of the state apparatus in order to

[19] For a discussion of anarchism and its relationship to more contemporary forms of Marxism, see Saul Newman, 'Post Anarchism and Radical Politics Today' in Duane Rouselle and Süreyya Evren (eds), *Post-Anarchism: A Reader* (2011) 46; Todd May, *The Political Philosophy of Poststructuralist Anarchism* (Penn State University Press, 1994) ch 3.

[20] The extent to which the base actually determines the superstructure is a major point of conjecture in Marxist theory. See Raymond Williams, 'Base and Superstructure in Marxist Cultural Theory' [1973] (82) *New Left Review* 5.

[21] Karl Marx, '"Preface" to A Contribution to Critique of Political Economy' in Terrell Carver (ed), *Marx: Later Political Writings* (Cambridge University Press, 1996) 158, 159–160.

[22] Karl Marx and Friedrich Engels, *The Communist Manifesto* (Pluto Press, 2008) 31.

implement a communist economy. Once this has been successfully achieved, and class conflict has been removed, the state, no longer serving any purpose, will simply 'wither away'.[23]

For anarchists, this approach demonstrates a fundamental failure to adequately account for the diverse sources and sites of power and domination, and the complex way these relate and interact. Anarchism does agree that economic relations play a central role in shaping a society's material conditions, and, therefore, are undoubtedly an important source of domination.[24] However, it adopts a far wider, and arguably more nuanced, approach to power and domination. Different sources or structures of authority may at times appear to be working in unison, and often do operate in ways that are mutually reinforcing; however, this doesn't necessarily entail that this process can be reduced to a single underlying logic or a single origin.[25] From an anarchist perspective, Marxism's reductionist approach to power and authority gives rise to two related issues, each speaking to one part of the dual meaning of (*an-*)*archē* I introduced in the previous chapter.

First, it fails to account for the autonomous power of the state (*archē* as leader/ruler). For anarchists, regimes of state governance, even if stripped of capitalism and private property, will always remain hierarchical and oppressive. Government, in whatever form, inevitably involves political representation. It claims authority to speak for others and to represent their interests, thereby immediately establishing a hierarchical relationship between those with the power to represent, and those whose interested are represented. And, further, this occurs notwithstanding which social class or group is in control. From the perspective of

[23] See Engels (n 18) 712–714.

[24] See, for eg, McLaughlin (n 6) 134–135.

[25] As is evident, for example, in Marxism's collapsing of state power into economic power. In this respect, as Carter has argued, 'Marxists have mistaken a contingent correspondence between state and bourgeois interests for an instrumental relationship.' Alan Carter, 'Outline of an Anarchist Theory of History' in David Goodway (ed), *For Anarchism* (Routledge, 2013) 176, 184.

anarchism, a 'dictatorship of the proletariat', is no less problematic than any other system of political representation. Further, Marxism's embrace of political representation actually extends beyond this 'strategic' use of state power, as it is also evident in its vanguardism: the idea that the revolutionary project needs to be led by a vanguard party, its members possessing privileged knowledge regarding the 'true' state of affairs, and thus, best positioned to take control of the movement. Bakunin, in what would turn out to be a moment of real foresight, astutely described the vanguardism that would underpin any 'dictatorship of the proletariat', remarking, 'the pseudo-popular state will be nothing but the highly despotic government of the masses by a new and very small aristocracy of real or pretend scholars. The people are not learned, so they will be liberated in entirety from the care of government and included in entirety in the governed herd. A fine liberation!'[26]

For these reasons, anarchists are deeply sceptical of the Marxist claim that the state would eventually just 'wither away'. Anarchism asserts that state power is relatively autonomous from economic power and, as such, operates in self-sustaining and self-perpetuating ways. As Malatesta recognised, 'the practical evidence' suggests that 'whatever governments do is always motivated by the desire to dominate, and is always geared to defending, extending and perpetuating its privileges'.[27] By viewing the state simply as the instrument of a specific economic class, Marxism loses sight of this aspect of state power. Transforming the means of economic production will not inevitably lead to a withering of the state, as the state has an existence and logic outside these. In this way, as Bakunin aptly put it, 'despotism resides not so much in the *form* of the State or of power as in the very *principle* of the State and political power.'[28]

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[26] Mikhail Aleksandrovich Bakunin, *Statism and Anarchy* (Cambridge University Press, 1990) 178–179. See also Newman, 'Post Anarchism and Radical Politics Today' (n 19) 50–51.

[27] Malatesta (n 11) 21. See also Newman, *The Politics of Postanarchism* (n 5) 77.

[28] Mikhail Bakunin, *The Political Philosophy of Bakunin: Scientific Anarchism*, ed GF Maximoff (Free Press, 1964) 221. See also Saul Newman, *Power and Politics in Poststructuralist Thought: New Theories of the Political* (Routledge, 2005) 34–35.

Secondly, Marxism's economic reductionism also means that it falls into many of the same essentialist traps as those modernist political theories I discussed in the previous chapter. In essence, Marxism has constructed, and is reliant on, a predetermined framework for understanding politics and society (*archē* as philosophical first principles). In this instance, it is the underlying economic and material conditions, and the inevitable class conflict which emerges from these, that provides the 'natural' foundation for social and political life. Within this perspective, power is ultimately located in a single source, the economic base. Therefore, it is this which governs the shape of political forms, and, importantly in this context, it is this which must be targeted if you want to effect social change. Other structures of authority are reduced to an effect of the economic base, effectively masking the complex ways power circulates through society and diminishing the importance of other sites and sources of domination. Marxism's focus on material economic conditions, rather than metaphysical assertions regarding the cosmos or human nature, however, does mean its politics is grounded far more concretely in social life than those other classical and modernist political theories discussed earlier. Nevertheless, it does still retain a level of determinism and, in this way, the outcome remains essentially the same. In reducing questions of politics to foundational and fixed first principles (in this instance the centrality of the economic base), the complex networks and relations in which social actions are embedded, and through which forces of power and resistance flow, are smoothed over. Politics (and political strategy) subsequently taking on a sense of inevitability and preordination.

Anarchism fundamentally rejects Marxism's centralised approach to political representation and political struggle. Its deep scepticism of authority, and its commitment to autonomy and diversity, means it is extremely reluctant to embrace any prescriptive approach, whether it is directed to the means or end of political struggle. To force social change through centralised processes, or to channel change along a predetermined path, is to embrace authority (both political and philosophical). Reducing politics to a singular logic in this way conceals and diminishes the diverse sites of domination, and subsequently, limits the options for

effecting change. In doing this, politics is abstracted from life and its generative potential is conceptually diminished. This relationship between politics, plurality, and life was captured very clearly by Kropotkin when he wrote:

> either the state will be destroyed and a new life will begin in thousands of centres … or the state must crush the individual and local life, it must become the master of all the domains of human activity, must bring with it its wars and internal struggles for the possession of power, its surface-revolutions which only change one tyrant for another, and inevitably, at the end of this evolution, — death!'[29]

To avoid lapsing into these hierarchical models, both practical and conceptual, anarchism embraces a strategy of prefigurative political change. As Franks has noted, '[p]refiguration has been a core concept of anarchism since, at least, the 1880s. It has been pivotal in identifying and formulating forms of libertarian organization. It plays a central … role in the generation of anarchist governance principles and assists in the identification of —and engagement with — particular agents of change.'[30] At its most general level, prefigurative politics refers to strategies, techniques, and forms of organising that are primarily focused on ensuring a unity between means and ends. That is, political actions and tactics should always reflect and *prefigure* the change desired.

This concept is of central importance within anarchist perspectives. For a political philosophy based upon anti-authoritarian principles, the idea that liberatory change could be forced or externally directed is anathema. Goldman, for example, in

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[29] Petr Kropotkin, *The State: Its Historic Role (1897)* part X <https://theanarchistlibrary.org/library/petr-kropotkin-the-state-its-historic-role>.

[30] Benjamin Franks, 'Prefiguration' in Benjamin Franks, Nathan Jun and Leonard Williams (eds), *Anarchism: A Conceptual Approach* (Routledge, 2018) 28, 28. For a general overview of the importance of prefiguration in anarchism see also Ruth Kinna, 'Utopianism and Prefiguration' in SD Chrostowska and James D Ingram (eds), *Political Uses of Utopia: New Marxist, Anarchist, and Radical Democratic Perspectives* (Columbia University Press, 2016) 198; Cindy Milstein, *Anarchism and Its Aspirations* (AK Press, 2010) 68–70; Benjamin Franks, *Rebel Alliances: The Means and Ends of Contemporary British Anarchisms* (AK Press, 2006); David Graeber, 'The New Anarchists' (2002) 13(6) *New Left Review* 61, 72–73.

reflecting on the aftermath of the Russian Revolution, asserted '[t]here is no greater fallacy than the belief that aims and purposes are one thing, while methods and tactics are another. … The means employed become, through individual habit and social practice, part and parcel of the final purpose; they influence it, modify it, and presently the aims and means become identical.'[31] In Goldman's statement we can see a hint as to the key advantages of prefigurative approaches and, in particular, the ways in which they can resist hierarchical and representationalist forms of politics. There are two central, and related, aspects of prefigurative strategies which are critical in this respect: first, an emphasis on practice over abstract models, and secondly, an emphasis on the present, the here-and-now, over the (predestined) future.

As I discussed in the previous chapter, representationalist forms of politics tend to begin with an abstract (and fixed) model of society (and politics) and use that as the basis to develop and implement appropriate political strategies. In this way, politics is always defined by its ends, specific strategies assessable based on their correspondence to the desired goals. Prefigurative approaches are fundamentally different. Political strategy is not derived from a predetermined framework; it emerges from, and should always be guided by, concrete social practices. In this way, it promotes a politics focused on (en)acting and doing rather than abstraction and predestination. Instead of working backwards from theory to action (as representationalism encourages), prefiguration develops theory *from* action. As Maeckelbergh recognises, it 'theorises through action, through doing.'[32] By inverting the relationship between theory and action in this way, theory becomes immanent to practice, it becomes a form of *praxis*. This allows for the development of political approaches that are locally or contextually relevant, but which still ultimately remain open and contingent — they remain works in progress, forever shifting, unfolding and adapting. This is not to suggest that prefigurative strategies

[31] Emma Goldman, *My Disillusionment in Russia* (Dover, 2003) 260.
[32] Marianne Maeckelbergh, 'Doing Is Believing: Prefiguration as Strategic Practice in the Alterglobalization Movement' (2011) 10(1) *Social Movement Studies* 1, 3.

are never planned or based on some preconceived ideal; inevitably, they often are. However, as they always embedded within everyday practices rather than reliant on, or derived from, fixed or dogmatic structures, they remain provisional and, therefore, always adaptable and able to accommodate changing circumstances or new insights. Campagna and Campiglio, for example, describe prefigurative actions as 'the continuous exercise of testing … imaginary landscapes against the necessities and the subterranean flows of daily life.'[33] In other words, praxis becomes a means through which people, in their everyday lives, are able to creatively experiment by enacting new or alternative forms of relating and organising.

Anarchism's strong commitment to prefigurative politics allows it to challenge social structures and promote change without lapsing into models that are politically or conceptually hierarchical. In focusing on change at the level of social practice, it offers a grounded and material approach to politics, one which is flexible and responsive, and thereby able to accommodate the vicissitudes and complexities of life. Through its focus on the power of prefiguration, that is, its focus on the ways in which practices enact the change they seek, it actively refuses a politics based in negation, embracing instead experimentation, creativity, and production.

POLITICS IN THE LEGAL FRACTIVERSE: ONTOLOGY, PREFIGURATION, AND (AN ETHICAL) LIFE

By rejecting any *archē* (in both senses of the word), anarchism allows us to explore political and ethical arrangements that are no longer sedentary and hierarchical, no longer defined by a priori structures or a sense of inevitability, and therefore, no longer detached from the flux and complexity of life. Such a politics is always risky. Calling into question fixed and transcendent foundations means giving up any solid

[33] Frederico Campagna and Emanuele Campiglio, 'Introduction' in Frederico Campagna and Emanuele Campiglio (eds), *What We Are Fighting For: A Radical Collective Manifesto* (Pluto, 2012) 5 cited in Kinna (n 30) 206.

ground from which universal or unequivocal political and/or ethical claims can be made. As I discussed in chapter 2, this was one of the central tensions for many critical perspectives in legal theory and, in struggling to adequately find a solution to this dilemma, many of these approaches remained committed to a negative critical project. While the risks involved in this type of politics cannot be denied, it is important to remember that there are also risks in not engaging. Foucault captures this point well when he argued, '[m]y point is not that everything is bad, but that everything is dangerous, which is not exactly the same as bad. If everything is dangerous, then we always have something to do. So my position leads not to apathy but to a hyper and pessimistic activism.'[34] To embrace a non-foundational politics and ethics undoubtedly means accepting a level of partiality, contingency, and uncertainty in our actions and frameworks. However, it does promote a real openness to life's unfolding, including an openness to the radical difference and diversity that forms part of that process. In this way it opens spaces in which we can experiment with social and political forms, potentially allowing us to create new life and inhabit new worlds.

Importantly, this openness, and the corresponding loss of certainty it entails, doesn't necessarily equate to a radical relativism in which anything goes or in which everything is of equal value. It is an openness that is dependent on acknowledging that our actions are always embedded within lively, relational worlds. If we are a part of life in this way, if we always remain (partially) connected to, and ontologically dependent on, each other and to the broader material world,[35] then we are, as Barad suggests, 'accountable to and for the lively relationalities of becoming of which we are a part.'[36] There may be no definitive or final answer regarding how we best 'account' for these relationalities. However, it does imply, I suggest, the development of an ethics that is also immanent and relational. That accounts for,

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[34] Michel Foucault, 'On the Genealogy of Ethics: An Overview of Work in Progress' in Paul Rabinow (ed), *The Foucault Reader* (Penguin Books, 1986) 340, 343.

[35] Marilyn Strathern, *Partial Connections* (Rowman Altamira, 2004).

[36] Karen Barad, 'Living in a Posthumanist Material World: Lessons from Schrödinger's Cat' in Anneke Smelik and Nina Lykke (eds), *Bits of Life: Feminism at the Intersections of Media, Bioscience, and Technology* (University of Washington Press, 2008) 165, 174.

even if this can only ever be partial and incomplete, those connections and relations from which we have emerged, and through which we participate in the world. This means always remaining open to both the *creation* of new life and new worlds, as well as, through our creations, always endeavouring to *sustain* (as much as possible) those generative processes that produce new life and new worlds. In fact, this openness to both creating new life, as well as to sustaining new life, is something that Emma Goldman saw as one of the central lessons of anarchism. In commenting on anarchism's practicality, she remarked, '[t]he true criterion of the practical … is not whether [a scheme] can keep intact the wrong or foolish; rather it is whether the scheme has vitality enough to leave the stagnant waters of the old, and build, as well as sustain new life. In the light of this conception, Anarchism is indeed practical.'[37]

In the context of law, the shift to relational ontology forces us to respond to a series of important implications for how we enact and study law. Do we conceptualise law in ways which bring diverse legal worlds to the fore, which acknowledge difference without reducing it to sameness? Or do we continue conceptualising law in a singular way? These choices are never agnostic or without consequence. Of course, when making them, we always remain embedded in broader socio-material networks. And, as such, it would be naïve to assume that by simply reconceptualising law we could undo or reconstitute the whole state legal apparatus. But, it does open a pathway, and the existence of that path is an invitation to new worlds.

If we were to respond to these implications through the immanent form of ethics I sketched out above, this would mean developing and enacting practices that would encourage the continual flourishing and growth of the broader legal fractiverse. This includes experimenting with and creating new legal forms or practices, both within

[37] Emma Goldman, 'Anarchism: What It Really Stands For' in Alix Kates Shulman (ed), *Red Emma Speaks: An Emma Goldman Reader* (Schocken Books, 1983) 63.

and across different legal worlds. It also means resisting those legal practices which seek to deny difference and reduce it to sameness.

There are many instances that have emerged in recent decades where people are doing exactly this. For instance, the Feminist Judgments Project[38] and Wild Law Judgments Project,[39] (in which academics rewrite famous historical cases) can be understood as resisting the (state)-law's claim to interpretative closure (what Cover referred to as jurispathy). Or, in aspects of the 'copyleft' movement,[40] where people have developed and promoted new forms of copyright (or appropriated existing ones) in an attempt to undermine existing legal restrictions on the distribution of intellectual materials. Both of these examples reveal an attempt to work with and against existing law in order to prefigure different legal worlds.

I began this thesis by revisiting one of the most famous and influential cases in Australian legal history, *Mabo*. Returning to this case judgment now also provides a good illustration of these political and ethical implications. As I outlined in the first chapter, this was a case which sought to remedy the injustice of colonisation. Its power to do this, however, was ultimately hindered by its inability to accommodate or envision (ontological) difference. Law, as enacted by the state (as well as understood by conventional legal theory), remains committed to a singular legal world. In this way, the concept of *terra nullius* can be understood not simply as a legal doctrine that outlines, and provides justifications for, the lawful acquisition of territory; it can also be understood as a specific worlding practice. As Blaser and

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[38] There are a number of feminist judgment books that have now been published. For instance, Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing, 2010); Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014). For a discussion of the prefigurative aspect of these projects see Margaret Davies, 'The Law Becomes Us: Rediscovering Judgment' (2012) 20(2) *Feminist Legal Studies* 167.

[39] Nicole Rogers and Michelle Maloney, *Law as If Earth Really Mattered: The Wild Law Judgment Project* (Routledge, 2017).

[40] See, for eg, 'What Is Copyleft', *gnu.org* <https://www.gnu.org/licenses/copyleft.en.html>; Gary Hall, *Pirate Philosophy: For a Digital Posthumanities* (MIT Press, 2016).

Cadena note, 'it actively creates space for the tangible expansion of the one world by rendering empty the places it occupies and making absent the worlds that make those places.'[41] The decision in *Mabo* may have officially rejected the legal doctrine of *terra nullius*, but it refused to disturb the equivalent worlding practice which continues to operate to deny the independent normative legitimacy of Indigenous legal worlds.

This promotion of a singular world, however, is not a necessary or inevitable response. There are a number of examples in which Indigenous knowledges and cosmologies have been explicitly incorporated in legislation, including legislation in New Zealand concerning the legal status of a river and a national park, and the Ecuadorian Constitution.[42] To differing degrees, each of these enactments include Indigenous language and concepts as central components, as well as grant rights to environmental entities not traditionally considered legal persons. For example, the Ecuadorian Constitution refers explicitly to 'Pachamama'. From a representationalist perspective, this could simply be read as an analogy for nature, a linguistic or semantic acknowledgement, but little else. But it is actually more than this. Pachamama doesn't simply refer to nature. Within an Indigenous ontology, it is an 'earth-being',[43] an ontological and real entity, but one that had previously been rendered invisible by the (singular) world-making practices of the colonial state.

By incorporating these Indigenous cosmologies in this way, these Acts redefine the relationship between different legal worlds. They do not, of course, remove all the tensions, but may be indicative of a change in paradigm and an attempt to escape

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41 Mario Blaser and Marisol de la Cadena, 'Pluriverse' in Marisol de la Cadena and Mario Blaser (eds), *A World of Many Worlds* (Duke University Press, 2018) 1, 3.

42 *Te Awa Tupua (Whanganui River Claims Settlement) Act* 2017 (NZ); *Te Urewera Act* 2014 (NZ); an agreement has also been made concerning the status of Mount Taranaki. In Australia, the *Yarra River Protection (Wilip-gin Birrarung murron) Act* 2017 recognises the significance of the river to the traditional owners and recognises that the river is a single living entity, but stops short of granting legal personality to the river itself.

43 Marisol de la Cadena, *Earth Beings: Ecologies of Practice across Andean Worlds* (Duke University Press, 2015).

the stultifying and singular logic of state-legal institutions, even if still embedded within a state apparatus. Potentially, they open a pathway to a different way of conceptualising the relationship between legal worlds, and provide the opportunity to tell a different story and enact a different reality. They are brought together in a way which acknowledges their difference, rather than seeks to erase or assimilate that difference. Like all legal worlds that compose the fractiverse, they remain connected and related in complex and multi-faceted ways. They are more than one (legal world), but less than many.

In this example we can see how we might be able to open routes that allow us to travel between different legal worlds. This process is familiar to marginalised peoples who have always been required to travel between worlds: as Lugones says, 'I think that most of us who are outside the mainstream of, for example, the US dominant construction or organization of life are "world travellers" as a matter of necessity and of survival. It seems to me that inhabiting more than one "world" at the same time and "travelling" between "worlds" is part and parcel of our experience and our situation.'[44] And, while there are always risks inherent in this process, and relationships of power that need to be negotiated, there are also opportunities. As Lugones makes clear, this can be a positive and productive process: 'I affirm this practice as a skilful, creative, rich, enriching, and given certain circumstances, as a loving way of being and living.'[45]

CONCLUSION

I began this thesis by noting the series of tensions that have historically shaped understandings of law's relationship to power and social change. These stemmed, I argued, primarily from an inability to accommodate or account for (ontological) difference. In effect, the representationalist frameworks which underpin these

[44] María Lugones, 'Playfulness, "World"-Travelling, and Loving Perception' (1987) 2(2) *Hypatia* 3, 11.
[45] Ibid 3.

theoretical projects disconnected law from the world, reducing it to a singular, static, and lifeless phenomenon. It is possible, however, to conceptualise law through a materialist and relational ontology. This draws attention to its processual and generative nature. It shifts our analytical focus to the lively and concrete socio-material practices and networks through which, and in which, law is continuously enacted and (re)produced and reveals law's inherent multiplicity. In this way, it brings into view a diverse legal fractiverse. This concept of a legal fractiverse provides new ways to think about the relationship between law, power, and social change. By conceptualising law as singular and state-based, the political utility of law was defined by an impossible choice: engage with the system and risk potential co-optation, or reject the system and thereby forgo any meaningful engagement with the law. The concept of a legal fractiverse, however, draws attention to law's multiplicity, fluidity, and instability. If allows us think about and experiment with alternative practices or arrangements of law. Further, it has implications for the way we study law. We must accept that the study of law is never apolitical. The way we choose to conceptualise law (whether this is done explicitly or implicitly), is part of the broader socio-material practices which produce law. By writing or speaking about legal worlds, therefore, we contribute to how the connections between those worlds are enacted.

As I argued, the foundations for this understanding of law already exist, and are locatable in pluralism's concept of jurisgenesis, in legal consciousness studies and everyday life's focus on everyday practices through which we produce the world, and in anarchism's non-foundational politics. Reading these through, and with, new materialism brings these forward and creates new insights. It is always useful to go back to the past, as Grosz has argued, '[t]he past is never exhausted in its virtualities, insofar as it is always capable of giving rise to another reading, another context, another framework that will animate it in different ways. The past, in other

words, is always already contained in the present, not as its cause or its pattern but as its latency, its virtuality, its potential for being otherwise.'[46]

This is what I have done in this thesis: drawn together a wide range of material, to read them through each other in an affirmative and productive way, and to see what possibilities might emerge.

In the end, the theories I have discussed are just one story that can be told, there are always others. While the fractiverse has been a useful concept in the context of my thesis, it is just one way to understand these issues. By relying on it though, I have to some extent opened pathways to new worlds and I have, even if only in a small and partial way, brought new worlds into existence. But this is always fleeting, and so it should be. Despite how we choose to understand them or render them conceptually, the political struggles which sit behind these theories will continue. The way we choose to understand these struggles and the theoretical models through which we do this may be important, but they do not, and should not, be seen as determining them. Theoretical frameworks always reduce and simplify to some extent (even ones which attempt to be open and privilege generativity). They always and inevitably involve making a cut in the flow and flux of life, bringing one element into focus, while pushing another to the edge. To stick rigidly to a theoretical frame, therefore, is to fall back into the essentialist trap of creating conceptual prisons. We should always be trying to break down walls, not build them. To return one final time to Emma Goldman: 'Theories do not create life. Life must make its own theories.'[47]

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[46] Elizabeth Grosz, *The Nick of Time: Politics, Evolution, and the Untimely* (Allen & Unwin, 2004) 254.

[47] Emma Goldman, *Emma Goldman: A Documentary History of the American Years, Volume 2: Making Speech Free, 1902-1909* (University of Illinois Press, 2008) 402.

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