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Law Embodied: re-imagining a material legal normativity

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Abstract

In this thesis I critique the modern tendency to construct the legal subject upon a sharp distinction between Reason and body and to ground the normative force of law on an ideal conception of Reason. The legal subject is thereby presented as a disembodied cogitans to the neglect of his corporeality. This disregards both the necessarily material aspect of the legal subject and the necessarily embodied aspect of legal action, and results in an inadequate account of how legal normativity is manifested in material reality. This thesis aims to construct a theory of material legal normativity by re-incorporating the body of the subject into legal action and presenting that as the proper locus of law's normative force. Although I focus on the material body in favour of Reason or rationality as the locus of action, I do not dismiss the possibility of meaningful normative action which is free from determination by material forces. I aim to construct a theory of action which is both material and normative by navigating the opposition between ideal Reason and material determinism. I do this by proposing an alternative conception of normative action which draws together the mechanism of habit and the manner of interaction with the material world. This theory of normative action will then form the basis for an account of normative legal action which gives due weight to the embodied nature of the legal subject as the proper locus for the material manifestation of the normative force of law.

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Introduction

Law is a ubiquitous presence in modern liberal societies; it towers in the grand buildings of government and courts of justice, omnipotent institutions of power whose agents of authority roam the civilian space as a constant visible reminder of law's might. But law's other, less visible face is more insidiously inserted into every crevice of society; in the humdrum motions of buying living necessities, going through reams of bills and registration forms, designating drivers for social nights-out. Law is an ineluctable aspect of modern living, so influences the very foundations of action for its legal subjects, however its own foundations of power and validity are arguably less accessible than its surface phenomena. The normativity of law¹ has been a source of philosophical inquiry for likely as long as the phenomena has existed; copious theories of law have been produced, ranging from law as divine inspiration,² to law as oppressive ideology,³ and all the while law continued to be uneventfully and relentlessly legislated, enforced, and obeyed.

My project as I wade into this debate is centred around my dissatisfaction with one dominant theme in jurisprudence; the tendency to ground law's normativity in some immaterial notion of Reason or cogito, and to dismiss the corporeal shell they are encased within. The subject of legal normativity is posited as a being whose faculty for Reason and rationality enables the norms of law to find purchase, and through the mind to dictate the movements of the body. This categorical attachment of legal normativity to the cogito aspect of the mind/body dualism is reiterated in varying forms throughout modern jurisprudence: law is a rational or moral reason for action; a coordination of joint social planning; a standard of impartial justice. The normative justifications for law are equally so: law is a necessary moral or natural state for human flourishing; a form of ideal public discourse; a narrative towards achieving *nomos*; a product of autonomous consensus. These prominent theories all appear to premise a

¹ I use the term normativity to refer to that aspect of 'ought' which distinguishes prescriptive norms from descriptions of fact. Although I do not subscribe to the Is/Ought dualism, I do believe there is a judgement or attitude attached to norms which is often expressed in value terms, such as 'should', or 'right'.

² Theological law, i.e. Thomas Aquinas; R.J. Henle, *Saint Thomas Aquinas, the Treatise on Law : [being Summa Theologiae, I-II; QQ. 90 through 97]*. Notre Dame Studies in Law and Contemporary Issues ; v. 4. Notre Dame: University of Notre Dame Press, 1993.

³ Various strains of Marxism, i.e. Antonio Gramsci; Joseph Femia, *Gramsci's Political Thought : Hegemony, Consciousness, and the Revolutionary Process*. Oxford ; New York: Clarendon Press ; OUP, 1981.

legal society consisting of rational and autonomous agents whose actions are dictated by the combined forces of legal norms and rational will. The law is fundamentally a rational system of rules, their validity is assured by the subject's receptiveness to rational reasons and arguments, and their efficacy is enforced by the subject's capacity for free autonomous action. Throughout this discourse the body is sidelined as a vessel for the mind, a contumely object for regulation whose sensible impulses necessitate that law is reinforced through coercion. Legal normativity is imposed upon the body; it is not derived from or conditioned by the body.

I feel an intuitive rebellion against an approach which effaces the irrevocable and, I would argue, primary mode of human existence, that of embodied action and being in the world. The body that enables sensory experience, motility, consciousness, is the conduit through which the material world is made accessible. Surely such a mechanism must condition to some extent the phenomena produced through its own motions. For me it is highly doubtful that law as foremost a social construct can establish its normative foundations independent of material reality, or that legal action can be determined beyond the influence of its embodiment in the corporeal legal subject. Hence my primary aim in this thesis is to redress this perceived lack of materiality and embodiment in normative legal theory, by constructing legal normativity from the body of the legal subject as an active being in the world. This also implicates the necessity of advancing an account of action which departs from traditional models of physical movement determined by rational deliberation.

Although large parts of my thesis will be concerned with the philosophical structure of normative action, it is not my intention to analyse the concept of action, its internal mechanisms or its conditions of possibility. Instead I take a largely descriptive approach to notions such as voluntary, cognitive action, and activity, without positing any particular theoretical basis for their possibility. The materiality I am concerned with is not limited to the body of the legal subject, but includes the wider material conditions of his existence, such as social and economic institutions. Neither is it my intention to analyse law as a concept with essential components or features that mutually interlock into a neat system which contains the conditions of its normativity. I take law as an open-textured social construct without conceptually necessary features; a haphazard construction which exhibits contingent commonality across empirical examples as a result of commonalities in action as opposed to common principles. My project consists in combining action and law into material legal action, which necessarily

implicates a certain theoretical approach to action. For this I draw upon a combination of phenomenology⁴ and pragmatist⁵ philosophical traditions, the former for its dialectical synthesis of body and mind, the latter for its emphasis on external reality as the vector for practical action. The aim is to present legal normativity as material action which is conditioned by law presented as structures of material reality; hence it is neither entirely a theory of legal action, nor a theory of law as concept, but an inquiry into the constitutions and conditions of how legal normativity is borne into materiality through action.

Pursuing my critique of grounding legal normativity in Reason, I examine the theories of Thomas Hobbes and Immanuel Kant as prominent representatives of a philosophical tradition which exerts significant influence on modern jurisprudence. I outline their arguments for law as a necessary part of a political common-wealth, built upon an absolute sovereign authority, all justified through ideal Reason, and offer my contentions for what I perceive to be problematic or insupportable. I then examine the theory of Karl Marx and his materialist approach as a philosophical foil, again focussing on his arguments of the politico-economic conditions of law, informed by his conceptions of human nature and consciousness.⁶ Although a materialist approach is preferable to idealism, Marxian theory exhibits a tendency towards economic determinism which I do not find compatible with normativity. In conjunction to Marx's antipathy towards law as ideology, I conclude his is not a potential model for legal normativity. (Chapter 1). Pursuant to adopting a materialist approach, I examine the theory of Michel Foucault, and his conceptions of discipline and subjectivity. At first glance his theory offers a promising account of material reproduction of norms which takes the subject's body as the primary site of training, however I find his theory of discipline to be excessively deterministic, and his notion of power too mercurial. Also given his dismissal of law as obsolete, his theory cannot be incorporated wholesale into my thesis. (Chapter 2).

⁴ Primarily Maurice Merleau-Ponty and Colin Smith, *Phenomenology of Perception*. Routledge Classics. London: Routledge, 2002.

⁵ Primarily John Dewey, *Human Nature and Conduct : An Introduction to Social Psychology*. New York: Holt, 1922.

⁶ Hobbes, Kant, and Marx advance their theories of law as part of their broader theories of society. For Hobbes and Kant this is political common-wealth, for Marx the political economy of production. I focus on these political philosophies because my inquiry relates to the social conditions for legal normativity, which I posit to be outside of law as concept or discipline. In other words legal normativity is not grounded in legal norms or practices, which are themselves products of other non-legal functions.

Having established the theoretical landscape and finding an impasse between idealism and determinism, I change perspective to inquire what I find counterintuitive in law and legal discourse. I explicate this counterintuitiveness of law through a few illustrative examples, and argue that it is a symptom of attempts to subsume the embodied experience of law under discourse, and could be remedied by a material discourse of legal action. (Chapter 3).

Constructing my theory, I begin from the intuition that what characterises human action is connection and interaction with the material objects that immediately surround us, undertaken through our corporeal being. From there I offer an analysis of how material reality may be understood as a constitution of such objects and actions, and detail how collective action and social entities such as law may be constituted in similar fashion without resorting to immaterial notions of collectivity. (Chapter 4). I then build upon this material skeleton framework by introducing habit as an embodied mechanism of action. Habit is examined primarily in its effects of conducting repetitions of action and structuring knowledge, which contributes to maintaining inertia in the *status quo*. (Chapter 5). I combine this account of embodied action with norms in a manner which overcomes the often antithetical relationship between norms and habit. I advance my conception of embodied normative action as the culmination of my thesis. (Chapter 6). Finally I apply this model to legal norms and legal action, and argue that legal normativity is constituted by habitual actions which contingently embody the norms of law and manifest them into materiality. I revisit the counterintuitive features and illustrate how they may be better understood through my account of embodied legal normativity. (Chapter 7).

Role of Reason

In this opening chapter I will set out what I perceive to be a central problem in common amongst many contemporary legal theories, namely an over-reliance on ideal Reason and the concomitant construction of the legal subject as rational, autonomous, and disembodied. I will argue that Reason-based accounts of normativity are unduly dependent upon a transcendental and immutable conception of Reason and its abstract principles as the foundations for normativity, so cannot adequately account for the embodied nature of the legal subject. By placing the embodied legal subject at the source of normativity a fuller and richer account of legal normativity may be achieved.

Normative theories of law¹, although widely diverse in each particular account of legal normativity, share an important similarity in their conceptions of the legal individual. Specifically they emphasise the individual's capacity for Reason, in the sense of enabling reflection on reasons as determinants of action, as the source of normativity. Reason is elevated to a plane of existence which is ostensibly free from determination by empirical experience, by any particularity of the subject or his historical or social context. Reason becomes in effect an eternal and immutable aspect of the subject which contains the very possibility of normative and rational action. Neglected in this conception of Reason is the embodied nature of the subject as physical being in the world, susceptible to sensation and bodily needs. The body and mind are bifurcated and entrusted with completely separate, often opposing realms of responsibility. The interactions between body and mind, expressed through action, are chaperoned by the omnipotent image of Reason. Emphasising the individual as locus of Reason results in a dichotomised and contrasting depiction of the rational and the real, separating legal normativity from its material existence.

¹ Normative theories are here distinguished roughly from Positive theories of law by their emphasis on different aspects and questions regarding the subject Law. Normative theories are engaged primarily with the conditions of law's existence and the source of its legitimacy, implicating questions of how authority is justified and why obedience is necessary. Positive theories in contrast are taken to engage more in articulating the criteria for ascertaining legal validity, given the presupposed posited existence of law. This is a rough distinction used only for the purpose of theoretical convenience.

In examining the fuller implications of such Reason-based theories of normativity the works of two eminent philosophers, Hobbes and Kant, will be taken as representative examples. Both theorists are preeminent in Enlightenment thinking which continues to exercise significant influence on modern secular philosophies. Kant's theory of law and civil society is based upon his conception of practical reason as the medium through which ideal Reason may determine action by ordering the Will according to its imperatives.² This formation of law as imperatives to action is a strong motif in contemporary legal theories which propound variants of the law as practical reason tenet, proponents of which I would argue include Raz³, McCormick⁴, and to some extent Hart⁵. This lineage shares the notion that normative legal action must be determined to some extent by legal norms, the force of which is grounded in practical reason, so predicates a bifurcation between the nature of reason and the body, and rejects a material account of agency.⁶ Kantian philosophy also lends itself to natural law theories which seek to establish morality as a condition for law and obligation; Simmonds⁷, Rawls⁸, and Finnis⁹ are examples of such theorists. I argue that these theories all exhibit that tendency to ground normativity in a disembodied Reason which enables the immaterial world of norms and morals to dictate the actions of the material body.

Hobbes' theory of the Leviathan state predicates a relatively more empirical basis for law's conditions of existence, based on an account of social covenant induced by material interests. Nevertheless the principles upon which the Leviathan state is

² Kantian accounts of moral normativity generally share an emphasis on an autonomous will which is determined fully by moral imperatives without extraneous instrumental objectives. Although Kant himself seemingly denies this requirement in his account of legal normativity, or the Doctrine of Right, nevertheless Kantian influenced legal theories generally argue law exerts some force upon action other than coercion. See George Pavlakos, 'The relation between moral and legal obligation: An alternative Kantian reading.' in G. Pavlakos & V. Rodriguez-Blanco (Eds.), *Reasons and Intentions in Law and Practical Agency*. Cambridge: CUP 2015.

³ Joseph Raz, *The Authority of Law : Essays on Law and Morality*. Oxford: Clarendon, 1979; law a pre-emptive reasons for action.

⁴ Neil MacCormick, *Practical Reason in Law and Morality*. Law, State, and Practical Reason. Oxford ; New York: OUP, 2008.

⁵ H.L.A. Hart *The Concept of Law*. 2nd Ed., 1st Pbk. ed. Oxford : New York: Clarendon Press ; OUP, 1997; the internal point of view of rules.

⁶ The extent to which law acts as a determining reason varies according to particular theory, but law must be present in some manner, so excludes actions which are pursued for purely instrumental purposes. Similarly the account of reason may be more or less ideal in character, but must retain some independence from determination by empirical factors in order preserve autonomous agency.

⁷ N. E. Simmonds, *Law as a Moral Idea*. Oxford ; New York: OUP, 2007.

⁸ John Rawls, *A Theory of Justice*, Oxford, OUP, 1976; specifically the idea that justice is universalised rights.

⁹ John Finnis, *Natural Law and Natural Rights*. 2nd ed. Clarendon Law Series. Oxford ; New York: OUP, 2011; law as a coordinating system of external freedoms based on the moral legitimacy of authority.

established and its authority maintained are explicated through a conception of reason which shares many similarities with Kant's. Hobbes' formulation of law as command and coercion finds resonance in the Positivist tradition of Bentham and Austin, which accepts law as primarily a system of force rather than norms.¹⁰ More nuanced theories centre around the social covenant as a product of rational agreement, and seek to characterise law as a form of social action whose legitimacy arises from voluntary agreement.¹¹ I would cite Shapiro¹², Habermas¹³, and Marmor¹⁴ as a few theorists who adopt a law as social action approach. Despite their empirical beginnings, the normative grounds of law become detached from material action and attached to some account of rational agency, thereby resulting in another form of the mind/body dualism.

By critiquing the normative theories of Hobbes and Kant, those Hobbesian and Kantian elements which contemporary legal theories draw upon for their accounts of legal normativity will also be put into question. It will be argued that the arguments presented by Hobbes and Kant for a concept of transcendental and eternal Reason capable of validating a set of eternal and immutable norms are incomplete. Moreover the dependence of these theories upon abstract principles neglects the real locus of legal normativity which is the acting legal subject, and in doing so presents an impoverished account of normativity.

The critique against Hobbes and Kant will be pursued through the theory of Marx as a preeminent representative in modern thinking. Marx's theory is pertinent to this critique in its direct rejection of the transcendental tradition of Hobbes and Kant in favour of a materially dialectical approach. Marx thinks of the nature of the subject and the concept of reason in ways diametrically opposed to Hobbes' and Kant's thought. The materiality of the subject is of central importance here, and the locus of

¹⁰ Jeremy Bentham, Burns, and Hart, *A Comment on the Commentaries: And A Fragment on Government*. Collected Works of Jeremy Bentham. Principles of Legislation. London: Athlone Press, 1977. John Austin, *The Province of Jurisprudence Determined*. Great Minds Series. Amherst, N.Y.: Prometheus Books, 2000. This was later problematised by Hart who questioned force as a legitimate source of obligation, after which legal theory in general moved away from coercion based accounts of law.

¹¹ A fundamental difference to Kantian theory which posits legal obligation as a universal moral duty. Social covenants only apply ostensibly to those who have given their voluntary agreement in some fashion, and cease to be valid if their conditions of agreement are breached, much like contract.

¹² Scott Shapiro, *Legality*. Cambridge, Mass.: Harvard Univ. Press, 2011; law as social planning.

¹³ J. Habermas, *Between Facts and Norms : Contributions to a Discourse Theory of Law and Democracy*. 1st MIT Press Pbk. ed. Studies in Contemporary German Social Thought. Cambridge, Mass.: MIT Press, 1998.; ideal public discourse as a means of establishing democratic institutions and legal norms.

¹⁴ Andrei Marmor, 'Legal Conventionalism.' in *Hart's Postscript*, OUP, 2001, chapter 6; social convention substantiating Hart's rule of recognition used to identify legal norms.

study is situated in the subject's embodied activity. Marx's theory of alienation poses a serious challenge to that transcendental and immutable concept of Reason propounded by Hobbes and Kant, by emphasising the necessarily material conditions which determine human existence and reduce human reason to situated embodied consciousness. However Marx's emphasis upon social and material conditioning of consciousness poses potential problems for the possibility of normative action, as the rejection of self-determination through reflection and the potential denial of autonomous action renders legal normativity meaningless.

1.1 Hobbes: Practical rationality

Hobbes' infamous conception of man is that of a creature obsessed with selfish desires for dominance and glory, whose inclinations drive him to always seek advantage, that his natural state is war and his life 'nasty, brutish and short'.¹⁵ Yet the Hobbesian man is saved from eternal perfidy by a single faculty of his mind which is Reason, the source of knowledge of the Laws of Nature, and the possibility of peace.

Hobbes begins from a naturalistic concept of man; drawing upon empirical evidence he asserts that humans are born with the faculties of Sense and Imagination, the former to access the physical world and the latter to remember and reconstruct it.¹⁶ It is the natural disposition of curiosity, to seek the cause and effect of events, which differentiates humans from animals. Specifically, the ability to envision future consequences based on past experience begets Prudence. According to Hobbes, Prudence is what guides men in their actions, and develops into man's 'natural wit' which is characterised by quickness of judgement, discernment, and discretion, so that based on differing experience man may achieve differing levels of wit.¹⁷ In contrast Hobbes' conception of Reason extends from the exactitude of beginning from true definitions and reasoning to true conclusions and knowledge; Reason is more akin to philosophic method, and serves the important purpose of discovering the Laws of Nature.¹⁸

¹⁵ Thomas Hobbes, *Leviathan : Or, The Matter, Forme and Power of a Commonwealth, Ecclesiasticall and Civill*: London: Printed for Andrew Crooke, 1651: Reprinted Cambridge, 1904.

¹⁶ Ibid. Part I chapters I &II

¹⁷ Ibid. chapter VIII

¹⁸ Ibid. chapter V

In conjunction with these faculties of the mind are the bodily appetites and aversions, which the subject comes to associate with love and hate, good and evil; these are separated into in-born appetites for food, drink, and such, and those appetites acquired by experience.¹⁹ It is these appetites which incentivise man to voluntary action, for in deliberation²⁰ amongst competing appetites the subject finds a Will in the last enduring appetite, a will which stimulates him to voluntary action in the means to satiate his desire.²¹ Thus Hobbes' conception of man is of a being capable of accumulating experience and acting upon simulated consequences to his own benefit. It would appear that in a state of isolation the man has no need for Reason²² for his appetites and the will to achieve them serve him adequately well. In normal life the common man has little use of Reason, instead it is sufficient for him to rely upon Prudence to serve his own purposes; so Prudence is adequate for the individual man whereas Reason is necessary to achieve the benefit of mankind which is the proper end of Reason.²³

The faculty of Reason is the medium through which Hobbes derives his Laws of Nature, essentially a set of laws which are necessary to fulfil the fundamental aim of self-preservation within a community. Because humans are endowed with practically equal strengths of body and mind, and are by nature driven by 'competition, diffidence, and glory'²⁴, the resulting natural state, wherein each man has the objective of self-advancement and the natural right to appropriate anything, is a state of war. However, to fully realise the fundamental objective of self-preservation each man must be secure against the violence of others, a feat which no man can achieve independently owing to his vulnerability.²⁵ Therefore to realise peace with another the subject must covenant away his right to interfere with the other's enjoyment, thereby creating duty

¹⁹ Ibid. chapter VI

²⁰ '...the whole sum of desires, aversions, hopes and fears, continued till the thing be either done, or thought impossible, is that we call deliberation.', ibid.

²¹ Ibid.

²² Reason here defined as acquired wit which is attained only by industry, proper method, and instruction, as opposed to natural wit which is begotten by experience.

²³ *Leviathan* pg.25-27. For a fuller discussion on the difference between the definition of Reason formulated in *Leviathan* chapter 5 and those in later chapters see John Deigh, 'Reason and Ethics in Hobbes's 'Leviathan', *Journal of the History of Philosophy*, 34(1) : 47-60.

²⁴ *Leviathan* pg.83

²⁵ Hobbes' state of nature has often been characterised as a Prisoner's Dilemma situation, and the choices of the agents postulated in accordance with economic rationality. Such readings of Hobbes include Rawls n.8 pg.269; Brian Barry, *Political Argument*, London, RKP, 1965, pg.253. Cf. Andrew Alexander, 'Should Hobbes's State of Nature Be Represented as a Prisoner's Dilemma?', *Southern Journal of Philosophy*, 30(2):1-16 who asserts that Hobbes' state of nature is more representative of an Assurance Game.

and obligation; to achieve peace in accordance with the Laws of Nature all men must covenant for the same. Hobbes has effectively combined the nature of man as a selfish yet rational being with the primary drive to self-preservation to derive the Rule of Reason, to 'do not that to another, which thou thinkest unreasonable to be done by another to thy selfe'²⁶, and presented this as a necessary outcome when accounting for the ability of each man to do violence to others, or alternatively to seek peace under equal terms. Following from this Rule of Reason are expounded the several Laws of Nature, which are necessarily applicable to all man living in peaceful civil society. Hobbes deemed these laws 'eternal and immutable', but nevertheless easily observed for they would appear reasonable to any man who wished his own wellbeing.

Thus for Hobbes Reason serves an important function in dictating proper action, not only for the immediate satisfaction of appetite, but also for the attainment of the overriding interest of self-preservation through establishing a stable civil society.²⁷ The Laws of Nature derived under the auspices of Reason dictate that certain natural human dispositions towards unconditional self-advancement must be curbed in order for a civil society to function. This conflict between the short-sighted motivations of each man and his greater interests is reconciled through the common faculty of Reason, which enables each man to perceive the benefits of peace when compared to the unpalatable alternative of war. The Hobbesian man is rational to the degree necessary to maximise his chances of prolonged survival, and as such may be persuaded into advocating a minimal set of social norms under the auspices of his Reason.²⁸

²⁶ *Leviathan* pg.194

²⁷ This dual use of Reason is a result of Hobbes' different definitions of Reason as instrumental rationality and scientific method. Hobbes does not make this differentiation explicitly, although it may be discerned in the different roles Reason plays in various parts of *Leviathan*, see n.23.

²⁸ The nineteen posited Laws of Nature include the keeping of promises, gratitude, compleasance, facility to pardon, amongst other dictates. In *Leviathan* chapter 14 Hobbes will come to call these the rules of morality which need no positive enactment but nevertheless must be observed for the proper functioning of civil society. In accordance with Hobbes' conception of Reason as method, the ostensible necessity of these laws are very much derived from imagining counterfactual situations and consequences which serve to destabilise society and lapse mankind into warfare. It will be seen that despite his more metaphysical approach, Kant advocates a similar pattern of reasoning in expounding his rule of universal law.

1.2 Kant: Transcendental Reason

In contrast to the monistic underpinnings of Hobbes' theory, Kant presents a dualistic conception of man; of the Will which is forever assailed by the irrational demands of Desire.²⁹ Kant explicitly severs the subject's physical being from the metaphysical realms of Reason and morality, and ascribes to the Kantian man a dualistic mode of living in which Desire determines unfree action, and must be overcome through his higher capacity of Reason for man to achieve his true end of freedom. These separate faculties of sensible Desire and metaphysical Reason³⁰ are combined within the act of choice, which for humans is affected, but not fully determined by sensible impulses.³¹ The Kantian man has freedom insofar as his choice is not determined in the final instance by his sensible desires, so is potentially capable of achieving an autonomous Will by subjecting his choice fully to the dictates of Reason.³²

Kant separates the essence of man, the Will, which is subject only to Reason, from the embodied presence of man in the world of Sense; hence man occupies two planes of being, that of Sense and Understanding, but the true essence of man lies in his Will which makes itself known through the effects it produces in its causal force upon action.³³ It is this faculty of Will which differentiates man from irrational things, and acts as the source of all normative and moral action. The Will alone is capable of responding to Reason, which necessitates the Will by imperatives.³⁴ These

²⁹ That the relationship between Reason and Desire is one of conflict is a widely accepted interpretation. See Roger Sullivan, 'The Influence of Kant's Anthropology on His Moral Theory', *Review of Metaphysics*, 49(1): 77-94, pg.86; Daniel O'Connor, 'Kant's Conception of Happiness', *Journal of Value Inquiry*, 16(3) : 189-205, pg.196.

³⁰ The metaphysical nature of Reason and the related concepts of Freedom and Autonomy have been criticised as presuppositions which were posited but not proven by Kant in his circular argument; Immanuel Kant, Gregor, and Timmermann, *Groundwork of the Metaphysics of Morals*. Rev. Ed. / Translation Revised by Timmermann. ed. Cambridge Texts in the History of Philosophy. Cambridge: CUP, 2012 (hereafter *Groundwork*) Section III. Cf. Warszawa P. Lukow, 'The Fact of Reason. Kant's Passage to Ordinary Moral Knowledge', *Kant-Studien*, 84(2) : 204-221 for a defence that Kant does not rely on asserting these transcendental ideas. Lukow asserts that the Fact of Reason is defensible through reflection and reflexive examination of its precepts and causality.

³¹ Immanuel Kant, and Gregor, *The Metaphysics of Morals*. Cambridge Texts in the History of Philosophy. New York: CUP, 1996. Introduction Section III 6.214-6221. Free choice is that only determined by Reason, and its opposite of animal choice is that only determined by impulse.

³² *Groundwork* section III 4.446-4.448. Kant calls the former 'negative freedom' meaning freedom from sensible determination. 'Positive freedom' consists in the causality of pure practical reason in determining choice independently of any empirical conditions, and indicates both a 'pure will within us' and the transcendental existence of Freedom which is the basis for laws of morality.

³³ Ibid.

³⁴ Imperatives of skill which denote the possible courses of action; hypothetical imperatives which indicate the necessary means to achieve an end; categorical imperatives which command absolutely. Ibid. 4.414-418

imperatives are expressed as 'oughts' and act upon all rational minds as objective reasons for action; as such they enable man to formulate means of action based upon his several ends. However Reason alone does not command the actions of man, who unfortunately is prey to sensibility; the faculty of Desire which is determined by experience acts upon the subject by furnishing it with ends.³⁵ Although such desires are purely subjective, like Hobbes' motivation for self-preservation, Kant also advances a common object of Happiness.³⁶ All humans will desire to be happy, their sensible faculties will furnish them with subjective desires learned from experience and thus create ends for action, whilst their faculty of Reason necessitates the Will in attaining the means to achieve happiness. The combination of these faculties of choice may be subject to capture by Desire or Reason in differing measure.

Unlike Hobbes' concept of will which is merely the last appetite in deliberation, it is significant that Kant's Will emanates from a separate metaphysical origin which is *a priori* to any empirical characteristics of the subject. As the causal factor for voluntary action the Kantian Will can only be more or less free from the pressures of desire and inclination, and be correspondingly more or less autonomous; for Kant the counsels of skill and prudence are irrelevant to Reason. This distinction from Hobbes arises from Kant's fundamental separation of the body and mind in achieving differing objectives; whereas for Hobbes the subject exists only as a body endowed with a rationality to preserve itself, for Kant the Will takes on a life of its own in pursuing autonomy from the demands of the body. There is a direct opposition between Reason and Desire, complicated by their mutual necessity in motivating action. The result is Kant's ultimate object of humanity, the absolutely good Will which can only be realised in internal freedom.

Despite this fundamental difference in the function of Reason, there is an important similarity between Hobbes' and Kant's concepts of Reason, which is its transcendence over the particularities of material existence. For both theorists Reason is universally *a priori* to the subject in its embodied form; for Hobbes as a method of reasoning which is acquired, for Kant a necessary imperative over Will which answers only to its own maxims. This similarity may be evidenced by Kant's own formulation of the universal maxim, which is to will that which may become a Universal Law; comparing this to

³⁵ Ibid. 4.414-421

³⁶ Ibid. 4.415-416; *Metaphysics of Morals* Introduction 6.216

Hobbes' Rule of Reason there is a striking parallel.³⁷ Both theorists utilise these rules in similar fashion, in the construction and reasoning from counterfactuals to establish the necessity of other rules. For example Kant uses the principle of non-contradiction to demonstrate how a maxim of promising without the intention to honour it can never become a Universal Law, for it will lead to a general disregard for promises and render them meaningless.³⁸ Due to the objective and universal character of Reason any normative force or claims derived from it must also be immutably true for all rational beings.

If for Kant the ultimate objective of Reason is to realise itself in the perfectly good Will, whence comes the impetus to enter into civil society? Kant's answer is to be secure from the violence of others and place oneself under a rightful condition of living. Kant asserts that although in a social state man may be naturally well disposed, there cannot be a conclusive right to anything for by nature every man has his own right to do as he sees fit, and commit violence upon others, which renders meaningless the very concept of Right.³⁹ The concept of Reason is normatively necessary in formulating a complete system of rights under which the external freedoms of individuals may be preserved through the authoritative coordination of their external choices. Thus despite the absence of the threat of mutual destruction which motivated the Hobbesian man, the Kantian man will nevertheless also enter into civil society under a Duty of Virtue derived from the dictates of Reason. For Kant there is only one law of Right, which is to act in a manner not inconsistent with another's freedom. This is supplemented by a set of natural rights derived from the innate right of freedom, and commanded by pure practical reason.⁴⁰

For Kant it is imperative that both the doctrines of Right and the doctrines of Virtue have their source in the *a priori* concept of Reason. It is this metaphysical origin that supports the absolute validity and purity of the laws of morality derived from Reason,

³⁷ For Hobbes the rule is a necessary caveat owing to the selfish nature of man, for Kant the significance lies in non-contradiction which is necessary to the *a priori* nature of Reason.

³⁸ *Groundwork* Introduction 4.11. Hobbes makes a similar line of argument for his Laws of Nature; *Leviathan* chapter XIV.

³⁹ *Metaphysics of Morals* Introduction 6.311

⁴⁰ Kant's reasoning in deriving his private rights from *a priori* practical reasons parallels that of Hobbes' reasoning in his Laws of Nature; both begin from the concept of human nature, in Kant's case the freedom of choice over external objects, the accumulation of means to better realise ends, and the motive to procreation. Kant elsewhere states explicitly that the accumulation of practical comforts is conducive to the development of a moral disposition, for unfulfilled needs and desires apply greater pressure upon the Will to satisfy bodily desires, thus rendering the Will heteronomous. *Metaphysics of Morals*, Introduction to the Doctrine of Virtue 6.380-390.

making them objectively applicable to all rational beings.⁴¹ Kant distinguishes between the duties of Right as being constraints upon external actions themselves, and the duties of Virtue as constraints upon the maxims of actions. External lawgiving is possible only for the former, and is the subject for his political philosophy.⁴² In deriving a complete system of rights from Reason, Kant attempts to establish the conditions under which the external freedom of all humans may be reconciled and coexist without conflict.⁴³ In contrast, in deriving a complete system of virtues Kant attempts to establish the proper ends for humanity to pursue. The Doctrine of Right dictates the norms for external action and leaves the choice of ends to the subject, whereas the Doctrine of Virtue goes beyond the mere form of action to prescribing certain ends which are duties for the subject, so dictates the norms for internal motivation.⁴⁴ The concept of Reason is the common factor between Kant's moral and political philosophies, for Reason generates obligation, both towards oneself and towards others. In light of the innate freedom of rational beings and their absolute moral worth, pure practical Reason is the only *a priori* concept which may validly dictate universal principles that afford equal respect to all subjects.⁴⁵

⁴¹ *Groundwork* 4.411-412. The relationship between Reason and its laws is presented here as a derivation or deduction. Cf. Lukow n.30 who asserts that the relationship is one of reflection and reflexive examination.

⁴² *Metaphysics of Morals* Section IV 6.218-6.221. Duties for which only internal lawgiving is possible are the subject for Kant's moral philosophy.

⁴³ The sum of such conditions is expressed in the Universal Principle of Right which is an obligation but in itself furnishes no incentive to obey. *Metaphysics of Morals* 6.280-231

⁴⁴ Ibid. 6.389-398. For Kant only a Doctrine of Virtue, consisting of the rules of morality may present ends as duties, and laws which themselves have normative force. Consistent with his conception of the Will ruled by Reason, the objective end of humans as Will is to achieve absolute moral worth, resulting in a Kingdom of Ends wherein public law becomes redundant, for every individual Will shall conform perfectly with the dictates of practical reason and Virtue. The faculty of moral endowments are what enables the subject to be put under obligation; coupled with the freedom to control action the human subject may increase his moral strength such that the law becomes the incentive to action rather than an external constraint. Thus only in a perfect utopian society can the disjunction between internal and external freedom be reconciled, and civil law become true obligations as reasons for action, rather than imposed constraints upon external choice motivated by extraneous interests.

⁴⁵ The relationship between Kant's moral and political philosophies is subject to wide debate. Theorists who claim that each philosophy is independent of the other, such that moral autonomy bears no connection to conformity with external rights tend to emphasise the different conceptions of external and internal freedoms; George Fletcher, 'Law and Morality: A Kantian Perspective', *Columbia Law Review* 87(3) :533-558. Contrast theorists who see conformity with Right as a necessary aspect of achieving moral autonomy; Robert Pippin, "On the moral foundations of Kant's Rechtslehre." *The Philosophy of Immanuel Kant* (1985): 107-42. The pertinent issue for the thesis at hand is not the specific relationship between Kant's moral and political philosophies as such, but rather the common factor of Reason in both. The two philosophies are taken to be differentiated by their ascribing different internal incentives to actions as opposed to external and internal freedom, thus preserving the image of Reason in both instances. For a similar argument in relation to Autonomy see David S. Stern, 'Autonomy and Political Obligation in Kant', *Southern Journal of Philosophy*, 29(1) :127-147.

Thus for Kant the concept of Reason serves as a metaphysical medium which both dictates the objective and moral forms of action, and through the Will legislates the body to act in accordance with universally objective principles as opposed to subjective desires. In common with Hobbes, Reason is charged with the exalted task of enabling the human being to discern and achieve his ultimate end, which is also his ultimate happiness and state of being. Kant more explicitly eschews the role of empirical experience, and by extension the embodied aspect of the subject, as having no influence upon autonomous acts of morality. Indeed Kant views all empirical examples as poor approximations to norms determined *a priori*. The Kantian man is rational in necessitating his Will to better achieve his desires, but is also possessed of an higher potential for morality which stems from that same faculty of Reason.

1.3 Common-wealth by necessity

Having established their several conceptions of human nature, it remains for Hobbes and Kant to organise the subject into civil society⁴⁶ which is the necessary outcome according to Reason. Civil society is antagonistic to the natural dispositions of human beings, yet is necessary for the advancement of human beings out of the state of nature. The condition of civil society is dictated by Reason, and by extension the normative force of law is also sustained by that faculty of Reason each man possesses which collectively prevents mankind from regressing to a state of war. Thus both theorists advocate the necessity of a common-wealth, specifically a sovereign which comes to represent the collective will of society, and derives its legitimacy from the dictates of each individual's Reason to himself.

Hobbes acknowledges that the Laws of Nature alone cannot compel the subject to obey, but must draw authority from a common power. Hence according to necessity each man must covenant to surrender his natural rights to a common representative, the sovereign, in order to receive the same protection from the violence of other men and the enjoyment of his liberties under the auspices of justice and right.⁴⁷ A common-wealth is achieved by the collective surrender by each man of his natural rights under conditions of equality. For Hobbes' Rule of Reason is such that the selfish nature of

⁴⁶ Civil society is Kant's terminology. Hobbes uses the term common-wealth; both are effectively the same.

⁴⁷ *Leviathan* chapter XVII

every man dictates he must not be disadvantaged in comparison to his neighbour, that he will only submit to be ruled if all others will submit on the same terms. By extension the sovereign must also be absolute in order to issue the necessary laws which obligate subjects generally. The normative force of civil laws is endowed by virtue of the sovereign being the issuing authority, whose position of authority is validated and reinforced by the Rule of Reason as the necessary locus of peace. Civil laws determine the particular definitions of Justice, Equity, and Virtue which exist in natural law without promulgation; vice versa the normative force of civil law depends upon natural law to legitimate the entire legal order and prescribe the conditions necessary to maintain peace. Since natural law in itself cannot compel man to action they must be positively enacted and enforced through civil laws which are particular interpretations of natural law.⁴⁸ Thereby civil and natural law contain one another and reflect different aspects of the same law.⁴⁹

This relationship means that civil law must not be contrary to the demands of Reason, and in particular subjects cannot give up those innate liberties of self-preservation, namely the right to self-defence, not to incriminate oneself, and to refrain from murder.⁵⁰ Hobbes has reasoned from the nature of man and the conditions necessary for him to realise his ultimate goal of self-preservation as dictated by Reason, to establish the foundations of the normative force of law and its permissible limits.⁵¹ The nature of man necessitates an absolute sovereign, whose will is expressed in civil laws which must be obeyed unless they infringe upon the inalienable right to preserve oneself. Thus analogous to how Hobbes utilised Reason to arrive at the Laws of Nature, he has utilised Reason to establish the normative force of civil law and conclude that any civil society which does not oppose Reason must be preferable to the state of war. It is thus open to Hobbes to conclude that obligations which are observed through fear are equally legitimate as those observed through duty, for they nevertheless secure the subject in his safety from the evils of others.

Although Hobbes' confirmation of the stark necessity of autocratic authority may be expected given his prior conception of the nature of man, Kant's own arguments for

⁴⁸ Cf. Martin Harvey, 'Hobbes's Conception of Natural Law', *Southern Journal of Philosophy*, 37(3): 441-460.

⁴⁹ *Leviathan* pg.188-193

⁵⁰ *Ibid.* chapter XXI

⁵¹ For a fuller account of how Hobbes' Laws of Nature constrain civil laws both formally and substantively see Harvey n.48.

civil society present many similarities. For Kant the necessary conditions for the perfection of the human being are divided into the external and internal conditions of freedom, consisting in a Doctrine of Right and a Doctrine of Virtue respectively. For Kant civil society is necessary to coordinate the physical choices of humans who cannot avoid living and sharing space and resources, so under a Duty of Virtue ought to enter into a rightful condition. It is only under such a rightful condition, wherein the distribution of rights is authoritatively guaranteed and unilateral exercises of Will prohibited, that the very concept of Right is maintainable and without it all falls into violence.⁵²

Like Hobbes, Kant presents an essentially contractarian vision of civil society, which is reinforced by the metaphysical idea of 'State'.⁵³ Kant begins from the natural rights of individuals inferred *a priori* from practical reason, namely the right of property, right of contract, and familial rights, which in a state of civil society are perfected into a system of rights and duties safeguarded by a common will.⁵⁴ This, argues Kant, is a rational development, for humanity is destined to live under a system of rights as opposed to a system of violence, thus it is incorporated in the very idea of 'State' the duty of the subject to absolute obedience.⁵⁵ It must be noted that the 'State' as the perfect civil constitution cannot be directly cognised, but sets the normative standard for all empirical examples such that all sovereigns in reality ought to be obeyed as a command of practical Reason.⁵⁶ This metaphysical idea of 'State' is supplemented by

⁵² *Metaphysics of Morals* 6.306-308. The rightful condition is an aspect of the final end of the Doctrines of Right; 6.354-355.

⁵³ 'Contractarian' is used here as a loose term of reference to the social covenant which is the source of civil society as propounded by Hobbes and Kant. It does not denote the various characteristics associated with traditional social contract theories. For fuller discussion on whether Hobbes and Kant are better interpreted in the tradition of Natural Law or Social Contract theory see Harvey n.48; also Daniel M. Weinstock, 'Natural Law and Public Reason in Kant's Political Philosophy', *Canadian Journal of Philosophy*, 26(3):389-411. The distinction is not directly pertinent to the thesis at hand.

⁵⁴ *Metaphysics of Morals* Introduction to the Doctrine of Right 6.231-239

⁵⁵ *Metaphysics of Morals* Public Right 6.319-320; 6.371-373

⁵⁶ The metaphysical origin of Kant's theory means it is not feasible to claim any empirical basis for his political philosophy; Manfred Riedel, 'Transcendental Politics? Political Legitimacy and the Concept of Civil Society in Kant', *Social Research*, 48(3) : 588-618. Cf. Weinstock n.53 who argues that Kant does not construct his political philosophy wholly upon such metaphysical bases, and that actual practices of public reason are also necessary to establish the legitimacy of law.

its substantive end which is the perpetuation of itself, from which stem further demands such as taxation and military powers.⁵⁷

Examined at their foundations both Hobbes and Kant appear to be asserting a common theory of legal normativity; the subject ought to obey the law because a system of civil law is necessary given the ultimate end of human beings. The normative force of law depends entirely upon a higher plane of ideals and principles cognised through the universal faculty of Reason accessible to humans as rational beings, which must be objective because of its ubiquity, and eternal in its premises and conclusions. The state of civil society, consisting of a centralised authority and system of norms must be an enduring solution to the problem of humanity, for any conceivable alternative is comparatively worse for the interests of industry, development, morality, and realisation of human perfection. In essence Reason-based accounts of normativity assert that law exists because we must have juridical justice, out of necessity, out of rationality, for only under law is the end of mankind able to be achieved.

1.3.1 Authority, not normativity

The emphasis placed by Hobbes and Kant upon the element of autonomy, reflected in the consent to authority and reinforced by the natural obligation to obey creates a contingent relationship between the normative force of law and human rationality. Both theorists begin from the nature of the human subject as possessing not only sensible desires and instincts which furnish him with the fundamental goals of self-preservation and happiness, but also a faculty of Reason which enables the subject to subordinate immediate desire for the pursuit of more far-sighted goals.⁵⁸ This faculty of Reason enables the subject to perceive the unfeasibility of prolonged peaceful interaction in the state of nature, but also demands that peace be sought under equal terms. From this dilemma both theorists deduce the necessity of a common will,

⁵⁷ *Metaphysics of Morals* Public Right 6.326. Comparing Kant's conception of state to Hobbes' conception of common-wealth it would appear both share similar end objectives of the perseverance of itself against internal discord and external attack. Both theorists utilise the ideal concept of a common-wealth to justify use of measures such as taxation, punishment and waging war. Significantly in both theories the State appears to have escaped direct translation from the original amalgamation of social contract to become a semi-autonomous state of being. It is this shared yet differentiated experience of the social form, reproduced in embodied actions and normativity which eludes both Hobbes' and Kant's theoretical efforts.

⁵⁸ For both Hobbes and Kant this includes maintaining a condition of peace and the capacity for moral action; where the Kantian man strives beyond self-preservation for the higher goal of a moral existence in itself, the Hobbesian man views morality in a more instrumental manner.

represented as the sovereign which is capable of placing all subjects under equal obligation and guaranteeing each from the violence of others. From this authority emanates the representation of its will in the form of law, which prescribes the permissible boundaries of freedom. Human rationality is satisfied only by subjection under equal terms to a common authority, and by extension to its laws, so that the normative force of law can only be construed in relation to the legitimacy of authority. The connection of necessity extends between the propounded nature of man and his ideal end, made possible by the common-wealth which in turn implicates the presence of authority and civil law. Insofar as legal normativity is concerned, it is fully contingent upon the necessity of authority. Hobbes and Kant cannot establish a normative order of law independent from the legitimacy of its issuing authority.

This reliance upon authority and the threat of force is perhaps the most telling indication that Hobbes and Kant cannot completely purge the subject's material aspect from their account of law's normative force. If compliance to norms depends upon the threat of coercion, obligation elides quickly into force, and the normative aspect becomes rhetorical as opposed to practical.⁵⁹ Hobbes explicitly states that obligation through fear is equally as valid as obligation by acceptance.⁶⁰ Similarly Kant acknowledges that his Doctrine of Right only prescribes the forms of action, not the ends of action, therefore laws themselves cannot form the motivation for the Will; the Will in acting legally is motivated by external interests, and is thus not acting autonomously.⁶¹

1.4 Materiality of existence

In light of the foregoing discussion of Hobbes' and Kant's respective theories on the human subject, it may appear theoretically feasible to sustain the sharp distinction between body as the source of base desires and appetites, and the mind as the seat of uncompromising Reason. However this dichotomy is complicated by the subject's inhabiting both the world of sense and the world of understanding, wherein pure

⁵⁹ Stern advances a defence for Kant's account of political obligation which he asserts do have direct bindingness without the need to elide political into moral obligation. Stern characterises all juridical duties as moral duties which are legislated for externally, such that the incentive to obey is not coercion, but the law's moral status; Stern n.45.

⁶⁰ *Leviathan* chapter XXVIII

⁶¹ *Metaphysics of Morals* Introduction 6.211-221

practical Reason is not the sole determinant in action, but must coordinate with empirical experience to mediate desire, organise enduring interests, and pursue long-term goals. Prior to attaining the perfect Kingdom of Ends, the faculty of Reason is not only utilised in its ideal form of morality, but also in its instrumental role as practical rationality to direct the subject's mundane actions.⁶²

This intermediate state of being, of a subject partially free from material determination by virtue of a degree of consciousness and self-awareness, yet nevertheless not fully self-determining, is the current reality for the human subject. Both Hobbes and Kant struggle to incorporate this partially rational image of man, with Kant erring on the side of idealism and Hobbes on the side of empiricism. For Kant this state of existence lies between being determined by sensible desires and being determined by autonomous Will; the state of nonmoral freedom realised in the exercise of choice, a freedom which is not truly free from sensible demands.⁶³ Kant acknowledges that the human subject must exist in the world of sense and be assailed by the demands of desire, but to the extent that the subject may think of his Will as belonging solely in the world of understanding he is also not fully determined by the demands of desire. Therefore he demonstrates his freedom by mediating his desire in the form of cultivating passions. These passions signify what the subject perceives will best serve his object of Happiness, given his perceptions of the current state of society, so are rationally developed through the dialectical interaction between Desire and Reason over time,⁶⁴ such is the development of the heteronomous will in the pursuit of Happiness, aided by Reason in the form of hypothetical imperatives. Kant acknowledges that owing to the indefinite and empirical nature of Happiness, objective principles for action cannot be deduced from that concept, however this does not preclude a minimal level of

⁶² For Kant a fully moral Will solely determined by Reason is theoretically possible. For Hobbes the issue of whether the subject can ever be free of empirical demands on his actions is less clear, given his definition of will being the last appetite in deliberation.

⁶³ This is Kant's negative conception of freedom, discussed above. This nonmoral freedom is characterised by O'Connor as the pragmatic use of Reason to organise a hierarchy of goals and desires in order to pursue Happiness, O'Connor n.28 pg.193.

⁶⁴ Iain Morrisson, *Kant and the Role of Pleasure in Moral Action*; OUP, 2008, pg.42-44. Morrisson calls these natural and social inclinations, and asserts that Kant does not radically divide pre-existing inclinations of desire from reason. Instead the human's predisposition towards freedom develops into those passions which are socially conditioned to achieve Happiness. Cf. O'Connor who asserts that passions are strong inclinations which act as obstacles to Happiness, and requires greater strength of Reason to overcome. Passions represent the 'victory of inclination over reason', so represents a conflicting rather than dialectical relationship between desire and Reason, O'Connor n.28 pg.196.

rationality required for the subject to mediate desire through farsighted goals and life plans.⁶⁵

Similarly the Hobbesian man in the state of nature remains ignorant of all but his immediate desires and concern for self-preservation, such that Hobbes is often regarded as propounding a theory of mechanical action and economic behaviour. However such a simplistic notion is only meant to serve as a conceptual contrast to the more maximally rational man who is capable of sacrificing immediate satisfaction for longer term happiness. Reason serves a greater role than merely guiding the subject to attain his immediate desire, by ordering and suppressing desire in the pursuit of a more coherent life plan which necessitates the observance of the Laws of Nature.⁶⁶

Therefore, the stark contrast between the Kantian man who is a potentially autonomous Will, hindered only by the demands of sensible Desire and the lack of moral strength to repress them, and the Hobbesian man who categorically seeks only self-advancement through the aid of instrumental rationality, becomes increasingly inadequate. The Kantian man is capable of minimal instrumental rationality when he mistakenly pursues socially determined passions and refuses to cultivate his higher moral faculties, in the delusion that it serves Happiness.⁶⁷ The Hobbesian man is capable of maximal rationality if by use of Reason he perceives the virtues of the Laws of Nature, of cultivating a good character and acquiring wit. It is apparent that both theorists make great concessions to the material existence of the subject, particularly its influence in determining the objects of happiness and the necessary means to attain them.

⁶⁵ This relationship between Kant's moral and practical theories, in particular the possibility of nonmoral freedom is widely disputed. Reath asserts that the categorical imperative is simply the logical conclusion of a practical reason which evaluates normative reasons and justifications for action; thus moral action is an extension of nonmoral action. Andrews Reath, *Agency and Autonomy in Kant's Moral Theory* Oxford, UK: Clarendon Press, 2006, pg.70-82. Contrast theories which views moral and nonmoral reason to be entirely disparate aspects of Kant's theory, such as Fletcher n.45.

⁶⁶ For a fuller account of how Hobbes' concept of man can be expounded as a complete moral theory see David Van Mill, *Liberty, Rationality, and Agency in Hobbes's Leviathan* Albany: State University of New York Press, 2001.

⁶⁷ Kant posits fundamental Passions for dominance over others and being free from such domination, which renders his conception of human nature very similar to Hobbes'. O'Connor n.28 pg.196; Morrisson n.64.

1.4.1 The material conditions of Reason

In light of these apparently ineluctable concessions to man's material existence, it is questionable whether the eternal and immutable laws of Reason deduced from metaphysical principles remain tenable. If, as Hobbes and Kant concede, man's rationality dictates the ends and means to his happiness, which is in turn determined by his material existence, and if there is no guarantee that the laws of Reason will not change to reflect developments in the material world, then they are not immutable. It is significant that in formulating these immutable dictates of Reason both theorists employ counterfactual examples drawn from the state of society as they understood it.⁶⁸ It appears from the similarity of their fundamental moral rules⁶⁹ that the emphasis upon equality and respect for others results from a rudimentary theory of mind, that is the ability to perceive others as possessing minds similar to one's own, and projecting particular behaviour to be generally applicable.⁷⁰ Again the very notion of justification, of practical reasons which are objective for all rational beings, of Laws of Nature appearing to be inevitable if only one employed Reason, depends essentially upon the predicate that rational beings think alike.⁷¹ Indeed it is this minimal level of likeness that enables both Hobbes and Kant to claim the dictates of Reason are objectively true and universally applicable, by positing laws of Reason which are imaginably acceptable to all in a particular historical and social context, and assuming a particular state of human condition.

It is by this act of reification that human reasoning is transformed into omnipresent Reason. Reification is the distortion of perception and behaviour in society, such that

⁶⁸ In arguing against the right to borrow money dishonestly, Kant asserts it is impossible to universally will such a maxim because in consequence humans will no longer trust any promise, resulting in no promises being made and no money being lent, amongst other examples; *Groundwork* 4.422-424.

⁶⁹ For Kant the categorical imperative; for Hobbes the biblical rule of impartiality.

⁷⁰ By theory of mind I refer to its social psychology usage which denotes notions such as meta-representations, false beliefs, 'I think that you think...', which aim to explain social interaction. For an interesting account of preschool theory of mind and its role in predicting actions of deception, persuasion, and other social behaviours, see Henry Wellman, *Making Minds: How Theory of Mind Develops*. OUP, 2014 chapter 3.

⁷¹ If this theory of like mindedness is not presumed, Hobbes' and Kant's counterfactual arguments for the necessity of their moral rules cannot be sustained.

concepts and things are attributed with characteristics they do not possess.⁷² It is relating to the social and natural world in an inappropriate way as a result of a particular form of praxis or worldview.⁷³ In this specific context the perception of human reason as *a priori* to cognition attributes Reason with the characteristics of transcendence and omnipresence.⁷⁴ Notwithstanding the earlier concessions to the materiality of existence, Hobbes and Kant appear to have divorced the instrumental rationality of embodied action from the pure Reason of disembodied thought through a series of generalisations. What is claimed to have been deduced from metaphysical truths is in fact constructed from presuppositions about the material world. Indeed Kant himself acknowledges that material hardship impedes the Will's ability to be moral, so satisfaction of material wants creates conditions more conducive to morality. This is an indication of the significant influence of material conditions upon the terms of morality.⁷⁵ If there is validity in this suspicion it greatly problematises the immutable nature of Reason and its substantive laws, for it allows potential changes in the material conditions of existence to change the content of Reason; what appears necessary or natural in one setting may not be so in another.

⁷² A definition of reification is offered as 'the transformation of intangible human qualities, such as thoughts, ideas, and values, into physical objects.' in Ian Buchanan, 'Reification.' *A Dictionary of Critical Theory*, 2010. Reification is part of the more general process of alienation, which for Marx takes on the material expressions of commodity fetishism and objectified labour. Marx's conception of alienation has its theoretical origins in Hegel's dialectic of the spirit which is first alienated from itself through its subjective and objective aspects, and the spirit's inability to be fully subject or object. Georg Wilhelm Friedrich Hegel, *Phenomenology of Spirit*. Oxford: Clarendon Press, 1977, chapter IV; Hegel's terminology is 'being in itself' and 'being for itself'. See Gavin Rae, 'Hegel, Alienation, and the Phenomenological Development of Consciousness.' *International Journal of Philosophical Studies* 20(1): 23-42 for a discussion on alienation as estrangement and externalisation. Cf. Sean Sayers, 'Creative Activity and Alienation in Hegel and Marx.' *Historical Materialism* 11(1): 107-28; discussion on the theme of labour as objectification of spirit. Timothy Brownlee, 'Alienation and Recognition in Hegel's Phenomenology of Spirit.' *Philosophical Forum* 46(4): 377-96; recognition of particularity is achieved through dialectical resolution of difference.

⁷³ In Marx's theory this reification stems from the social form of commodity exchange which imbues commodities with a semblance of value, and human relationships with an element of commodification; Karl Marx, *Capital*. Everyman's Library ; No.849. London: Dent, 1951 v.I chapter I section 4. See also Lukacs, 'Reification and the Consciousness of the Proletariat' in György Lukács, *History and Class Consciousness : Studies in Marxist Dialectics*. London: Merlin Press, 1971. Cf. Honneth who criticises Lukacs' interpretation as insufficiently theorised, instead advancing a theory of reification which is based on recognition of other humans which extends towards the natural external world. Axel Honneth, Judith Butler, Raymond Geuss, *Reification : A New Look at an Old Idea*. The Berkeley Tanner Lectures. Oxford ; New York: OUP, 2008.

⁷⁴ I would argue that this process of casting off and forgetting the material foundations of reason in order to posit it as something metaphysical involves a form of reification. The theme of forgetting inherent in reification is advanced in Theodor W. Adorno & Max Horkheimer, *Dialectic of Enlightenment*. London: Verso Editions, 1997.

⁷⁵ *Groundwork* 4.399 Kant emphasises the indirect duty of achieving happiness, the absence of which will exacerbate the temptation to moral dissolution.

The source of this incongruence lies in the atomistic approach taken by Hobbes and Kant in divorcing the subject from his material conditions of existence whilst retaining the same conception of Reason developed within those conditions. Both theorists began from the notion of an isolated individual 'man' and expounded from his essential nature his various faculties and his proper end.⁷⁶ They then proceed to postulate a state of nature wherein this theoretical construction of man is multiplied, and his interactions with other men then deduced as an inevitable consequence of his theoretical characteristics. From this the unfortunate condition of war and violence is deduced and presented as the natural and unavoidable state of community which is antagonistic to the proper end of humanity and must be overcome through a collective endeavour by all subjects through their common faculty of Reason. As Reason is seemingly accessible to all human subjects, this leads to the conclusion that Reason is objective and universal. Consequently the dictates of Reason must also apply objectively and universally. Thus Reason is qualified to serve as the origin from which to derive eternal and immutable laws which are objectively valid because all who possess Reason will arrive at the same conclusion. Reason itself is beyond reproach, so its precepts must also be equally valid.

This argument whereby Hobbes and Kant begin from seemingly irrefutable postulates of human nature and end in universally valid laws, with each step in reasoning posited as theoretically necessary, is deceptively plausible. However the atomistic approach of isolating the subject as individual whilst also projecting a common faculty of Reason misconstrues a constituted subject as *a priori*. Hobbes and Kant take the subject out of the community but retain those characteristics which were constituted by that community, and present them as somehow endowed by nature. It will be argued that the claims to metaphysical status are made possible by obscuring the material origins of the subject, and sustained by constructing an artificial image of human society.⁷⁷

The opposition between the claims of universally true laws of Reason and the materially affected rationality of the subject is a source of tension in Hobbes' and

⁷⁶ These faculties refer to those pertaining to sense and intelligence, namely the faculties of Desire and Reason combined with the motivations they engender, and their relation to the causal factor of human action which is the will. The proper end of humans, for Kant the moral Will, and for Hobbes the benefit of mankind, are posited as unique and necessary to the subject by virtue of his humanity.

⁷⁷ A similar argument is advanced by Sullivan n.29 who criticises the validity of Kant's supposed metaphysics which he asserts is a result of Kant's particular theory of anthropology. This reliance upon a specific view of human nature as the foundation for a supposedly metaphysical moral and political philosophy calls the validity of their justification into question.

Kant's theories. Once the illusion of immutable Reason is abandoned, the concept is reduced to the observation that all human subjects have a degree of self-determining consciousness, a concept so impoverished that it is unable to sustain any ambitious claims of morality.⁷⁸ There are no longer moral principles which humans must observe by virtue of their humanity, or by their absolute worth in the pursuit of human development. What remains justifiable in both theories is that of limited rationality, of the subject who is capable of responding to reasons and norms, who possesses a degree of foresight and the desire for happiness, and orders his desires and actions for purposive living.

1.4.2 Law without Reason

Having problematised Hobbes' and Kant's conceptions of reason, their Reason-based accounts of legal normativity are also called into question. If Hobbes and Kant can no longer plausibly claim the status of natural or moral law for the legitimacy of the sovereign, it is no longer tenable to claim unconditional obedience from the subject towards an empirical figure of authority. Once the unquestionable validity of natural and moral law is undermined, so is the normative force of positive law which emanated from the once supposed unquestionable figure of sovereign.⁷⁹

This critique may be elaborated by exploring the concept of the state of nature, which both Hobbes and Kant rely heavily upon as the conceptual foil to civil society. The state of nature is a collection of discrete individuals who interact principally through competition and threatened violence. Great emphasis is placed upon the distinction between self and other, expressed through property relations, or division of control over external objects, and the act of contract, or the alienation of rights over external objects. Hobbes and Kant claim these rights are 'natural' insofar as they are necessarily implicated by a self-regarding, purposive being who utilises external objects to vindicate his freedom and achieve happiness. This natural right to contract consists of a hypothetical mutual exercise of will between equal parties which creates

⁷⁸ Claims that the laws of morality are valid eternally and universally, irrespective of context because of their derivation from metaphysical Reason, such that the laws themselves take on a status akin to metaphysical maxims.

⁷⁹ Manfred asserts that Kant fails to address the aporia of norm and fact in his account of legitimization of civil society. Kant's transcendental approach in using an *a priori* universal will as the foundation for State and obligation is criticised as being reliant upon prior material suppositions. See Manfred n.56.

obligations, and by extension justice.⁸⁰ It is highly significant that obligation is possible in the state of nature only as an act of exchange expressed through relations of property and power, to the extent that all other forms of 'ought' exist only by the auspices of morality.⁸¹ In the state of nature and between nonmoral subjects the predominant form of shared obligation is mutual contract.⁸² I would argue that this contract-created obligation represents an impoverished vision of social interaction, and casting it as the predominant social interaction corrupts social normativity in general. Contract may simply be one possible form of social interaction which is perfected in material life and transposed into the state of nature, thereby elevating it to a status of natural right.

The foregoing does not demonstrate that the ostensible natural rights are not aspects of the human subject eternally and necessarily as Hobbes and Kant claim, merely that those claims are not fully warranted. Instead of taking community as an organic whole, the state of nature ignores community and replaces it with a constructed collection of theoretically rational subjects. In similar fashion Reason, which was cultivated through material interactions in community is artificially abstracted and implanted into the theoretical concept of human nature, thereby reified to metaphysical status.

Hobbes' and Kant's artificial constructions of human subject and human society lead to an artificial and impoverished account of legal normativity. Although both theorists emphasise the necessity for civil society as a coordinating system between physically embodied beings who cannot avoid sharing space and resources, that material aspect becomes obscured and displaced by a metaphysical and reified Reason. Hobbes and Kant concede that perfect Reason is not attained for most subjects, for whom the primary motivation is sensible desires and selfish ends, so external constraints upon action enforced by coercion is required. The necessity of law is thus premised upon an image of the embodied and self-regarding subject who reacts primarily to self-

⁸⁰ Kant's definition of the rightful condition is where such distributions of property rights are authoritatively enforced, and encroaching upon another's rights of property deemed unjust, *Metaphysics of Morals* The Doctrine of Right, Part I section II; similarly Hobbes defines justice purely in terms of proprietary rights, that to encroach upon property belonging rightfully to another is deemed unjust, *Leviathan* pg.89-100.

⁸¹ Such examples may include Kant's duty of virtue to observe the perfection of one's own capabilities and the achievement of others' happiness, and Hobbes' various Laws of Nature which do not depend on mutual promising but on the general dictates of civil society.

⁸² Indeed Kant goes as far as to express relations of marriage as contracts for the exclusive use of another's sexual organs, so terms familial rights 'rights to persons akin to rights to things', *Metaphysics of Morals* The Doctrine of Right, Part I section III.

advancing motives, whilst its normative legitimacy is premised upon the subject as a disembodied vessel of perfect Reason. This disparity between the conditions of justification leads to a portrait of society wherein the majority of subjects experience legal normativity only in terms of external constraint and threat of punishment. It is the figure of authority which is paramount, not the normative order of law.

Hobbes and Kant construct their theories of legal normativity upon a false dichotomy between the embodied subject and his Reason, and between the state of nature and civil society, so limit legal normativity to a choice between opposites. Legal normativity is premised upon the imminent threat of human subjects succumbing to the demands of desire, passions, and mutual diffidence. Law saves the human subject from himself by externally imposing the dictates of Reason which guard against those sensible impulses so subversive to peace. Law's normative force becomes aligned with Reason against those aberrant elements such as emotions and desires, just as Reason purges itself of its material and embodied aspect. However such an impoverished account of legal normativity merely obfuscates those problematic elements, which make their presence felt in counterintuitive features of law.⁸³ Hobbes' and Kant's account of legal normativity pretends to forget its dependence on human subjects who are incessantly assailed by their sensible desires and inclination to violence, instead addresses itself to an abstract and metaphysical concept of Reason.

1.5 Historically conditioned reason

In this section I will explore the Marxian view of man which is based on a rejection of transcendental traditions.⁸⁴ By propounding a dialectical relationship between man and reason Marx presents a unified subject who changes and progresses throughout history, thereby rejecting Kant's ideal ontological categories.⁸⁵ Marx attempts to

⁸³ These will be explored in greater detail in chapter 3.

⁸⁴ Marx's theory is often compared with Hegel's, from whom Marx took his dialectical method but rejected Hegel's idealist approach. See generally David Harvey, *Companion to Marx's Capital* Verso 2010 chapter 1.

⁸⁵ Marx's dialectics is often presented as a historical materialism, a theory of history which evolves dialectically through different epochs of economic production, culminating in the state of communism and the end of history. This gives the impression that Marx is advancing a predestined or scientific account of human development. Cf. M. Tabak, *Dialectics of Human Nature in Marx's Philosophy* Palgrave Macmillan, New York, 2012, chapter 2 for a non-teleological interpretation.

construct a conception of man which is predicated upon the necessarily material conditions of his survival, yet possesses the potential for change and self-realisation.⁸⁶

Eschewing the metaphysical approach of Kant, Marx begins from empirically observable descriptions of the life-process of man, which is his active production within the confines of material limits existing independently of his will. For Marx, what distinguishes man from animal is primarily his faculty for consciously producing the means of life by purposively fashioning the objective natural world according to his needs.⁸⁷ Hence the peculiarly human aspect of the subject is organised labour, not possession of rationality; the species-being of man is the conscious labouring upon inert nature, through which man raises himself above nature and becomes more fully actualised in the self-fulfilling act of labouring.⁸⁸ In this initial description of Marx's theory there emerges a fundamentally different conception of reason, for unlike Hobbes and Kant for whom the concept of Reason is removed from the material sphere and is preserved in a higher metaphysical plane accessible through reflection, for Marx reason is limited to the consciousness of the material subject. Moreover due to the necessity for human development, reason is not fully realisable merely by the employment of logic or reasoning; it is not discoverable as eternal and immutable natural laws, but only expressible through the actual development of the subject himself.⁸⁹

The first historical state for Marx is the existence of man possessed of animal consciousness, specifically those fixed needs for subsistence.⁹⁰ The satisfaction of

⁸⁶ The proceeding discussion is a controversial topic in Marxian scholarship regarding the status of Marx's earlier philosophical works in relation to his mature works in *Capital*, specifically around the issue of human nature. Some critics posit a continuity between the 'young Marx' of *Economic and Philosophic Manuscripts* and his seminal volumes of *Capital*, whilst others downplay the weight of Marx's earlier works as being philosophically immature. See Marcello Musto, 'The 'Young Marx' Myth in Interpretations of the *Economic-Philosophic Manuscripts of 1844*' *Journal of Socialist Theory* 43 (2) 233-260 for a general overview of the subject. In my following arguments I have relied mostly on Marx's pre-*Capital* works in constructing a Marxian account of human nature, only because that is where the most references to human nature is to be found. I do not subscribe to any particular school of Marxist thought, and the prospect of an entirely structuralist reading of Marx poses no direct problem for my thesis.

⁸⁷ Karl Marx, *Economic and Philosophic Manuscripts of 1844*. New Ed.]. ed. London: Lawrence & Wishart, 1970 (hereafter *EPM*) pg.328-329.

⁸⁸ Thomas Wartenberg, "Species-Being" and 'Human Nature' in Marx.' *Human Studies* 5(2): 77-95.

⁸⁹ The important difference here is the way in which Reason is constituted, for Hobbes and Kant also conceded imperfect manifestations of Reason owing to the very material aspect of the subject which Reason is intended to compel. Marx is stressing the changeable nature of reason and denying it a separate ontological status apart from the material subject; hence Marx refers only to consciousness and self-awareness without referring to autonomous will or reason.

⁹⁰ Karl Marx and Friedrich Engels, *The German Ideology : Including Theses on Feuerbach and Introduction to The Critique of Political Economy*, Great Books in Philosophy. Amherst, N.Y.: Prometheus Books, 1976 (hereafter *GI*) pg.48-49

these first needs lead to producing the means of survival, the creation of new needs, and the need to produce other men.⁹¹ As this process continues, the division of labour, originally presented in the sexual act, expands to encompass increasing productivity in order to satisfy the increasing needs of the growing population.⁹² For Marx this is the most rudimentary form of social intercourse. The actual cooperation necessary between subjects in the satisfaction of their needs creates social relations which form a mode of cooperation associated with a certain mode of production and independent of any specific social order.⁹³ Significantly the Marxian subject requires no prompting in this division of labour apart from the immediate consciousness of sensual activity, and the awareness of his and others' needs.

Therein lies a fundamental difference between Marx's conception of the human subject and those of Hobbes and Kant. Marx eschews the atomistic approach of isolating the subject as individual from his social context. Instead the subject is posited from the outset as both creator and creation of a set of social relationships, such that an isolated individual endowed with purely natural characteristics is inconceivable. Marx emphasises the human as social being inseparable from society.⁹⁴ For Marx the hypothetical state of nature as constructed by Hobbes and Kant, wherein man is isolated but nevertheless imbued with a specific social dynamic of competition and violence is a false premise.⁹⁵ The subject is a nexus of social relationships which by definition cannot exist independently of its social context.

⁹¹ Ibid. pg.48-51; Marx saw these moments as hypothetical but also replicated in every act of the subject even to the present day; thus it is not a mischaracterisation to see this process as akin to a law of nature for Marx.

⁹² Ibid. pg.48

⁹³ In contrast to Hobbes the first social intercourse is not conflict but cooperation, and society is not an abstracted entity above the individual but an extension of man as social-being.

⁹⁴ Marx n.90 *Introduction to the Critique of Political Economy* (hereafter *Introduction*) pg.2; *Theses on Feuerbach* (hereafter *Theses*) VI; EPM pg.350-351

⁹⁵ *Introduction* pg.2 where Marx states 'isolated individuals outside of society - something which might happen as an exception to a civilised man who by accident got into the wilderness and already dynamically possessed within himself the forces of society - is as great an absurdity....'

Marx has avoided corrupting the social character of man, but in emphasising the social aspect⁹⁶ he is often interpreted as advocating a theory of determinism.⁹⁷ Humans are fully determined by society, a nexus of modes of life and production relations fashioned historically and independently of their will. Man cannot determine his consciousness, only his labour, such that the Marxian man seems to lack autonomy and is incapable of self-determination.⁹⁸ However such a crudely materialist interpretation neglects man's capacity to transform nature, thereby transforming himself.⁹⁹ Marx's humanism is reflected in his conception of human freedom as production free from the constraints of necessity. Man is truly free when he fully realises his species-life, namely the objectification of self through humanising nature, and he may achieve this through the fulfilling act of labour in order to objectify his self by consciously transforming the natural world around him. The Marxian man, far from being a socially determined object, demonstrates his autonomy by purposively transforming nature, thus exhibiting a potential for positive material freedom. The Marxian man's relationship to external objects is not reduced to mere control or ownership, but is a direct reflection of his being.¹⁰⁰

⁹⁶ *Gl* pg.41-43 where Marx speaks of the social formation of man; *EPM* pg.350-351 where he speaks of the 'social being'.

⁹⁷ On structuralist accounts of Marxism the economic relations of production scientifically determine their corresponding class consciousness, so allows no room for human nature or reason; the traditional base-superstructure model. Althusser offered an alternative model wherein Ideological and Repressive State Apparatuses actively operated to control the public; Louis Althusser, and G. Goshgarian, *On the Reproduction of Capitalism : Ideology and Ideological State Apparatuses*. English-language ed. 2014. Nevertheless he outright rejected humanist readings of Marx and the possibility of change in consciousness without the collapse of capitalism; Louis Althusser, and François Matheron, *The Humanist Controversy and Other Writings (1966-67)*. London ; New York: Verso, 2003. Cf. H. Sherman, 'Marx and Determinism', *Journal Of Economic Issues (Association For Evolutionary Economics)*, 15(1): 61-71.

⁹⁸ Indeed this summary approximates the claims of vulgar theories of Marxism. Further evidence for such interpretations is ostensibly provided by Marx's *Theses*, but see Geras' denials of that textual interpretation and his defence of Marx's concept of man in general. Norman Geras. *Marx and Human Nature: Refutation of a Legend*. London: Verso, 1983. Cf. Wartengurg n.88 makes an argument that Marx's theory of human nature is rich enough to ground a normative critique.

⁹⁹ Marx levels this criticism at Feuerbach's theory of materialism, which he asserts commits the mistake of crude materialistic determination by casting man as an impassive object of the senses and ignoring his sensuous activity; *These VI*; *Gl* pg.44-47.

¹⁰⁰ This dynamic humanism reading of Marx is propounded by various critics. See Erich Fromm, *Marx's Concept of Man*. Milestones of Thought. New York: F. Ungar, 1961; Gary Chamberlain, 'The Man Marx Made', *Science and Society* 27(3) : 302-320; Walton et al., 'Image of Man in Marx', *Social Theory and Practice*, 1(2) :69-84. Wartenburg n.88. Cf. Tabak who presents Marx's dialectic as a process which culminates in the reunification of man and nature; Tabak n.85 chapter 1.

1.6 Alienated consciousness

In positing this image of man as both autonomous and conditioned, Marx is concerned with relating the human subject in his entirety, encapsulating a universal humanity and not merely a disintegrated vision of it. The latter is characterised by the tendency of bourgeois society and philosophy to atomise the individual, to force him into dichotomies and particularities of existence.¹⁰¹ Such is the unfortunate state of man's self-alienation within bourgeois society. Marx presents alienation in various forms,¹⁰² however the process remains essentially the same. Alienation arises from the division of labour which obscures the sociality of production from the limited perception of each contributor, such that the end product appears independent of each contributor's labour. Man is alienated from his species-being when the products of his labour, his inorganic body, are removed from his control and confront him as something foreign. Alienation is only overcome when the relations between men may be directly perceived and immediately experienced. This entails submitting the totality of productive forces to the conscious control of society, thus freeing man from the necessities of living in order to pursue freedom.¹⁰³

Parallel to Marx's rejection of the fragmentation of man's being, he also rejects the apparent schism between common and private interests. Instead, for Marx, the appearance of conflict is also an unfortunate result of alienation within society. Man is alienated from other men when his cooperation with others within the common interest is hidden and involuntary, and the products of his labour used only to satisfy another's desire, such that he perceives the common interest to be in conflict with his private interests. When man is atomised into particular roles in the social intercourse he becomes limited by those imposed categories, his labour becomes involuntary, and in

¹⁰¹ Marx gives examples of such dichotomisations of abstraction from civil society vs. integration into political society in *Critique of Hegel's Doctrine of the State* pg.143, and *On the Jewish Question* pg. 221-222, in Marx, Karl, Livingstone, Rodney, and Benton, Gregor. *Early Writings*. The Penguin Classics. Harmondsworth ; New York: Penguin in Association with New Left Review, 1992.; different occupations in *GI* pg.53.

¹⁰² Self alienation, alienation from other men, and alienated labour in *EPM* pg.322-334; political and social alienation in *Critique* pg.140-147; *GI* pg.51-54; economic alienation in *Capital* vol.I chapter 1 section 4. For a concise definition of alienation see Buchanan n.53 under 'alienation'. For a concise description of alienation see Walton n.77 pg.69-84 who presents Marx's 'three modalities' of alienation. Cf. Meszaro who asserts that for Marx alienation is superseded when social practices are no longer fragmented, and a truly human science could be achieved; Meszaro, *Marx's Theory of Alienation* London: Merlin P, 1970, chapter 2.

¹⁰³ D. McLellan, 'Marx's View of the Unalienated Society' *The Review of Politics*, 31(4), 459-465

consequence he cannot perceive his relationship to society except in terms of conflict and isolation.¹⁰⁴

Marx acknowledges that man seeks only his particular interest, which may not coincide with the common interest.¹⁰⁵ The common interest here is real in the sense of interdependence among men in order to reproduce the means of satisfying the current and potential increases in their needs; in other words the common interest is the satisfaction of needs, be they basic or social, which can no longer be achieved through individual effort as a result of population expansion.¹⁰⁶ In addition each generation would have inherited a totality of productive forces from the preceding generation, which is an historically created set of relations of individuals to nature and to each other, which propitiated self-activity within the community and so is expressed as the common interest. Marx is asserting that given a certain level of productive forces there corresponds a social form and division of labour which better utilises those forces, thereby advancing the interests of humanity to become more productive. These social forms will eventually be outgrown and consequently discarded as fetters to increased productive forces.¹⁰⁷ To the extent that the social forms are successful in advancing the productive forces of society, Marx may be construed to be advancing a comparable argument to Hobbes and Kant. The common-wealth and rightful condition are in the greater interests of humanity, but only perceived to be in conflict with private interest due to a lack of Reason in the self-regarding individual. Similarly the common interest is in the greater interests of society, but only perceived to be in conflict due to the individual's alienated state of being. Once these defects are remedied through education or de-alienation, man would voluntarily accede to the common interest.

The vital difference, however, in Marx's conception of common interest is its historically specific character which is embodied in the class structure. The division of material from mental labour enables consciousness to express itself independently from reality in the form of pure theory, through the endeavours of its guardians. By extension the

¹⁰⁴ *EPM* pg.322-326. It is submitted that when Marx speaks of man's consciousness being determined by his social position he is not speaking of generic consciousness, but the way in which man views his relationship to other men, specifically to the social power which is distorted by this process of alienation.

¹⁰⁵ For Marx common interest denotes a class interest which is presented in its ideal form, thus it is not an enduring common interest of humanity in the sense of Hobbes' Commonwealth or Kant's rightful condition. Althusser makes plain that capitalism serves exclusively the class interest of the bourgeois, n. 95.

¹⁰⁶ Marx mentions this factor explicitly, *G/I* pg.48

¹⁰⁷ *G/I* pg.53-92. On the inevitability or otherwise of these transitions see Tabak n.85 chapter 2 and the need for revolutionary force.

class-specific interests are also expressible in this idealistic fashion. The ruling class, which is defined as that which controls the greatest material means of production, also controls the greatest forces of intellectual dissemination, and presents its class interests in their ideal form as being universally rational and eternally valid.¹⁰⁸ For Marx this motivation towards the ideal form is necessary during revolutionary epochs when the prevailing ideals of the failing ruling class no longer promote the productive forces, so must be supplanted by an alternative.¹⁰⁹ During this time the rising class will present its interests as the common interest in order to appeal to other classes in society, an endeavour made tenable owing to the coinciding interests against the failing ruling class. Owing to this idealistic form of expression the ideas are reified into immutable ideals, or the Idea of the age which in reality is only the interest of a politically motivated mode of life.¹¹⁰

Indeed Marx explicitly levels this criticism at Kant, who he asserts is the unwitting recipient of the ideas of political liberalism from England and France as a result of their social revolutions.¹¹¹ Whereas the economic stage in England and France had matured sufficiently for the bourgeois to rise into ruling position, and thereby asserting their class ideas of freedom, independence, and such as instruments towards achieving their political goals, Germany which still languished in the economic stage of the vulgar burghers¹¹² could only conceive of these as abstract metaphysical concepts.¹¹³ Thus for Marx, Hobbes saw the presence of power within the liberal revolution where Kant saw only metaphysical origins of self-determination and freewill; these ideas are divorced from their historical bases and consequently reified and alienated from the material conditions of man.¹¹⁴ For Hobbes and Kant the liberal ideals of freedom and self-determination engender the universal laws necessary to reconcile the essentially self-regarding man with his greater moral and civil interests by justifiably compelling him through force and morality. For Marx such ideals are merely private interests expressed in an ideal form, a mode of life conducive only to historically specific stages of productivity which are continually destroyed and reproduced in the life-process of production. The image of the egoistic subject

¹⁰⁸ *G*/ pg.67-71

¹⁰⁹ Tabak n.85

¹¹⁰ *G*/ pg.208-211. See Kit Christensen, 'Marx, Human Nature, and the Fetishism of Concepts.' *Studies in Soviet Thought* 34(3): 135-71 on the fetishisation of concepts in general.

¹¹¹ *G*/ *ibid*.

¹¹² *Ibid*. Marx is presumably referring to the pre-capitalist bourgeois class who were intermediate between the peasantry and the lord in the feudal system.

¹¹³ *Ibid*.

¹¹⁴ *Ibid*.

compelled to conform to an enduring common interest is false, for the common interest is only the ephemeral mode of life, and the egoist only the reflection of the bourgeois man.

1.6.1 Material conditions of freedom

The foregoing is not to argue that Marx propounded a naturally cooperative and productive image of human society, but merely to convey the emphasis Marx placed on the material and historical relations between men, expressed in the mode of social intercourse, as the determinants of human nature and human consciousness.¹¹⁵ Indeed the Marxian man shares certain similarities with the Kantian and Hobbesian man. He seeks to satisfy his needs which are conditioned by his physical nature and social existence, thus he may be prone to greed, selfishness, and other predispositions of character. However the advantage of the Marxian man lies in his potential to redefine his needs through improving his material conditions of life, to overcome constraints of character not by forcibly imposing a metaphysical Reason upon himself, but naturally by the efforts of his labour. What for Hobbes and Kant is the inevitable and undesirable burden of humanity, is for Marx only a stage in human development, and in denying absolute Reason he makes possible the achievement of full human consciousness, which is consciousness unimpeded by alienation or ideology.¹¹⁶

This contrast may be further elaborated by comparing Marx's depiction of the capitalist economy as characterised by the commodity form with Hobbes' and Kant's constructed state of nature as characterised by private rights. Under capitalism man is alienated from the products of his labour which are transformed into commodities for exchange rather than for use. This commodity fetishism imparts a semblance of inherent value onto objects by obscuring the real source of value which is congealed labour power.¹¹⁷ Capital is perceived to be inherently productive, so becomes the object force which organises social relations. The commodity form rules over man's

¹¹⁵ Tabak n.85 chapter 4. Contrast Hobbes and Kant who vice versa begin from positing an essential human nature, one which is self-advancing and rational, from which they construct feasible modes of cooperation which constitute the relations within society. For Marx the actual cooperation is prior to the formation of the consciousness of that mode of cooperation, which in turn shapes the nature of the subjects when engaging in social intercourse.

¹¹⁶ McClellan n.103.

¹¹⁷ Capital n.73 chapter 1 s.4.

consciousness and corrupts their production relations into 'fantastic social relations between things'.¹¹⁸ The common interest here is the marketplace, whose laws appear independent from, and as constraints upon the subject acting in the market. Man becomes merely an appendage to the exchange of commodities rather than their creator. In this guise he can only relate to other men as owners of property, a social form which obscures their real relations as producers of those objects. This is the distorting effect of capitalism and the commodity form upon the consciousness of man.¹¹⁹

This perverted portrayal of society is instead advanced by Hobbes and Kant as the hypothetical natural state of man. The form of private property is presented as a natural right, and extension of man's exercise of freedom. The act of exchange through contract is lauded as the natural source of mutual obligation and cooperation. Where Hobbes and Kant insist upon the form of equivalent exchange as the basic rationality between equal subjects, Marx reveals the hidden inequality of surplus-value which originates in extracting from labour value above its market price.¹²⁰ The dictates of Reason which arise from this capitalist conception of society are taken by Hobbes and Kant to be inevitable and natural. The fundamentally alienated state of the subject is hidden by elevating the reified form of private property into the natural form of social relations. As in the state of civil society, the historically specific rules of the marketplace are preserved in reified form as the enduring state of nature.

The same criticisms of how Hobbes and Kant reify the interests of liberalism into an enduring common interest of humanity, and the interests of capitalism into a hypothetical state of nature, may be applied to their conceptions of metaphysical Reason.¹²¹ Man's consciousness under the social conditions of capitalism and liberalism still exist in a state of alienation. Since alienated man is unable to relate immediately to his sociality, so he perceives himself to be constrained by the demands of the market to specialise and earn his subsistence, by the demands of other men which are hostile to his own, and by the demands of civil society to conform upon

¹¹⁸ Ibid. pg.99

¹¹⁹ Marx discusses this perversion of social relations by objects of property in the context of lumber laws: Karl Marx, and Friedrich Engels *Preface and Introduction to A Contribution to the Critique of Political Economy*. Peking: Foreign Languages Press, 1976.

¹²⁰ *Capital* n.73 vol.I chapters 9-10. Marx's theory of surplus-value is based on the differing values of labour power, where the cost of reproducing labour power is lower than the value able to be abstracted from that labour. See David Harvey n.83, *Companion to Marx's Capital* chapter 4.

¹²¹ These are essentially elements of the superstructure misidentified as the *prima facie* reality. Tabak, n. 85 chapter 4.

threat of violence. For Hobbes and Kant this alienated state of being is portrayed as the inevitable lot of mankind. By extension that alienated consciousness is portrayed as the image of immutable Reason which acts to reconcile man's essentially self-regarding nature to his greater common interests. Reason is the reified form of consciousness, just as civil society is the reified form of bourgeois ideals, and the state of nature the reified form of the capitalist market.

1.7 Law as Ideology

Marx's systematic rejection of ideal conceptions of human nature and society poses a problem for establishing legal normativity. For Hobbes and Kant the normative force of law lies in its capacity to advance the ends of humanity. Under their respective conceptions of the human condition, a lawful or rightful condition is necessary to realise the fate of humanity in the ends of peace and morality. Insofar as the subject conforms to the dictates of Reason he is consciously fulfilling his potential to be fully human. In this sense law-making represents an act of autonomy; it is a conscious and autonomous act to better fulfil the human potential. Legal normativity is the promise of human fulfilment through the active striving by the human subject towards the higher goals of morality and justice.

In contrast to the necessity of autonomous action towards a moral humanity, Marx conceives of humanity in a dialectical relationship with nature which ends in nature becoming fully humanised.¹²² Man is related immediately to the products of his labour and is free to produce without the constraints of necessity. It is a state of de-alienation which is only possible under the social conditions of communism, a condition which cannot be actively brought about, but must mature within the womb of its preceding social structure.¹²³ This is not to assert that Marx is given over to materialist determination, for the Marxian man is always the active force in reproducing his conditions of existence. However Marx's formula of alienation may amount to a denial of the possibility of true legal normativity. Because of the presence of class conflict, any dominant theory of social norms is deemed to be ideological, the ideal form of

¹²² Tabak n.85 chapter 1.

¹²³ GI pg.72-82 where Marx illustrates how the epochs in history are characterised by differing degrees of division of labour, asserting that capitalism matured in the womb of feudalism. Cf. Tabak n.85 for argument that communism is only a historically specific arrangement made necessary by the growth of capitalism, and not the teleological end of human society.

class interest. Dictating the norms for behaviour is attempting to preserve an historically specific mode of production and preventing it from being superseded. Expressions of social normativity are the products of alienated consciousness which do not further the advancement of humanity. Only labour is truly transformative, and when the subject is no longer alienated there remains no need for such ideologies.¹²⁴

1.7.1 Ephemerality of law

Marx does not deny categorically the significance of law and State within society, merely their pretensions to ideal status. As recognised in the preceding discussion on the common interest, Marx himself saw the instrumental value of ideals, expressed in the form of State and by extension its laws, religion, and other social institutions.¹²⁵ Such social forms are needed to stabilise and promote the functioning of production relations as determined by the existing productive forces. Social forms are depicted as serving a functional role of enabling the productive forces of society to function and increase.¹²⁶ Social forms by themselves carry no determining force against the real relations of production, consequently law as a social form can only be determined by the prevalent modes of production.¹²⁷ Law as a form of consciousness for Marx possesses no determining potency, for it is merely a reflection of how man perceives his world through a consciousness conditioned by his material state, a consciousness to be destroyed and reproduced instantly upon a change in his material state.¹²⁸

In direct contradistinction to Hobbes' and Kant's theories of State and law, it is not these concepts and institutions which are the determinants of history. Authority and law are not determinants of man's proper end, but are products of his life-process, alienated from him and reified to rule over society. Civil society is not the ideal social form as dictated by unerring Reason or nature, but only a manifestation of the social-being of man expressed in varying forms necessitated by the specific relations of

¹²⁴ *EPM* pg.348-358 where Marx details what communism entails for human emancipation, and how human history begins. For the seminal theory of law withering away under communism see Evgeniĭ B. Pashukanis, *Law and Marxism : A General Theory*. London: Ink Links, 1978.

¹²⁵ Althusser on ISA n.97. Tabak n.85 chapters 5 & 6.

¹²⁶ *Gl* pg.72-82. Such a functional theory of social forms is expounded by Cohen who defends historical materialism led by the productive forces, the expansion of which is the function of the corresponding production and social forms. G. A. Cohen, *Karl Marx's Theory of History : A Defence*. Expanded ed. Princeton Paperbacks. Princeton, N.J.: Princeton University Press, 2001.

¹²⁷ Marx uses the example of laws changing to admit new forms of appropriation, such as insurance companies, which in reality are new modes of cooperation. *Gl* pg.100.

¹²⁸ *Ibid.* pg.41-43

production. Analogously law is not the final arbiter of justice and obligation, but simply a pale reflection of the prevailing modes of production and the ideas of the dominant social form depicted idealistically. In a state of communism, with the supersession of private property these disparate modes of existence will be unified, and the alienation of man from the products of his labour overcome, implicating the eradication of State and law.¹²⁹ Hobbes and Kant posited the role of State and law as essential aspects of human society. For Marx, State and law were essential to human society only insofar they served to advance the historically specific productive forces. Because the state of consciousness corresponds with the economic stage of development, social forms are liable to radical change and the forms of ideology are incapable of an independent history.¹³⁰ Attempts to construct an enduring theory of law's normativity or legitimacy risks reifying ephemeral ideas into ideology.

1.8 A state of impasse

The foregoing discussion seems to culminate in a state of impasse between the oppositions of ideal Reason and material dialectics, with neither theoretical approach offering an adequate account of embodied normativity. The accounts offered by Hobbes and Kant as representatives of a Reason-based approach to normativity tend to increasingly efface the subject's material aspect as Reason is elevated to a higher metaphysical plane, and the body consigned to a mere empirical instrument. In spite of each theorist's concessions to the significance and necessity of material being, that mode of being is strictly denied as a source of meaningful normative content. The result is a dependence on a theoretically precarious concept of Reason to unilaterally determine the normative terms of embodied human action.

In contrast a materialist approach as represented by Marx begins from a sound base of the material conditions of living, however encounters difficulties when attempting to integrate the non-empirical normative aspect. Marx opts to maintain materialism at the

¹²⁹ Pashukanis n.124.

¹³⁰ *Gl* pg.41-43; *Preface* pg.424-426

expense of denying social norms objective validity.¹³¹ Social forms such as law claim normative force only as an instrument to a mode of production capable of furthering the productive forces in society, and must be discarded in order for human progress to continue.¹³² It is the innate productivity of the human subject which drives the creation of social forms which will ultimately be superseded once emancipation is achieved.

I believe that neither of these approaches provide an adequate theoretical foundation for legal normativity which unifies the subject's material being with the non-material norms of law into a moment of embodied normative action. Hobbes' and Kant's accounts dismiss the body as a contumely object for Reason to tame, whilst Marx's account portrays enduring norms as ossified class ideologies. The former seeks normativity in the metaphysical, the latter tends towards determinism and denies normativity of substance and meaning.

¹³¹ The extent to which the material 'base' of economic activity determines the 'superstructure' of social forms and vice versa differs amongst Marxian scholars. Structuralists and historicists such as Althusser and Cohen would allow only an instrumental significance to social forms, whereas Pashukanis arguably offers a more dynamic interpretation. However in almost no Marxian theory are norms such as law or religion treated as valid determinants or goals for human action, as to do so would be anathema to Marx's philosophy.

¹³² At best they serve a functional purpose of enabling production; Pashukanis n.124. At worst they operate to oppress and retard human development; Althusser n.95.

2

Foucault and Subjectivity

In the first chapter I have identified and analysed what I perceive to be an over-dependence on a concept of ideal Reason for the normative foundation of law, and a corresponding neglect of the corporeality of being. I explored this theme through the theories of Hobbes and Kant, and by extension those modern legal theories influenced by their philosophies which also exhibit some variant of this theme. I also explored Marx's material dialectics as a possible method of reintegrating the body into normative action, but found his theory lacking because of its tendency towards economic determinism. As things stand, the chasm between norms and their material foundations has yet to be bridged by an account of embodied normativity which I believe entails a legal subject unified in mind and body, whose actions materialise law in an undetermined fashion.

To construct such a legal subject I will proceed in this chapter to explore Foucault's theory of subjectivity as a potential theoretical foundation for legal normativity. Foucault presents a suitable foil for Marx and Marxian theories of the subject, as he pursues the common aim of constructing a material conception of subject, but rejects that structuralism which characterises much of Marxian theory, and which I have also critiqued as the source of economic determinism. Instead Foucault offers a less rigid genealogical method with explicit emphasis on social forms as a constituting factor in subject formation, another notion largely denied by Marxian theories. A subject whose formation is not constrained by an economically determined society or a structured view of historical evolution offers the possibility of normative self-determination. Moreover Foucault's emphasis on the individual body as the site of discipline is in common with my claim that the individual subject is the locus of legal normativity.

Firstly I will analyse Foucault's theory and compare it to those of Hobbes, Kant, and Marx. The points of comparison will be centred on each theorist's conception of the human subject, how that subject is able to exist in a social setting, and specifically the role of law in providing a normative force enabling social cohesion. I will not follow

Foucault's genealogical approach, instead I will adopt a conceptual analysis which I believe is better suited to addressing the problem of legal normativity. Eschewing a strictly genealogical approach would also avoid collapsing all normative concepts into mere historical effects and denying their normative aspect, or sliding into some form of radical relativism. Despite these potential problems, Foucault's theory nevertheless offers valuable insights into the processes of subject formation, notably the body as an instrument and object of power.

2.1 Foucault's genealogical critique

The Foucauldian project of envisioning a modern society dominated by biopower represents a fundamentally different approach compared to preceding philosophies. Eschewing analysis of abstract principles in favour of instances of minutiae and concrete examples, Foucault's theory is able better to approximate the immediate experience of a subject in society. Moreover in constructing a discourse from the material subject in his entirety as social being, Foucault is able to give adequate attention to the body of the subject as a source of value and knowledge. This has the advantage of weaving a discourse which omits no part of the subject, by placing the body and its material experiences at the forefront of study.

Foucault's genealogical approach which emphasises instances of experience as unique and irreducible¹ results in a theory of historical analysis as opposed to a science with discernible principles. Whilst this has the advantage of placing theoretical concepts in their historical context, it also renders the application of theory to different contexts less certain. Coupled with Foucault's tendency to write of historical concepts in their ideal form,² as if such events were absolute, complicates efforts to identify his critique as opposed to a narrative description of events. As such it is difficult to abstract the substantive theoretical elements of subjectivity formation from the historically specific events they are embedded in, and replicate them in the particular case of legal subjectivity.³ Alternatively if subject formation is entirely determined by

¹ A methodology Foucault derives from Nietzsche; see John Ransom, *Foucault's Discipline : The Politics of Subjectivity*, Durham: Duke University Press, 1997 chapter 1.

² Ransom, *ibid*.

³ Foucault's treatment of law is a non-starter for legal normativity, as he relegates law to an obsolete form of power; see below.

social mechanisms, then Foucault's theory encounters the problem of determinism which I have rejected in Marx.

Nevertheless Foucault's theory offers a rich and fertile account of the human subject in society, with the advantage of focusing on how the body of the subject is not only incorporated in his development, but also forms the site upon which expressions of knowledge and power are inscribed.⁴ By beginning from the concrete experiences of the body in its various relationships, Foucault allows the body a history independent of metaphysical concepts which are so privileged in Western philosophy. For Foucault the corporeal mode of existence is suitably placed at the centre of his account of the subject, who is both the source of knowledge and the object of power.⁵

Foucault offers an historical account of the body in society which, having undergone various epochs of development, culminates in a modern society of discipline wherein every crevice of life is studied, regulated, and administered.⁶ Through the forces of disciplinary mechanisms and the art of governance, the subject's body becomes a valuable site of 'political anatomy' which is fought over and moulded by a multitude of disciplines and governmental regulations.⁷ The envisioned end result is a well-oiled machine of society comprised of fully disciplined subjectivities working in concert to reproduce the administered society.

2.2 The Foucauldian subject

Explication of the Foucauldian subject necessitates a discussion of Foucault's conceptions of power and knowledge and their inextricable connection to the subject.⁸ His departure from traditional conceptions of knowledge is particularly pertinent in comparing his theory with those of Hobbes and Kant, who equate objective enduring truths with morality. For Hobbes and Kant the possibility of a knowledge acquired

⁴ Michel Foucault, *Discipline and Punish : The Birth of the Prison* Harmondsworth: Penguin, 1979, (hereafter DP), pg.27

⁵ Michel Foucault, *The History of Sexuality. Vol. 1, The Will to Knowledge*, London: Penguin, 1998, (hereafter HoS I), pg.17-21.

⁶ Foucault, DP pg.195-197.

⁷ Ibid. pg.24-27; pg.135-140

⁸ Although Foucault discusses power in great detail in his works, his central concern remains the subject, and how he is produced through power relations. See Michel Foucault, 'The Subject and Power.' *Critical Inquiry* 8,(4) pg.777.

through Reason which transcends material particularity guarantees the universal validity of moral laws, whose contents inform the necessary norms for human society, and whose universality validates their normative status. I see this conception of true knowledge as immutable and independent of the subject, but nevertheless accessible through inner reflection, as a fundamental cornerstone in both theorists' conceptions of legal normativity. Power is also heavily implicated in this model as a force possessed by the subject which must be submitted to Reason and knowledge in order for human society to advance. Sovereign power in particular must conform to the dictates of objective morality in order to claim any normative force. Whilst Marx's conceptions of power and knowledge are grounded in the material acts of labour and consciousness, I would argue that his idea of emancipation as social power and consciousness free from alienation implies there is innate within the subject true knowledge and power over his life, which is realised once the necessary material conditions are achieved. The idea that power and knowledge are already present pure and fully formed within the subject, to be realised through inner reflection or objectifying labour is the common notion between these theories. The conception of a subject who exercises power and knowledge, but whose essence is beyond their influence, so able to serve as the benchmark for ideal critique, is what Foucault challenges in his theory.⁹

2.2.1 Subject and power

The Foucauldian subject is a product of relationships of power, which also determine the possible fields of knowledge; the subject is both a source and an object of knowledge, and a conduit for that power.¹⁰ Herein lies a fundamental difference in Foucault's conception of power compared to Hobbes' and Kant's, and to an extent Marx's. For Hobbes and Kant power is predominantly conceptualised as a possession or capacity imbued in the individual by virtue of his natural state; the individual is a source of various forms of power which he may exercise over others, typically in manners of coercion. In the state of nature this power is rampant and tenuously constrained by the will of the individual through the dictates of his Reason. This arbitrary power which is potentially destructive presents a problem for which Hobbes and Kant devised the state of civil society as the only possible solution. In the civil society each subject's naturally endowed powers are constrained under equal terms,

⁹ Michel Foucault, *The Order of Things*, Routledge Classics. London: Routledge, 2002, pg. xiv. See Sacha Golob, 'Subjectivity, Reflection and Freedom in Later Foucault' *International Journal of Philosophical Studies* 23(5) 666-688 for her comparison of Foucault's and Kant's conceptions of reflection.

¹⁰ Foucault's conception of subject is foremost an 'effect and object' of power; *DP* pg.192.

by surrendering part of their power to the sovereign who exercises this collective power for the preservation of peace. Sovereign power is a conglomeration of those powers denied to each individual, concentrated and amplified into powers necessary to ensure the survival of the State. As a result the individual subject confronts sovereign power as an external constraint upon his freedom, thus giving legal power its liberal model as a perimeter of prohibited and permissible fields of freedom.¹¹ For Hobbes and Kant power is a relatively static factor which presents only a problem of proper partitioning and legitimate exercise.

Marx by comparison envisions power as a valuable source of constructive energy, specifically his conception of labour power as both the means of realising the conditions of freedom, and the most direct expression of the human's species-life.¹² The problem Marx presents is the alienation of that positive social power which is captured by class interests, and made to serve the interests of a particular group. For Marx this social power may be directed through various means to serve either the ephemeral interests of capitalism, or the enduring interests of human society. Thus social power is inherently constructive, but the source of that power remains with the individual in the form of his life force and labour power.

In contrast Foucault adopts a conception of power which is altogether more mundane but also more insidious. Foucault defines power in terms of relationships, specifically the everyday instances of relationships where there exists an unequal status or standing. Foucault gives the example of a father and son kinship as one such power relationship which is not directly magnified into an analogy of State power over the citizen, but is part of a matrix which elides into other relations of power.¹³ Hence for Foucault the entire social fabric is comprised of such matrices of power which form a continuum and are invested in the individual bodies they come into contact with. This new form of power actively forms and constitutes the individual and makes his subjectivity possible. Instead of any individual or group holding and exercising power over others in the form of coercion, power is actually invested in the individual by virtue

¹¹ For both theorists law is concerned only with the coordination of external actions, and not with the internal motivations of actors. Thomas Hobbes, *Leviathan : Or, The Matter, Forme and Power of a Commonwealth, Ecclesiasticall and Civil*: London: Printed for Andrew Crooke, 1651: Reprinted Cambridge, 1904 chapter XXVIII. Immanuel Kant, and Mary J Gregor, *The Metaphysics of Morals*. Cambridge Texts in the History of Philosophy. New York: CUP, 1996, Introduction to the Doctrine of Right 6.230-231.

¹² Karl Marx, *Economic and Philosophic Manuscripts of 1844*. New Ed.]. ed. London: Lawrence & Wishart, 1970 pg.328-329.

¹³ Foucault, *HoS I* pg.92-94. See also Ransom n.2.

of his relationship to others. This implies that there is no individual subject outside the network of power relations which constitute him, as power is not a possession to be held, but a relationship to be engaged and experienced.¹⁴ Moreover this implies that one individual is not fixed in the amount of power he exhibits, as his position may shift as he moves through the various matrices of the social network. Foucault's conception of power is far removed from that sovereign or class power which he insists have been superseded.¹⁵

2.2.2 Subject and knowledge

Analogous to Foucault's conception of power is his conception of knowledge, which is intimately implicated in the former. Within this power-knowledge matrix is the privileged position of truth, whose validity is placed in question. For Hobbes and Kant truth and knowledge are self-evident facts which are discernible through a proper application of their science, specifically through the reflections of Reason. Hobbes' empiricist approach to knowledge begins from correct identification of objects, which through deductive reasoning leads to truths regarding the human subject which are eternal and immutable.¹⁶ Similarly for Kant knowledge is obtained through rigorous application of the principles of Reason, and although one may never know the nature of things in themselves, one may nevertheless discern the categorical principles of morality through transcendental Reason.¹⁷ For both theorists the locus of knowledge is the knowing subject, the active *cogitans* which, by employing his distinctive faculty of Reason, may arrive at true conceptions of his self and the world.

For Foucault this privileged position of the knowing subject and his access to truth is an historical result of a form of truth creation which stems from the confessional.¹⁸ This procedure of producing truth and knowledge is based on an assumption that truth has an absolute and immutable quality which is spontaneous and independent of the subject. Hence philosophy needs only to look inward to the subject's consciousness in order to retrieve certainties of truth free from the taints of power, whereas, in fact, the

¹⁴ Ibid. pg.96-97

¹⁵ Ibid. pg.89; *DP* chapter 1

¹⁶ Hobbes, n.11 chapter V

¹⁷ Immanuel Kant, Gregor, and Timmermann, *Groundwork of the Metaphysics of Morals*. Rev. Ed. / Translation Revised by Jens Timmermann. ed. Cambridge Texts in the History of Philosophy. Cambridge: CUP, 2012 Section III.

¹⁸ Foucault, *HoS* / pg.57-60. This 'scientia sexualis' is contrasted with 'ars erotica', or the art of sexual practice, which is focused more on mastery and use than on attaining truth.

confessional is a relationship which is invested with power given to the confidant who is placed in a position of authority by the confessor, who gives his truth value only by its intimate relation to himself.¹⁹ Foucault categorically denies the validity of a truth of oneself, or knowledge of morality which is guaranteed by the apparent certainty and immutable quality of the subject's consciousness. For Foucault there can be no power-neutral knowledge.²⁰ This critique reveals a significant assumption by Hobbes and Kant of a subject whose constancy of nature and Reason together provide an objective source from which to deduce immutable knowledge and morality. In denying the possibility of a pure and objective knowledge, Foucault has precluded dependence upon such knowledge as a possible guarantee for normative validity.

Marx's approach to the subject of truth and knowledge is much more nuanced, as he shares Foucault's denial of the validity of an eternal and immutable Reason. Instead the Marxian subject comes into his consciousness through the objective life of his labour, and is capable of altering his consciousness through the material conditions of his being. However Marx does not deny the possibility of a truth which is the ultimate expression of human emancipation. For Marx the human subject indicates a necessary species-life which is capable of fulfilment in the condition of labour free from need.²¹ What is obstructing the attainment of this true state of being is the presence of alienation created by the conditions of capitalist production.²² The emancipated conditions of production will provide the subject with the full consciousness of his self, analogous to Hobbes' and Kant's state of complete determination by the faculty of Reason. The intermediate state of alienation may be likened to a mistake in reasoning, or misidentification of truth.

For Foucault the fundamental difference lies in his questioning the very possibility of a knowledge that is not invested with power. On the contrary power determines the possible fields of knowledge, which is developed and used in a tactic of discipline. Foucault gives the example of sexuality becoming a field of knowledge and a method of accessing the truth of the human subject, only as a result of the problematisation of sex contemporaneous with a growing population and consolidation of middle class social power.²³ Any field of knowledge which centres upon the subject takes him as

¹⁹ Ibid. pg.58-60; pg.64-67

²⁰ Foucault, *DP* pg.27

²¹ Thomas Wartenberg, "Species-Being" and 'Human Nature' in Marx.' *Human Studies* 5(2): 77-95.

²² D. McLellan, 'Marx's View of the Unalienated Society' *The Review of Politics*, 31(4), 459-465.

²³ Foucault, *HoS* 1 pg.115-123

the object of investigation, but only through power relationships which define and fix the truth of that knowledge onto his body. Experience is never 'true' in itself, but is given its truth and meaning retrospectively by the discourse which produced it.²⁴ Thus for Foucault the subject may never come to know his self or the world in an absolute or transcendental fashion, for the possible fields of knowledge are always already defined and imbued with power relations.²⁵

The combined effect of Foucault's critique of power and knowledge in relation to the individual subject amounts to a denial of the subject as a position of critique. In fact it may be fair to say that the 'Foucauldian subject' is a theoretical fiction, so dispersed is he along the relations of power and knowledge which constitute him.²⁶ In the theories of Hobbes, Kant, and Marx there is discernible a relatively stable conception of the individual subject. The Hobbesian or Kantian subject who is beset with natural passions, but also possesses a faculty of Reason which defines his humanity and provides the means to attain his ideal human state. The Marxian subject whose species-life leads inevitably to a state of freedom characterised by full self-realisation through productive labour. Both theoretical approaches describe an ideal state of being which finds its ground in the present, albeit in an imperfect fashion. The human subject in his pursuit of his ideal humanity provides the means and position of critique.

In contrast the Foucauldian subject who is the product of power and knowledge relations appears to lack a corresponding ideal form. Any knowledge he may gain of his self will have been fed to him through a discipline which has reproduced countless other subjectivities. He is no discrete individual at all, but is only fixed in his individuality by the spheres of knowledge traversing his body. The more he becomes a specified and individual subject, the more he approaches a fully disciplined and knowable object of power and governance. Such is the logical result of the trends of disciplinary tactics Foucault details. It remains to be seen whether Foucault does indeed propound such an individual as the ultimate end result of society, and the problems such a conception of subject poses for the possibility of autonomy and normative action.

²⁴ Ransom n.2 chapter 2

²⁵ Golob n.9

²⁶ Although Foucault in his later works did retreat from the more hardline deterministic conceptions of the subject which characterised his earlier work, and attempt to return some form of freedom and self-determination to the subject. See Golob n.9. Cf. Charles Scott, 'Foucault, Ethics, and the Fragmented Subject.' *Research in Phenomenology* 22(1): 104-37 on how fragmentation of subject presents a different form of ethics.

2.3 Disciplining the body

The first step in constituting a disciplined subject lies in establishing complete control over the body through exercise and repetition, rendering it docile and productive.²⁷ Instrumental in this process are the disciplinary institutions which Foucault identifies as correlating with the growth of a 'political anatomy' from 19th century onwards.²⁸ With the decline of pestilence and death, technologies of life became necessary to support the growing population, to turn subjects into economically productive but politically docile bodies. Within that process the aspects of the body under discipline are studied, their results amassed into expanding areas of knowledge about the human subject, which in turn reinforces more efficient disciplinary methods and fuels the colonisation of greater parts of the body. The end result is an individual whose every aspect may be registered, measured, compartmentalised, and fixed according to a population norm. It is a process of enforcing conformity through normalisation.²⁹

Foucault analysed several dominant institutions which first employed disciplinary techniques upon the body; the military, the monastery, and the school.³⁰ From this comparison he abstracted elements which he argued are characteristic of disciplinary mechanisms and come to define the docile body.³¹ Firstly the body must be confined within a space of monotonous discipline, individual inmates must be partitioned and ordered according to function, efficiency, and other criteria. Secondly everyday activity must be controlled and structured down to the most minute of gestures to maximise efficiency of movement, and to avoid idleness and time-wasting. Thirdly time is used as a measure of development and accumulation of skill within the body. Lastly the organic body is composed around inorganic machines to increase efficiency.³² 'The

²⁷ Foucault, *DP* chapter 5

²⁸ Ibid. pg.135-140. Cf. Jan Rupp, 'Michel Foucault, Body Politics and the Rise and Expansion of Modern Anatomy.' *Journal of Historical Sociology* 5(1): 31-60.

²⁹ *DP* chapter 6

³⁰ Ibid. chapter 5. Foucault makes abundant use of such examples, using them as epitomes rather than concrete historical events, a symptom of that tendency to speak of historical events in ideal terms noted above. See John Hassard, & Michael Rowlinson. 'Researching Foucault's Research: Organization and Control in Joseph Lancaster's Monitorial Schools.' *Organization* 9(4): 615-39, presenting material research on schools as disciplinary institutions. Cf. Neil Websdale. 'Disciplining the Non-disciplinary Spaces, the Rise of Policing as an Aspect of Governmentality in 19th Century Eugene, Oregon.' *Policing and Society* 2(2): 89-115. Cf. Alana McKinlay, Chris Carter, Pezet, and Eric. 'Governmentality, Power and Organization.' *Management & Organizational History* 7(1): 3-15 on Foucauldian influence from the perspective of organisation and management.

³¹ *DP* chapter 6

³² Ibid.

disciplined body is cellular, organic, genetic, combinatory'.³³ The overall effect of a disciplinary institution is to produce bodies imbued with a certain set of skills through rigorous physical training and subjection. Such is the procedure Foucault describes as the successful subjection of the individual through his body. By taking complete control over the physical body and forcing it to submit to repetition and habit, the individual becomes ingrained with that automatic reaction.

A contemporaneous process is the normalisation of behaviour which aims to establish a proper norm and enforce conformity to that norm. Firstly the subject must be observed in order to gather information, which leads to the construction of architecture in disciplinary institutions conducive to observation. Secondly normalising judgement is used as the standard for punishment; arbitrary yet natural criteria are chosen, and the subjects ranked according to that criteria to establish a population average or norm against which performance is evaluated. Discipline is achieved not only by punishment for non-conformity, but also by rewards for good performance, such that within homogeneous groups there are differentiated ranks which determine the status of each individual at any time. Lastly the examination process is undergone as the ritualistic reaffirmation of hierarchy, norm, but also the truth of oneself, the 'case' of each individual judged according to its particular values.³⁴ Every disciplinary mechanism utilises these methods of training to establish an internally coherent system of norms and their corresponding punishments.³⁵

For Foucault these centres of discipline are the harbingers of a disciplinary society awash with technologies of the body, which have become detached from their respective institutions and 'swarm' the social fabric.³⁶ As the Foucauldian subject becomes increasingly specified in every aspect of his character, a 'case' is made of him which may be passed from one discipline to another, and constitutes his entire life history. The subject is disciplined from the moment of his birth, through the surveillance of the family, the school, and other social institutions. He learns what is required of a model student, an obedient child, a responsible citizen. For every transgression of the norm he is punished, and for good behaviour he is rewarded.

³³ Ibid. pg.167

³⁴ Ibid. pg.190-192

³⁵ DP chapter 5. Cf. Websdale n.30 on how policing acts as a method of swarming.

³⁶ DP pg.211-212

Hence the subject's level of tolerance for punishment is dramatically lowered, as he is persistently punished in every manner of his life.³⁷

In conjunction to this persistent process of normalisation, Foucault identifies a trend of fixing the individual in his' individuality'. Actions and behaviours which were discrete events come to be fixed to the actor and made to reveal an ostensibly innate aspect of his character.³⁸ Foucault gives the example of madness, which in the Classical age simply expressed an absence of Reason or degree of Unreason, with the advent of psychiatry became a medicalised and documented phenomenon, identifiable as an inherent pathology of the individual.³⁹ Similarly the act of sexual perversion such as sodomy, once limited to the act itself, now comes to be attached to and define a distinct sexuality.⁴⁰ Thus in this process it may be seen how Foucault's power knowledge dynamic operates to discipline the subject, to make him an objectified individual, and teach him the truths about himself and the proper way of behaving according to that truth.

2.3.1 Subjection of self

A distinct aspect of discipline which operates to reinforce generalised discipline, but also directly produce individual subjectivities, is the pressure to self-regulate, to make oneself the object of self-discipline and reflexive behaviour. This habit of self-discipline for Foucault may be achieved through two processes; the device of panopticism, and taking the self as the object of ethics. The Panopticon, a perfect incarceration device envisioned by Bentham utilises the power of the omnipresent gaze to monitor and correct behaviour.⁴¹ In the Panopticon each inmate is visible to the surveyor, without the inmate having corresponding visibility of the surveyor or other inmates. It induces a 'state of conscious and permanent visibility' which engenders self-correction and automatic submission to power.⁴² The individual is always aware of being observed,

³⁷ Ibid. pg.302-303

³⁸ I would argue this insight on subjectivisation is why Foucault's theory is often employed by identity and gender theories. See Judith Butler, *Gender Trouble : Feminism and the Subversion of Identity*. 1999 Part I section V and Part II section II. Cf. David Farrugia, 'Exploring Stigma: Medical Knowledge and the Stigmatisation of Parents of Children Diagnosed with Autism Spectrum Disorder.' *Sociology of Health & Illness* 31(7): 1011-027, on the specific case of autism as a fixed social identity.

³⁹ Michel Foucault, and Richard Howard. *Madness and Civilization : A History of Insanity in the Age of Reason*: Routledge Classics. London: Routledge, 2001 (hereafter *MaC*) pg.186-188

⁴⁰ Foucault, *HoS I* pg.45-49

⁴¹ Jeremy Bentham, *The Panopticon Writings*, London ; New York: Verso, 1995.

⁴² Foucault, *DP* pg.200-201

so learns to observe his own behaviour, thereby inscribing the power relation onto himself. It is a power which is exercised from the inside, and precludes the necessity for external coercion.

For Foucault the principle of panopticism, namely surveillance, is vital in facilitating the deinstitutionalisation of disciplinary mechanisms, turning them into flexible methods of control, and enabling them to swarm throughout the social fabric.⁴³ By being spread along the networks of surveillance exercised by centres of discipline, whole communities may be controlled and disciplined at low economic cost. Foucault gives the example of a school which uses parents to survey and discipline the children, or, vice versa, the school comes under surveillance through the children's behaviour outside its walls.⁴⁴ Such networks of surveillance repeat to produce increasingly homogeneous communities and subjectivities.

Alternatively the individual may also become self-subjecting by thinking of himself as an ethical subject. Foucault uses the example of sexual practice and charts the genealogy of sex as a moral problematic through the prescriptions the ancient Greeks propounded regarding the proper use of sex in caring for the self.⁴⁵ An analogy may be drawn with modern self-ethics such as the proper care and conditioning of one's productive abilities; the moral imperative to embrace learning, cultivate skills and hobbies, the productive use of time and avoidance of idleness.⁴⁶ The mundane cautions and commonplace wisdoms which are proliferated in modern society as self-evident truths, but are in fact effects of a particular attitude towards the value of work and the sin of idleness.⁴⁷

2.3.2 Social or self determinism?

There is a similarity between Foucault's use of the disciplines and Marx's treatment of the factory assembly line. Both devices operate through subjecting the body to repetitive and mundane tasks to deprive the subject of independent thought and make

⁴³ Ibid. pg.211-212

⁴⁴ Ibid.

⁴⁵ Michel Foucault, *The History of Sexuality Vol.2 The Use of Pleasure* Penguin History. London: Penguin Books, 1992. (hereafter *HoS II*)

⁴⁶ Witness how for Kant the non-cultivation of self potential amounts to a moral wrong. Kant, n.11 Introduction to the Doctrine of Virtue 6.390-392.

⁴⁷ Foucault, *MaC* chapter 2

him an extension of the machine.⁴⁸ However there is a significant difference; whereas for Marx the human potential is stifled and stunted as living labour is made subservient to dead labour,⁴⁹ for Foucault the disciplining serves to make the subject more productive. The oppressive setting of a factory or school serves to produce ever more efficient bodies by instilling them with skills otherwise not possible. This difference stems from their fundamental conceptions of the subject, which for Marx is a species-being with innate powers of labour and creativity capable of infinite modes of expression. For Foucault the body appears a much more mundane matter, it must be trained and worked upon in order to be skilful; creativity and productivity must be taught. Hence for the Foucauldian subject discipline is that which constitutes and makes him possible.

A similarity may also be drawn between Foucault's self-disciplining subject and Hobbes' and Kant's moral subject who acts voluntarily in accordance with the rules of Reason, without the need for external constraint. For Hobbes and Kant the ability to reflexively censure one's behaviour is indicative of a freedom and autonomy which separates man from beast. Whether Foucault envisions self-discipline to be emancipatory or simply a further gain for the disciplinary mechanisms is slightly more ambiguous, particularly with regard to thinking oneself an ethical subject, an exercise which does appear goal-oriented and teleological.⁵⁰ With panopticism the dilemma is less apparent, as forcibly ingrained self-correction becomes akin to the training of animals through reinforcements of pain and pleasure, replicated on humans capable of second-order thinking. The gaze which represents the threat of punishment is constantly present in the imagination, so that subject is reduced to a state of perpetual subjection through the power of his own mind. I would argue this is a far cry from the autonomous moral agency envisioned by Hobbes and Kant.

These comparisons reveal a potential problematic for Foucault's theory of the subject which is the distinct lack of a teleology, an ideal towards which society may strive. Foucault refers to 'resistance' as the path to freedom, and self ethics as a form of self-

⁴⁸ Foucault, *DP* chapter 5. Karl Marx, *Capital*. Everyman's Library ; No.849. London: Dent, 1951 v.I chapter 13.

⁴⁹ Marx, *ibid.* chapters 10-14. See David Harvey, *Companion to Marx's Capital* Verso 2010 pg.180-185.

⁵⁰ See Cressida Heyes, *Self-transformations : Foucault, Ethics, and Normalized Bodies*. Studies in Feminist Philosophy. Oxford ; New York: OUP, 2007, chapter 5 for an interesting discussion of how modern self-improvement practices present paths towards embodied freedom against normalisation.

determination,⁵¹ however even if such self-determination free from power is achieved, this still leaves the question of what ends should this subject pursue. Whilst Foucault presents a commendable analysis of the disciplinary mechanisms and their modes of operation, arguably the mechanisms by themselves cannot hope to approximate a value order. Perhaps realising the possibility and potential for resistance and change is the more pressing issue for Foucault than establishing substantive norms to guide change. Nevertheless I consider it difficult to claim that the Foucauldian subject in conforming with law is engaging in meaningful normative action as opposed to being determined by the disciplinary forces employed by legal institutions.⁵²

2.4 The Foucauldian Society

Having explored the Foucauldian conception of subject as a productive body constituted through power and knowledge, I proceed now to examine how a Foucauldian society of such subjects is constructed, with a specific regard to the role of law. Unlike Hobbes, Kant, and Marx whose conceptions of the subject already provide an ideal model of society with a robust normative content which empirical models may approximate, Foucault's lack of a distinct teleology means the relationship between subject and society is more apparent in functional terms, but less so in normative terms. In other words whilst Foucault emphatically relates how shifting power and knowledge dynamics constitute different types of societies in history and produce different types of subjects, the latter is increasingly subsumed and determined by social relations of power such that its status as a locus of normative action is effaced. As social mechanisms determine subjectivities, it is difficult to imagine the subject as the active producer, as opposed to the mere product of social relations, except in a limited and deterministic fashion. In specific regard to law, a legal subjectivity that is fully determined by the disciplinary mechanisms used by power is

⁵¹ Foucault, 'The Subject and Power', in Hubert L. Dreyfus, Paul Rabinow, and Michel Foucault, *Michel Foucault, beyond Structuralism and Hermeneutics*. 2nd ed. Chicago: University of Chicago Press, 1983.

⁵² The apparent denial by Foucault of rationality and humanism is heavily criticised by Habermas, whose theory of ideal rational discourse is directly opposed to Foucault's power knowledge matrix. Jürgen Habermas, *The Philosophical Discourse of Modernity: Twelve Lectures*, trans. Frederick G. Lawrence; Cambridge: MIT Press, 1987; lectures 9 & 10. For a comparison of the two theories see Amy Allen 'Discourse, Power, and Subjectivation: the Foucault/Habermas Debate Reconsidered', *The Philosophical Forum*, 40: 1–28. Nancy Fraser makes the critique of 'normative confusion' against Foucault in Nancy Fraser, *Unruly Practices: Power, Discourse, and Gender in Contemporary Social Theory*; Minneapolis: U of Minnesota P, 1989, Part I. The fundamental commonality amongst these critiques is Foucault's dismantling of liberal normative frameworks without providing any alternative to curb the seemingly irrevocable domination of power.

only capable of reproducing the norms of law in a mechanical way which I would hesitate to portray as an instance of normative legal action.

2.4.1 Law and power

The Foucauldian society comprises of a network of continuous and referential power relations, which work in concert to produce hegemonic forms of power. These in turn find their object and mode of expression in the body of the subject to create a society of subjects with certain characteristics. For Foucault the modern society is typified by the techniques of discipline wrought on the subjects' body, but also by the art of governance of a population necessary for the flourishing of the State. The two forms of power work in cooperation to create a bio-politics, based on 'political anatomy' and 'governmentality'.⁵³

Because of the way in which Foucault conceives of power in his theory, rarely does he reference explicitly law understood in its form of State or juridical law. For Foucault law is simply an expression of power, and the liberal model of juridico-political law is one form of power which has been superseded by newer modes of power. Hence it is more conducive to analyse the forms of power and the function that law partakes in that power. Foucault's seminal study of power and society is conducted through the specific phenomena of punishment.⁵⁴

In *Discipline and Punish* Foucault conducts a genealogical study of the history and theories of punishment through three historical epochs. Through this analysis he identifies the role juridical power serves in meting out punishment; through juridical judgment, condemnation of crime, and its hermeneutic approach to an aspect integral to itself. Significantly, Foucault concludes that the power to punish is increasingly disavowed publicly by juridical power, which is fragmented to become an area for experts of science.⁵⁵ This dilution of the juridical element is in keeping with a general shift in the form of power in modern society away from its old terms of force and

⁵³ Tadros, 'Between Governance and Discipline' *OJLS*, 18: 75-103

⁵⁴ Foucault, *DP* Introduction

⁵⁵ Ibid. pg.20-21. Cf. Carole Smith, 'The sovereign state v Foucault: law and disciplinary power.' *Sociological Review* 48(2) 283-307.

consent, legitimacy and illegitimacy. This assertion has often led to an interpretation of Foucault as rejecting the relevance of law in modern society.⁵⁶

However I would argue that this represents an impoverished reading of Foucault's theory, for the law retains a substantial role within the disciplinary society. What Foucault has pronounced obsolete is not law itself, but that particular expression of power which presents itself as prohibitive and punitive, a simplistic model which Foucault associates with the juridical.⁵⁷ For the purposes of clarity the following discussion will be structured along the three forms of power, monarchical, juridico-political, disciplinary, which will be discussed in concert with their corresponding forms of punishment; torture, semiotics, imprisonment. These pairings are not conceptually discrete, and for Foucault one form of power may exhibit all three forms of punishment simultaneously. I will argue that Foucault reserves a specialised role for law in modern society which presents a challenge to law's normative element.

2.4.2 Law and punishment

Foucault famously remarked we 'have not cut off the head of the king',⁵⁸ specifically referring to that form of sovereign power which is associated with the monarchy. This power, asserts Foucault, exhibits itself through arbitrary and violent displays of force. It is a power which unabashedly allies itself with military might, and the people are simply subjugated to this sovereignty. The law of the land is represented as the will of the sovereign, and any transgression regarded as a personal attack upon the sovereign's majesty.⁵⁹ Yet, simultaneously, there is a surfeit of illegalities which are not only persistent, but tolerated. These pockets of illegalities are dispersed based on right, so form the privileges of the aristocracy, and the customary infringements of the peasantry. Thus monarchical power is characterised by arbitrariness, physical force, and a relatively immobile public.⁶⁰

⁵⁶ Alan Hunt, & Gary Wickham, *Foucault and Law : Towards a Sociology of Law as Governance*. Law and Social Theory. London ; Boulder, Colo: Pluto, 1994.

⁵⁷ Tadros, n.53

⁵⁸ *HoS* I pg.89, in reference to how theories of power are retarded at the juridical monarchy model which has been superseded.

⁵⁹ *DP* chapter 2

⁶⁰ *Ibid.*

The corresponding form of punishment is torture and public spectacle. Because every transgression of sovereign will was seen as a personal injury, the sovereign must take the physical body of the criminal and mark him with the power of sovereign force. The absolute sovereign power is demonstrated upon the criminal's body as a sign of the monarch's reinstatement of domination.⁶¹ Moreover, the public character of this punishment makes the spectating crowd co-adjudicators in the torture. In an age where the primary instrument of juridical truth is confession extracted through torture, the criminal must repeat his confession publicly through speech and the mutilation of his body. For Foucault this expression of monarchical power is exhibited most literally through the mutilated body.⁶²

Foucault's second epoch is characterised by a juridico-political power which arguably finds most resemblance to the liberal model of juridical law.⁶³ Gone is the arbitrary power of the monarch to be replaced by a transparent and coherent set of laws which may be organised hierarchically, and anchored in the common will. Gone also are the old illegalities which were centred around rights, to be replaced by a new emphasis upon illegalities against property as the bourgeois class became dominant and desirous of protecting their interests.⁶⁴ Laws which were once the private will of the sovereign, now must find their validity in the natural and moral order, such that their necessity must be immediately perceivable as natural and inevitable.⁶⁵

Correspondingly the form of punishment devised by the Reformists⁶⁶ was characterised by a preoccupation with semiotics, specifically the symbolic value of punishment which must mirror the nature of the crime.⁶⁷ Hence the public spectacle was transformed from one of instilling fear to public education. The criminal is displayed as an example of the inevitability of punishment, and to teach the public the immediate connection between the crime and the punishment. The purpose is to educate the masses to recognise their true interests in society as dictated by Reason through the creation of a 'punitive city'. The old methods of confession were replaced

⁶¹ Ibid. pg.47-49

⁶² Ibid.

⁶³ Ibid. chapter 3

⁶⁴ Ibid. pg.80-87

⁶⁵ Ibid. pg.106

⁶⁶ Ibid. pg.101

⁶⁷ Ibid. pg.94-101. Foucault lists the 'rules of punishment' which characterise the new form of punishment which focused on semiology and achieving penance of the soul.

by common standards of truth, modelled upon the standards of Reason. The Reformist punishment sought to influence the mind, and through it control the body.⁶⁸

This epoch is arguably the golden age for liberal theories of law and power; a juridico-political power modelled upon enlightened thought. However for Foucault the shift was necessitated by a growing volatility in the people towards the raw expressions of sovereign power. This restlessness was subdued only by a growing legalisation of social relations. The dispersal of the juridical power throughout society was realised in the constitution of juridical subjects through the use of semiotic punishment.⁶⁹ However, the formal egalitarianism of juridico-political power concealed the actual inequalities which lay within society. Moreover this masking of the actual disciplinary mechanisms already operating was necessary to ensure their successful continuation. Foucault's critique may be levelled directly against Hobbes' and Kant's theories of law which ostensibly draw their validity from the immutable rules of Reason, but which are bound up inextricably with a certain form of truth produced through punishment and power.⁷⁰

Foucault's third epoch represents that disciplinary society which he argues has been the perpetual dream of rulers: not the state of nature and civil society, but the plague-ridden city.⁷¹ The latter is characterised not by a gay lawless festival, but rather by a completely regimented society under constant surveillance and control.⁷² Such is the ideal disciplinary society which Foucault asserts is being constructed through disciplinary power. In this society the form of law as juridical power has been superseded, for it is no longer the primary instrument in constituting the individual. It is the head of the king which remains as a visible decoy to mask the real operations of discipline within the social institutions.

This shift of power from expressing itself in negative terms of constraint and coercion, in delineating areas of prohibited and permissible action, to a positive life affirming power was precipitated by a growing population. The decline of pestilence and death from everyday lives means a decline in the significance of power over death. Instead death is viewed as the limit of power's province, which must be kept at bay for the

⁶⁸ Ibid. pg.101-103

⁶⁹ Ibid.

⁷⁰ *HoS I* pg.88-90

⁷¹ *DP* pg.195-199

⁷² Ibid.

sake of humanity.⁷³ Coupled with the growth in productivity comes the emergence of 'population' as a political object, thereby leading to the art of governance where every aspect of the population must be monitored, regulated, and managed in order to extract the maximum efficiency from a productive resource.⁷⁴ Foucault details how the size of population relates directly to its sexual activities, which also in turn became a problem for political science and the object of a new power-knowledge.⁷⁵

2.4.3 Law and governance

In this disciplinary society Foucault has indeed excluded the function of juridical law to the outskirts of power, which now expresses itself as life technologies, reproducing docile and productive bodies. This critique of law and ideology is in part reminiscent of similar Marxian critiques which also emphasise the ideology of law in contrast to the material subsumption of bodies to capital.⁷⁶ However for Foucault the crucial difference lies in the workings of the law in producing real individualities, not merely the illusions of an ideology. This may be demonstrated in Foucault's concept of the delinquent and its part in the police-prison-law discourse.

For the disciplinary society the corresponding mode of punishment is the prison, encompassing the multifarious techniques of discipline. The deprivation of liberty expresses publicly the vindication of law by depriving juridical subjects of their most valuable asset.⁷⁷ However once within the prison walls the juridico-political trappings of discourse dissipate, and one is confronted with a disciplinary space where punishment is measured in terms of rehabilitation and conformity rather than penance. The prison also serves a significant goal apart from its penitentiary function, which is to reproduce and cultivate 'delinquency'.⁷⁸ For Foucault this new category of the delinquent is the disciplinary version of the old illegalities and vagabondage, which were no longer tolerable in their unruly nature. The disciplinary society requires

⁷³ *HoS* I pg.135-138; the beginnings of biopower.

⁷⁴ *Ibid.* pg.140-141

⁷⁵ Tadros n.53; *HoS* I pg.135-138, pg.140-141

⁷⁶ Michael Hardt, & Antonio Negri, *Empire*. Cambridge, Mass. ; London: Harvard University Press, 2001, Part 3 chapters 3.2 and 3.6; the authors discuss how subsumption of labour under capital becomes real through the process of discipline. However they also note that capitalism has advanced beyond that governmentality described by Foucault as capital expands across States and borders and their political denominations.

⁷⁷ *DP* pg.232

⁷⁸ *Ibid.* pg.254-255

absolute control even over its criminality, so deploys three primary institutions to effectively reproduce, monitor, and control its criminal classes.⁷⁹

Delinquency occurs in the vast majority of cases within the lowest socio-economic strata which is placed under heavy police surveillance. The police institution operates to section the class of illegality by frequently transporting part of its population to the prison. The prison in turn gathers these delinquents in close proximity to promote internal networks and connections, which are utilised once the delinquents re-enter society. The role of law lies in creating legal prohibitions which actively generate delinquent behaviour and act as the recruitment criteria for this class of specialised criminality.⁸⁰ Thus Foucault details a process whereby through pro-actively targeting, recruiting, and training a category of delinquent persons, society is able to section and control criminal activity by confining them within the province of several disciplinary institutions. It is the active and intentional reproduction of criminality which explains why prisons are the only answer to a problem they have created.⁸¹

Foucault's analysis of delinquency and the role of the legal system in its production is enlightening. It explains why the law is able to permeate both legality and illegality⁸²; the delinquent is at the very heart of law, and his discipline is perceived as natural and acceptable, for the threshold of punishment is lowered as individuals are punished at every turn. The legal norm is merely a continuum of a wider process of normalisation in society; its function is not to judge or prohibit, but to rehabilitate and discipline.

2.5 The Normative Question

Foucault's theory presents a two-fold challenge to the concept of legal normativity: the relevance of law in setting normative standards for behaviour in a modern disciplinary society, and the capacity of a decentralised and disciplined subject to engage in normative action in a non-deterministic fashion. The latter challenge is more pertinent to my thesis which aims towards a theory of material legal normativity based on the

⁷⁹ Ibid. chapter 9. Cf. Foucault and how the class of poverty is necessary to maintain the general wealth of society; *MaC* pg.218-219.

⁸⁰ *DP* chapter 9

⁸¹ Ibid. pg.270-277.

⁸² The opposition to law is not illegality, but indiscipline; *ibid.* pg.290-292.

subject as the embodiment of law. It is also arguably the more difficult challenge to answer.

In regard to the first challenge, if Foucault relegates the role of law explicitly and exclusively to the recruitment of illegality, he may indeed be interpreted as offering an excessively narrow view of law in society. Specifically this conception of law as merely instrumental deprives legal norms of any normative status, and the notion of justice as an expression of a normative ideal. Such is the critique advanced by Hunt and Wickham who argue Foucault neglects the importance of law's regulatory function in his emphasis on its punitive function, thereby miscasting law as irrelevant.⁸³ Tadros rebuts this critique by raising the possibility of law acting as an interface between governance and the disciplinary mechanisms. Law may be used to control other diverse disciplinary tactics, in addition to its involvement in prisons.⁸⁴

I believe that whilst both critiques have merit, both neglect to address the normative element of law which Foucault's analysis appears to challenge directly. If Foucault is interpreted as relegating law to the very limits of society, that is no issue if law is represented as delineating some form of acceptable social limit, such as in liberal theories where the law represents a moral or value perimeter. What is more problematic is for law to be reduced to a disciplinary mechanism which is now largely obsolete, for that would imply the internal norms of law were nothing more than a derived average standard of behaviour, a standard which no longer applies owing to the emergence of more scientific and objective criteria. Hence Foucault's premonition that the standards of psychiatry and criminology will gradually replace legal norms, legitimated by their greater scientific quality, and force law to relinquish its prerogative in determining criminality. Indeed this appears a close approximation to Foucault's pronouncement of how 'criminal justice functions and justifies itself...by this unceasing reinscription in non-juridical systems. Its fate is to be redefined by knowledge'.⁸⁵ The normative force of law will be established, not by reference to Reason or morality, but by a technical organisation of society according to objective knowledge of how the population behaves.

⁸³ Hunt & Wickham, n.56

⁸⁴ Tadros n.53

⁸⁵ DP pg.22. Foucault advances a similar prediction of 'juridical regression' in *HoS I* pg.144-145.

My view is that there remains some normative space for law to subsist prior to the empirical disciplinary forces. As long as society continues to utilise law as the medium of cohering various disciplinary institutions, such as how family relate to schools, or how police relate to prisons, then law exerts an active force in shaping the power relations which constitute society. Even if law or juridical power is no longer the predominant mode of controlling the population, it can retain a normative role in organising the more direct expressions of discipline according to law's normative standards.⁸⁶

In regard to the second challenge, if the Foucauldian subject is truly decentralised along the various disciplinary forces which all compete to fix him in this or that subjectivity, then any robust conception of will or rationality would be unfeasible. Although I reject ideal conceptions of rationality or freewill, I interpret the Foucauldian subjectivity as determined in his actions to an extent which undermines meaningful normative legal action. I appreciate that different interpretations of Foucault's theory clearly deny a deterministic reading of the subject, especially Foucault's later works which attempt to advance a substantive theory of how freedom is exercised in resistance against disciplinary power and the pursuit of a form of ethics.⁸⁷

I agree that portraying the Foucauldian subject as a fully determined being incapable of normative agency would be an unfair critique. However I will maintain that Foucault's emphasis on power as generated by relations between subjects and capable of being exercised in hegemonic forms, leads to a tendency to lose adherence to the material conditions of being. Because power and knowledge are ultimately intangible relations, material aspects such as the physical body, places, and objects are designated as the effects of power relations; the material is constituted rather than constituting.⁸⁸ In relation to my aim of constructing a material theory of legal

⁸⁶ Examples of this might include legal regulation on the permissible extent of biological experimentation and medical ethics, both of which Foucault identifies as modern disciplines designed to advance biopower and governance of the biological body, but I would argue are heavily curtailed in their exercise of power by legal regulations in the fields of genetic mutation, cloning, prioritising patient rights over medical expertise.

⁸⁷ Charles, E. Scott, n.26. Cressida Heyes, n.50. Brenda Hofmeyr, 'The Power Not to Be (What We Are): The Politics and Ethics of Self-creation in Foucault.' *Journal of Moral Philosophy* 3(2): 215-30.

⁸⁸ This also is a relatively simplistic account of Foucault's theory, particularly in relation to his notion of biopower and the trained body as the potential locus for resistance against power. See Diane Skinner, 'Foucault, Subjectivity and Ethics: Towards a Self-forming Subject.' *Organization* 20(6): 904-23 for an interesting ethnography of organic farming as a method of subject formation. However overall Foucault pays less attention to the broader material conditions compared to Marx, and designates materiality to instruments or functions of power, as opposed to Marx to saw them as the means for achieving emancipation.

normativity, I would regard Foucault's approach of focusing on the body predominantly as an effect of intangible power and knowledge as not giving sufficient emphasis to the body's immediate material environment. Although Foucault's conception of subjectivity is comparatively more sophisticated than Marxian conceptions, on the issue of external materiality Foucault's theory lacks in comparison to Marx's.

3

Counterintuitive Features

Hitherto I have analysed the theories of Hobbes and Kant as representatives of an ideal Reason-based account of norms, premised upon a fundamental division between the sources of normativity and material existence. In contrast to this idealism I have explored the theories of Marx and Foucault as representatives of a different philosophical approach based on materialism and embodiment. I have advanced my arguments for what I perceive as problematic with these theories in the preceding chapters. I now turn to the perspective of the legal subject as the locus of legal normativity in order to explicate how the Reason-based account of norms fail to offer an adequate account of the embodied experience of law. This inadequacy is presented in certain features of law which I identify to be counterintuitive and not amenable to explanation by modern legal discourses.

According to many modern legal theories, the normative force of law lies in its capacity to stand in judgement of the legal subject's empirical existence from the perspective of an ideal *nomos*. The validating force of this *nomos* depends on objective or valid principles ascertained through Reason and reflection.¹ Legal normativity, or the aspect of oughtness with which law makes claims upon the behaviour of individual legal subjects and determines public standards of conduct, may be expressed as the bridge between the *status quo* and a hypothetical state of affairs ostensibly achievable through faithful submission to the strictures of law. This chasm to be bridged is between the empirical reality and *nomos*, and is surmountable by taking the law as guide to action.

My argument against this and similar accounts of legal normativity is that they neglect the fundamental aspect of the legal subject as a material being whose actions are situated within and responsive to his empirical reality. It appears to me that to posit Reason as the sole determinant of valid normative action and dismissing other

¹ Korsgaard's four sources of normativity, which include 'reflexive endorsement'; Christine Korsgaard, and Onora O'Neill, *The Sources of Normativity*. Cambridge ; New York: CUP, 1996.

features such as emotions or instincts as natural and non-normative, takes a one-sided approach to human behaviour. It precludes the possibility of meaningful interaction between a legal subject and his environment beyond terms of dominance by one over the other, such as Reason determining nature, or social forces determining the subject. In respect to what I term the discourse of Reason on legal normativity, this dismissal of the body presents its symptoms as certain counterintuitive features in its theoretical representation of law, wherein the embodied experience of law runs counter to the legal rhetoric.

I use the term counterintuitive in its simple sense of being aberrant or conflictual to intuition, understood as a deep seated and immediate sense of knowing characterised by quick and unreflective decision making.² I am not concerned with a rich philosophical inquiry into intuition or its evidential value for knowledge or truth; intuition is not posited as a distinct faculty or cognitive category. I take intuition as a synthetic and descriptive phenomenon which is created through material being; instincts, reflexes, gut-feelings, premonitions, are all aspects of intuition.³ Counterintuitive is simply that which conflicts with or defies expectations or common-sense truths.⁴ Law's counterintuitive features are symptomatic of a legal discourse which fails to address the embodied nature of the legal subject which I would argue is the seat of intuition.⁵

3.1 Law and Reason

Theories in this discourse claim legal normativity to be the faithful instrument of the faculty of Reason inherent in every legal subject. It is the dictates of this higher faculty which both constrain and justify the validity of the law's demands upon individual action, and enable the legal subject to respond to those demands as reasons for

² See definition Colman, *A Dictionary of Psychology*, 2008, under 'Intuition' OUP 2013. Erik Dane, and Michael G. Pratt. 'Conceptualizing and measuring intuition: A review of recent trends.' *International review of industrial and organizational psychology* 24: 1-40.

³ The closest analogy would be social psychology's theory of cognitive domains which dispose humans to certain structures of belief and experience, such as religion or superstitions. See Pascal Boyer, 'Cognitive Constraints on Cultural Representations: Natural Ontologies and Religious Ideas.' in *Mapping the Mind: Domain Specificity in Cognition and Culture*, Hirschfeld and Gelman (eds), Cambridge: CUP, 1994. Social psychology's claim that cognitive domains as natural categories of mind are not relevant to my thesis.

⁴ Scientific thinking is actually a counterintuitive phenomenon, as it does not congeal naturally onto these domains and often presents results not anticipated by intuitive knowledge; see Paul Harris, 'Thinking by Children and Scientists: False Analogies and Neglected Similarities.' in *Mapping the Mind* ibid. Law is similar to science as it is also a publicly maintained world theory.

⁵ Elijah Chudnoff, *Intuition* OUP 2014 chapter 1.

action. Reason is the condition for law's existence and the guarantee of its validity, thus law must structure itself in conformity with Reason in order to maintain its normative force. Consequently legal subjects who deny the normative force of law must thereby reject the dictates of their own Reason, and by extension their own humanity, and revert to an uncivilised state of nature and animalistic existence.

Such is the relation between law and Reason propounded by the theories of Hobbes and Kant, reiterated in differing guises in the theories of many modern jurists.⁶ A dichotomy is posited between the state of nature characterised by uncurbed self-interest and mutual warfare, and the precarious social stability of civil society maintained by the tenuous regard each legal subject holds towards the social covenant. The necessity for law to bridge this dichotomy is established by appealing to Reason, which in turn guarantees law its normative validity. Legal norms give practical import to the dictates of Reason by positing the respective rights and duties between legal subjects, instituting authoritative procedures to settle and adjudicate mutual conflicts and mete out justice, and prohibiting unilateral expressions of interest or violence at the expense of others' interests. Thus legal norms regulate the external interactions of legal subjects according to the dictates of Reason, and maintain their normative integrity through ratification by the faculty of Reason possessed by rational human subjects.

3.1.1 Embodiment

Present throughout this discourse of Reason is the embodied legal subject whose material situation within his social conditions of being cannot be reduced to pure discourse. The body is both a rich source of motivation and stimuli towards action, and the vessel for Reason's conscious deliberations; the body is both a belligerent source of irrational demands, and a necessary conduit for Reason to realise itself in the world through practical action. The embodied subject encounters limitations to the potentially infinite aspirations of his Reason in the form of his bounded material existence. Inasmuch as Reason would like to think itself limitless and fully autonomous, it seeks to subject the motions and demands of the body to its unilateral

⁶ See chapter 1. These theories share the common presumption that legal community represents a rational development from a prior natural state wherein cooperation was either fortuitous or inefficient, and society has not yet achieved the degree of coordination necessary for full human flourishing. Where these theories diverge is their conception of the final end of legal community as either fulfilling a discrete good in itself, or as simply the means through which other social goods are obtained.

instruction, to the extent it becomes almost a disavowal of the embodiment of self, which is characterised as a base and animalistic existence. Analogously legal normativity which explicitly justifies itself solely through Reason perceives the embodied being as the contumely object of regulation, rather than a valid source of meaning.

Such an approach to the embodied being of the subject has been challenged by social theorists who emphasise the body as the locus of extensive social conditioning not fully cognisable in spite of Reason's endeavours. The subject's embodiment is constructed and conditioned through an array of disciplinary technologies which take the human body as their object of knowledge, and seek to normalise it according to objective standards.⁷ The body has also been cast as the locus of primordial libidinal enjoyment which must be tamed and de-eroticised in order to exploit its energies for labour.⁸ The common challenge posed to the discourse of Reason is to reinstitute the material aspect as the centre of the subject's being, such that what appears to be decisions of autonomous agents are in reality the predetermined response of socially conditioned beings. The faculty of Reason cannot escape its embodiment within the socially conditioned subject, as such its deliberations are not so autonomous as it claims. Neither is Reason so omnipotent as to fully comprehend the internal motivations of the self, for the embodied subject is a product of social forces independent of himself, forces which operate to produce subjectivities not thoroughly understandable through Reason.

The embodied subject who is the object of legal regulation is bifurcated into a body which is the cause of potential conflict for material beings sharing space and resources, and the faculty of Reason which is the only valid source of norms. The discourse of Reason presupposes an image of the body as natural and constant, and constructs a theory of legal normativity which treats this body as a passive object of regulation. Such a theory ignores the role of law in actively constructing and mediating the meaning and experience of embodiment by reifying what is social and conditioned into a natural and enduring phenomenon. Feminist jurists have criticised the image of the legal body as unjustifiably masculine inclined; the legal body is defined by bounded masculinity, Cartesian consciousness, and moral autonomy which are overwhelmingly

⁷ Michel Foucault, *Discipline and Punish : The Birth of the Prison*, Harmondsworth: Penguin, 1979; *The History of Sexuality. Vol. 1, The Will to Knowledge*, London: Penguin, 1998.

⁸ Herbert Marcuse, *Eros and Civilization: A Philosophical Inquiry into Freud*, London: Ark, 1987.

expressed in terms of valorising masculinity and debasing femininity.⁹ More pertinently in viewing the body as a natural phenomenon, the discourse of Reason is unable to communicate law's transformative force upon embodiment, except in an impoverished fashion.

Despite the law's overt role in defining the terms of material human interaction, the embodied presence of the legal subject quickly becomes subsumed within the totalising discourse of Reason. This is problematically exhibited in certain counterintuitive features of legal normativity as experienced by the legal subject, whose sociality with other embodied beings is not confined to the limits of purely intersubjective relations. Embodied beings do not interact on a metaphysical plane consisting of a disembodied cogitans; their material presence does not simply conform to the instructions issuing from their Reason, but will often make itself intrusively felt. The experience of legal normativity cannot be explained through a discourse of Reason which is satisfied with an abstracted legal subject as discrete moral agent fully disposed to the normative force of law through reflection.

3.1.2 Discursive dissonance

Legal normativity as propounded by the Hobbesian and Kantian tradition and the modern jurists influenced by it, is a discourse explicitly aligning itself with Reason and the legal subject as a disembodied moral agent. Underlying this explicit discourse is an implicit discourse which cannot be fully articulated without subverting law's normative foundations, yet is also necessary to support legal normativity. The counterintuitive features of law may be characterised as indicative moments where the irreconcilability of the two discourses are exhibited. Whether these counterintuitive features are necessary products of law's liberal rhetoric, evidence of law's reification, or simply aspects of inherent opposition or conflict within the law remains to be investigated. However it will be argued that in all likelihood the embodied nature of the legal subject is implicated in some fashion.

⁹ Ngaire Naffine, 'The Body Bag', and O'Donovan, 'Sense, consent' in Naffine and Owens, *Sexing the Subject of Law* 1st ed. North Ryde, NSW: LBC Information Services, 1997. Atherton, 'Cartesian reason and gendered reason', and Lloyd, 'Maleness, metaphor, and the 'crisis' of reason', in Antony & Witt, *A Mind of One's Own : Feminist Essays on Reason and Objectivity*. 2nd ed. Feminist Theory and Politics. Boulder, Colo.: Westview Press, 2002.

The counterintuitive nature of law will be illustrated by tracing the fault lines of discourse upon two leitmotifs within legal discourse; responsibility, and emotion. Responsibility is an idea intimately connected to law and is expressed in various ways across specialised legal areas, from contractual obligation, to tortious duty of care, to criminal liability. In contrast the topic of emotion has less visibility in formal law, but in its guise as passions, desires, and guilt permeates legal discourse and legal action.¹⁰ These are not an exhaustive account of law's counterintuitive aspects, but are simply illustrative examples chosen for their breadth of representation. Firstly the discourse of Reason pertaining to each theme will be elaborated, and its problems illustrated using specific examples of conflicting discourse found in the legal literature. I will attempt to articulate the implicit discourse, and argue that legal normativity is dependent upon this dual level discourse which may occasionally manifest as apparent mistakes or problems in legal reasoning, but ultimately serve to maintain a particular account of the normative force of law as sustainable purely through the force of its own rhetoric by creating illusions of universality and coherence.

3.2 Reason and responsibility

The explicit discourse of responsibility as articulated by Reason proceeds from an atomistic conception of the legal subject and the necessary conditions for his social existence.¹¹ The self-regarding nature of the legal subject, coupled with his economic rationality leads to the creation of mutually beneficial arrangements of will in contract, wherein each subject voluntarily accedes certain duties and obligations towards the other. In the ideal contract model responsibility is that which is stipulated under the contract, and each party motivated by their natural self-interest in securing an immediate benefit. Therefore contract creates responsibility directed towards the other by force of the subject's autonomous will. Where immediate interest conflicts with longterm benefit, Reason is required to dictate the necessary terms and conditions for a functioning social contract. Under the guidance of each individual's Reason to himself, consent to his share of social responsibility is procured. This responsibility is expressed as a limitation upon the natural freedoms of appropriation and pursuit of self-interest, by restraining the legitimate avenues of their expression. Each legal

¹⁰ Legal action for Hobbes and Kant are determined by desires and passions which conform externally to the norms of law; see chapter 1.

¹¹ See chapter 1

subject thus becomes responsible for the exercise of self-control in his pursuit of advantage and the accordance of due respect for the equal status of others as autonomous moral agents, as ends rather than means. Collectively a state of social peace and mutual compromise is achieved through the law mediating the external interactions of legal subjects according to objectively determined public responsibilities.

From the subject's perspective responsibility becomes displaced from the other to the legal norm and himself, as he must now exercise vigilance against his natural compulsions and become a self-subjecting being. His publicly apportioned responsibility to society applies not because of autonomous choice, but by virtue of their foundations in Reason, and the requisite motivation provided by threat of sanctions. Subjects have regard to legal norms as determinants of public responsibility, so preempting the need to negotiate mutual contracts with all other members of society.¹² Insofar as these responsibilities do not fully accord with their desires, the lack of motivation is remedied by the threat of punishment, which is internalised by subjects who learn to check their actions even when punishment is not imminent.¹³ According to this explicit discourse, Reason would reign through law to allocate social responsibility amongst equal moral agents, who must consent to these necessary limitations upon their natural freedom by force of Reason complemented by legal sanctions. It is the combination of law and Reason which enables the voluntary accession of legal subjects to legal norms, without which social responsibility would not be possible.

It is significant that Reason's discourse places such emphasis upon the notion of autonomous moral agency as the cornerstone for juridical responsibility. This is a result of positing contractual obligation as the origin of responsibilities between legal subjects, whose autonomous choice is necessary to impart legitimacy onto the contract. However this conception of the responsible individual is problematised in the context of responsibilities defined through relationships other than mutual agreement, and by the presence of persons seen to lack the capacity of Reason essential for assuming responsibility.

¹² Raz's theory of legal norms as preemptive reasons. Joseph Raz, *The Authority of Law: Essays on Law and Morality*. OUP, 1979.

¹³ See Foucault's account of Panopticism and discipline, Chapter 2.

3.2.1 *Familial responsibility*

The archetypal challenge to Reason's juridical personality lies in the context of family and its constitutive familial relations and ethics of care towards minors. The normative framework of a society of free autonomous rational legal subjects fits uncomfortably when applied to the family context. In particular the legal subject as locus of rights and responsibilities is problematised by the person of the child who is not capable of the same autonomy. The model of mutually defined rights and duties of individuals is complicated by the relationally defined responsibilities within the family structure. More fundamentally the presumption of the selfishly rational juridical subject is undermined by the expectations of altruism and unconditional benevolence between family members which speaks of an entirely different aspired ideal from that proposed by purely juridical relations.¹⁴ In short, the presence of family poses a discursive problem for legal normativity based solely on Reason which seems to offer only an impoverished and counterintuitive representation of the family subject.

This problem of discursively constructing the family in law has been addressed extensively in the literature on family law, the specifics of which are not directly pertinent to the issue at hand.¹⁵ A general overview of the broad themes of debate will suffice to illustrate the counterintuitiveness exhibited in this area of law. Proceeding from a presumption that law can and should regulate the relationships between family members, the question becomes how this is achievable in accordance with Reason's discourse found so suitable to private law. Traditional theories approach the family as a collection of individuals with relative status, and allocate responsibilities based on

¹⁴ The model which characterises a private law concerned with Aristotelian corrective justice as immediate justice between two formally equal parties, which cannot be understood in terms of community, see E. Weinrib, 'Liberty, community, and corrective justice.' In R. Frey & C. Morris (Eds.), *Liability and Responsibility: Essays in Law and Morals* : CUP 1991.

¹⁵ There are many ways in which the law's construction of family poorly reflects the realities of family life. The law may simply be outdated or insensitive to changes in contemporary family relations, such as the rise in prevalence of unmarried couples, civil and homosexual partnerships, children having different legal and biological parents. In these relatively superficial cases of disconnect between law and society, it is straightforward matter of changing the law to better reflect and regulate contemporary family life. See generally on the developments in US law, Wilson. *Reconceiving the Family : Critique on the American Law Institute's Principles of the Law of Family Dissolution*. 2006. A more fundamental way law may be inadequate to constructing the family is the lack of appropriate conceptual tools with which to analyse and represent the various facets of a complex idea. For a comprehensive analysis of various concepts and their legal counterparts, see John Eekelaar, *Family Law and Personal Life*: OUP 2007. For a review focused on the concept of responsibility and how that is treated in various parts of family law, see Jo Bridgeman, et al., *Regulating family responsibilities*. Farnham, Surrey, England ; Burlington, Vt.: Ashgate Pub. 2011.

the legal status of the subject.¹⁶ Thus the legal status of 'parent' would comprise of rights and duties towards the legal status 'child', and vice versa. The result is a legally constructed model of family wherein the statuses are accorded respective responsibilities in the form of corresponding rights and duties, fixed categories into which concrete individuals are placed. The responsibilities of a parent are demanded of a legal subject by virtue of their legal status and relationship towards another legal subject, defined by and owed to the law and society in general.

Such a legal theory of familial responsibility is an impoverished mischaracterisation of the parent and child relationship. Arguably Reason's discourse cannot fully integrate the family structure into the public sphere of juridical society without compromising the relational integrity of family itself,¹⁷ and yet to exclude family relations from the province of law altogether would represent a significant injury to the normative force of an institution claiming to be the manifestation of Reason. In response legal theory proposed alternative normative frameworks to discursively construct the legal family, most notably communitarian theories and theories of ethics of care.¹⁸ Such theories reject Reason's discourse by emphasising the communal and relational nature of familial responsibilities, and reinstate the concrete other as the proper object of care and responsibility. Instead of allocating rights and duties on the basis of status, parental responsibility becomes an open-ended, context bound activity which is constrained only by the responsibility of caring for the minor.¹⁹ Responsibility is shifted away from its representation in legal norms towards the material person of the child as the proper recipient of parental activity. This is more than merely a difference in conceptual analysis, but represents a change in the very nature of parental duties which find only tenuous expression in the language of legal obligation. However proponents of such theories are not so naive as to place trust in the better nature of legal subjects as the only guarantee for the discharge of their proper responsibilities. The law remains a significant factor in family relationships, but its role is confined to a guarantee of minimal welfare rather than the constituting discourse of family.²⁰

¹⁶ Sonia Harris-Short and Joanna Miles, *Family Law : Text, Cases, and Materials*. 2nd ed. OUP 2011 chapter 10; Eekelaar n.15 chapters 5 & 6.

¹⁷ Eekelaar, n.15; Eekelaar, 'Are Parents Morally Obliged to Care for their Children?', *OJLS* 11(3) 340-53

¹⁸ Amitai Etzioni, *The Parenting Deficit*. London: Demos, 1993.; Jo Bridgeman, 'Parental Responsibility, Responsible Parenting and Legal Regulation' in Bridgeman, et al., *Responsibility, Law and the Family*. Aldershot, England ; Burlington, VT: Asgate, 2008.; Bridgeman, Jo. "Accountability, Support or Relationship-Conceptions of Parental Responsibility." *N. Ir. Legal Q.* 58: 307.

¹⁹ Harris-Short and Miles n.14.

²⁰ Eekelaar, n.15

Reason is displaced in favour of ethics, morality, and community in the context of family.

However this challenge to the omnipotence of Reason's discourse is robbed of much of its subversive potential through an act of discursive disavowal whereby the law's inability to regulate is re-characterised as a concession of autonomy to the subject of family granted by law. Moreover it is a concession in accordance with the very ideals of Reason itself, and by sleight of hand legal normativity reaffirms and reinforces its ubiquitous validity through the very act of non-regulation. This is achieved by characterising the concept of family as a natural concept which exists in the state of nature, that is pre-civil society and pre-legal.²¹ By differentiating between naturally altruistic familial relations and naturally competitive relations between autonomous legal subjects, the family comes to represent a sacrosanct value of nature which ought to be protected from external interference. Just as the internal motivations of an autonomous legal subject are not the proper object for legal regulation due to respect for freedom of choice, so analogously the boundaries of family must be respected and the internal dynamics of familial relations allowed self-determination. By confining the alternative discourse of community and ethics to the context of family, and justifying its exclusion upon the basis of Reason, family becomes another nodal point in the structure of civil society rather than a competing ideal of embodied sociality.²²

The foregoing discussion on the normative theories behind the family concept endeavoured to draw out the counterintuitive quality of law through the concept of responsibility. The law's rhetoric would have one believe that without the constant vigilance of Reason, no rational subject could voluntarily undertake any limitation on himself or responsibility towards others. There is a constant threat of widespread abdication of social responsibility and a regression to the state of nature, kept at bay only by the force of law and the legal subject's consent to its normative demands. In contrast, familial responsibility is represented as a natural order, maintainable without external compulsion and defined by relationships rather than rational interest. Here

²¹ Classically the family is represented as the natural conduit through which persons as members of *oikos* become members of a larger *polis*, Aristotle, and Saunders, *Politics. Books I and II*. Clarendon Aristotle Series. New York: Clarendon Press, 1995. Aristotle also emphasised the spousal relationship as defined by a specific form of *philia* forms the rational basis for ethical community, thus an essential component in a rational *polis*. Eekelaar n.15 has also remarked upon the different attitudes adopted by law towards family correlating to differing political ideologies of the time.

²² I argue this in the context of modern Western liberal democratic societies. I am not claiming that this dichotomy between family and public society pertains to all communities, or that there is stark separation of the two in reality; I am presenting the relationship in an ideal form.

the material other is central to responsibility, and the law cannot mediate this relationship without altering the very nature of its obligation. Family as a collection of embodied social relations is constituted by concrete and unique individuals interacting in close physical and emotional proximity, to establish mutual relations which are highly unique to the persons involved.²³ I would argue that embodied interaction is the foundation of family, and whilst theories on family relationships and models may generalise common features, the necessity for physical proximity and interaction in order to build those relationships are largely affirmed.²⁴ For me this indicates the fundamental importance of embodiment in familial relations; physical and bodily proximity and interactions, family traits and resemblances exhibited through appearance and behaviour, and the home environment all serve to constitute and reinforce family relations.²⁵ These relations in turn condition how responsibilities in the family are actually discharged, not as rational agents fulfilling the duties of Reason, but as embodied beings sensitive to the messy physical and emotional demands of others.²⁶

The normative relationship of the subject to himself defined by his duties to Reason translates poorly to the family context, for without the other as the relational reference parental duty is empty and meaningless. The explicit relational nature of familial roles reveals the fact that all human subjectivities are defined relationally. As argued in chapter 1 the conception of an atomistic moral agent is untenable. By extension Reason's discourse misrepresents responsibility, by structuring it upon individual nodes of legal subjects, neglecting the otherness of human interaction, and displacing the responsibility onto the legal norm and self-subjection.

²³ Attachment theory in developmental psychology states that physical presence is vital in allowing children to become attached to their caregivers, and early separation leads to predictable negative outcomes for the child. For an overview of John Bowlby's seminal theory see Jeremy Holmes, *John Bowlby and Attachment Theory*, London: Routledge, 1993.

²⁴ Hayley Davies, 'Affinities, seeing and feeling like family: Exploring why children value face-to-face contact' *Childhood* 19(1) : 8 - 23.

²⁵ Mason J, 'Tangible affinities and the real life fascination of kinship' *Sociology* 42(1): 29–45.

²⁶ See Stoilova, et al. 'Constructions, Reconstructions and Deconstructions of 'family' amongst People Who Live Apart Together.' *British Journal of Sociology* 68(1): 78-96, for a study on how normative expectations of cohabitation and de facto separation impact subjective evaluations of family status. Even for business and work relationships physical or face to face interaction is important, see J. Urry, 'Social networks, travel and talk' *British Journal of Sociology* 54(2): 155–175.

3.2.2 Underside of responsibility

Thus far the discussion has revolved around how Reason's discourse on responsibility tends to pervert its representation of the family context due to the obtrusively necessary presence of embodied relationships in that context. The discourse is premised on an atomistic autonomous legal subject, and the object of responsibility is displaced from others towards the subject's self and the legal norm. Each legal subject's self-responsibility leads to a collective state of peace and externally coordinated spheres of freedom. However as responsibility is transformed into a subject-self relationship, this renders law complicit to widespread social irresponsibility, and the abdication of responsibility for great social atrocities.

Veitch advances a theory of how law facilitates irresponsibility by creating categories which are defined by their function, thereby apportioning responsibility for certain tasks amongst the population.²⁷ These roles enable their functionaries to enact their responsibilities which collectively facilitate the perpetration of vast atrocities to humanity without the accompanying responsibility towards the victims of those atrocities. This is made possible by obfuscating the victim and perpetrator from sight behind the immediate role or function, in this case the legal norm which authorises individual actions and accumulates their effects without accumulating their responsibilities.²⁸ To an extent Veitch's theory may be interpreted as one of alienation and reification in society; each functionary is alienated from the social power, mediated by the legal norm which is reified to become the ultimate referent of responsibility.

The discussion of social responsibility may be further elaborated by taking the perspective of the exception, in this case the holder of substantive responsibilities and obligations towards a specific recipient. Cover's essay upon the difference of Jewish obligation from liberal rights rhetoric presents such a perspective.²⁹ Instead of the initial social contract which authoritatively apportions social responsibility according to

²⁷ Scott Veitch, *Law and Irresponsibility : On the Legitimation of Human Suffering*. 1st ed. Abingdon, Oxon ; NewYork., NY: Routledge-Cavendish, 2007. I would say that these functional roles share a similar effect with authority in that both are requests for action without the burden of responsibility, which is displaced onto either the duty or the authority, as was demonstrated by the Milgram experiments 1963.

²⁸ Each functionary in fulfilling a task defined and limited by the office is only liable for those correspondingly limited responsibilities, such that there is no party capable of bearing liability for the accumulated harms.

²⁹ Robert Cover, 'Obligation: a Jewish Jurisprudence' in Cover et al. *Narrative, Violence, and the Law : The Essays of Robert Cover*: Ann Arbor: University of Michigan Press, 1993.

formal equality, the Jewish counterpart of Sinai operates by allocating public responsibility based on social status, with a specific emphasis upon adult males. Each subject, instead of being affirmed in their rights to property, contract, and family, becomes the holder of determined obligations towards specified recipients, such as the obligation of a father to provide his children with education. Cover notes that within rights rhetoric there is a danger towards empty ideological slogans to the prejudice of substantive technical bureaucracy. In contrast, in mitzvot³⁰ there is the danger of obscuring oppression by placing the obligation above the subject, so perpetuating social inequalities. The pertinent observation here is that a legal discourse which takes the form of rights and duties, and the legal subject as disembodied Reason suffers precisely from that obfuscation of substantive responsibility that Cover has noted. The presence of a legal norm which claims to enshrine a public right is sufficient to absolve the legal subject of his responsibility with regard to that right. For example the oft repeated right to equal opportunity prevalent in labour law, human rights law, freedom of contract creates the impression that the legal subject participates in a society which recognises the equality of all subjects, and effaces the material obstacles of social prejudice and economic inequality. Similarly the discourse within family law on the rights of children to receive care and education creates the impression that the care of children is limited to its familial context, and conveniently ignores the material conditions of society, such as economic hardship and availability of childcare services and schooling.

Reason's discourse is unable fully to capture the experience of responsibility because it limits subjectivity to rationality, which is primarily the subject's relation to his self. The initial object for legal regulation which is the external presence of the embodied other, is transformed firstly into a problem of society's ability to coordinate a multiplicity of subjects, then into a problem of a subject's ability to coordinate his natural compulsions in order to live in peaceful association with others. The object of law which began as the external coordination of embodied subjects became an internal struggle within the subject between his nature and his Reason, and what was once the means to a civil society became the end of civil society itself.³¹

³⁰ The 613 commandments in the Torah.

³¹ This process may be presented as an example of fetish whereby the disciplinary mechanisms take on an element of eroticism which makes their operation the fulfilment of a desire in itself; Foucault *History of Sexuality* n.7 Part II.

3.3 Reason and emotion

This ability of law to interpolate between the legal subject and his self, and the legal subject and society, and locate law's normative force within the vacuum of the legal subject's alienated experience is repeated in its treatment of emotions. There is the explicit Reason discourse which rests on a disavowal of emotions and the body in the valorisation of objective and universal standards against subjective and arbitrary demands. Underlying this rhetoric is a mass of social emotion which law attempts to direct towards its own purpose to drive and reinforce its normative force, but which always threatens to burst the tenuous boundaries of law's rhetoric. The law vindicates subjective emotions by displacing them onto the legal norm, hence inflating an embodied experience into a societal expression. The presence of emotion within the law becomes counterintuitive when it infects the foundations of a legal normativity ostensibly derived from the objective and rational dictates of Reason.

The body is associated with the state of nature wherein action is driven primarily by appetites and passions, and it is only fear of reprisal and calculation of benefit which restrains the subject from indulging in excessive expression of his impulses.³² The faculty of Reason subjects the body's natural emotions to its rational and moral deliberations to provide objective and universal rules for action. Therefore only Reason is capable of imposing objective norms upon society to regulate individuals' conflicting subjective expressions of desires. Reason constituted by objectively valid principles sets itself in opposition to emotion which is arbitrary and subjectively valid only for a particular individual. Law as the instrument of Reason is necessary to prevent unilateral and excessive expression of particular interests which threaten to destabilise the social peace. Law must thus rise above competing subjectivities and arbitrate according to impartial standards dictated by Reason. To preserve the force and validity of its normative claims, law cannot allow itself to be influenced or captured by the arbitrary impulse of emotion.

This fundamental dichotomy between the body's emotion and Reason means the subject is involved in a constant struggle between his natural predisposition to indulge his emotional impulses, and obeying the demands of his Reason. Analogously the

³² I would argue that motivations for nonmoral action necessarily contain an emotional element, in the impetus of desire or constraint of fear. See chapter 1 for Hobbes' and Kant's theories of nonmoral action.

precarious state of civil society is only maintainable if its subjects obey the demands of their Reason. Unruly emotion which challenges Reason directly poses a threat to public peace. Thus the discourse begins from the individual legal subject whose perpetual inner struggle between his sensible emotions and his Reason represents the competing demands between subjective desire and objective norm as the determinant of practical action. On a societal level the struggle is staged between competing demands of individual legal subjects pursuing their private interests, and impartiality of the law in coordinating these demands according to objective standards of justice.

The foregoing is not an argument on whether legal action must proceed from subjective or objective motivations for obeying the law, but rather an attempt to convey the awkward position of emotion in Reason's discourse. Emotions are presented as an individual concern which the law must involve itself with due to their potentially destructive effects if allowed unilateral expression. The state of civil society cannot countenance capricious acts of emotion unconstrained by legal norms, which threaten to cause society to regress back to a state of warfare. For example, the emotion of desire must be expressed in a legally condoned fashion such as consensual bodily contact or intimacy, and not through rape or assault. The emotion of hatred must be properly pursued through legal proceedings and lawful punishment, not through private revenge or retribution. Emotions are not prohibited by law per se, but restrained by objective standards which apply equally to all legal subjects, irrespective of the strength or veracity of their particular emotional appeals. Law which purports to reflect the dictates of Reason acts like a form of public Reason to constrain and order the emotional impulses of a society.³³ The disjunction between acting from the dictates of Reason, and the experience of emotional impulse within the legal subject is bridged by the obligatory demands of the legal norm. Legal normativity which succumbs to emotional persuasion risks jeopardising the validity it derives from universally objective Reason, so law must distance itself from particular emotional arguments to preserve the force of its normative position.

3.3.1 Hatred of the body

Problems arise where the capricious element of emotion overwhelms the boundaries imposed by Reason's discourse. The discursive dichotomy which attempts to contain

³³ Cover on law as communal narrative; n.29 'Nomos and Narrative'.

the unruly emotional element in the content of a legal norm whilst keeping the form of legal institutions impartial and objective, becomes suspect when the emotional foundations of legal normativity are revealed. Hate crimes are a pertinent and potentially illuminating area from which to analyse the discourse of Reason and emotion, for they represent norms of behaviour which arguably have their basis almost solely in emotional justification. Laws of prejudice derived their normative import largely from the irrational hatred for the other's sex, race, or sexuality, given systematic expression through an institution ostensibly faithful to the dictates of Reason. Laws which ironically now derive their legitimacy from the very denouncement of those same emotions and justify this change of allegiance as a progress of human Reason. Furthermore such norms of hatred represent a further challenge to Reason's discourse by focusing on the embodied other as the object of the legal norm. Unlike areas such as private law, laws relating to prejudice cannot ignore the bodily intrusion of the other in its highlighted foreign element; the raced, sexed, or sodomised body. In these cases the source of threat is not the autonomy of the other in competition with the subject for advantage, but the very visible bodily aspect of the other. Reason cannot discursively obfuscate these intrusively present embodied beings without rendering the concept of crime in its case nonsensical. Reason can only seek to rationalise these objects to conform with its discourse, an endeavour which is analysed below.

Nussbaum has noted the prevalence of emotions in the law, specifically those of shame and disgust and their influence in not only reinforcing pre-existent judgements in social attitudes and legal norms, but also justifying the criminalisation of certain behaviour.³⁴ Much of contemporary theories of social psychology concur that the psychological basis for prejudice such as racism and homophobia lies in an aversion towards the bodily presence of the hated object and the fear of contamination.³⁵ Concurrently there is also a perceived lack within the hating subject which is transmuted into the *jouissance* of the other, leading to a perverted desire for that *jouissance* which is manifested as envious hatred.³⁶ Racism, sexism, and homophobia are the results of a fantasy discourse which reacts to the primordial compulsions of the human subject towards his most animalistic instincts.

³⁴ Martha Nussbaum, *Hiding from Humanity: Disgust, Shame, and the Law*, Princeton: Princeton University Press, 2009.

³⁵ Simon Clarke, *Social Theory, Psychoanalysis and Racism*. Basingstoke, Hampshire ; New York: Palgrave Macmillan, 2003.

³⁶ Slavoj Žižek, *The Sublime Object of Ideology*. Phronesis. London: Verso, 1989.

The problem posed to Reason is to rationalise and justify legal normativity independently of the powerful emotional foundation of these social norms. Reason must explain how those subjects possessing a different race, sex, or sexual persuasion may be treated as less than morally autonomous agents, and why these distinguishing features are sufficient to deserve legal regulation. This is achieved by constructing supposedly 'natural' categories of persons, and denying them the privilege of possessing Reason, or characterising their behaviour as defects of Reason, and consequently forfeiting the respect and recognition due to a fully autonomous legal subject.³⁷ This assertion may be illustrated by a cursory examination of popular depictions of racial minorities, homosexuals, and women in legal and social discourse. The image of the black man as an animalistic, pre-evolved human, 'scientific' evidence of his lower intelligence, his preoccupation with the animal pleasures and his voracious sexual appetite which renders the black man a veritable sexual predator.³⁸ Such popular beliefs serve to lend credibility to Reason's discourse that the black object is not a proper legal subject on account of his defective humanity, which in turn justifies the exclusion of this object from the respect legal normativity demands towards autonomous beings.

Reason in so rationalising the black object is claiming to respect the natural order, for the black object cannot help being what he essentially is, just as the moral agent cannot help suffering from emotional compulsion against the better judgement of his Reason. In similar fashion the position of the female object is also discursively constructed in such a way as to deprive her of full autonomous standing. The woman is prone to hysteria and psychological pathology, and therefore cannot exercise autonomy in certain actions such as marital sex, abortion, or sexual consent.³⁹ Again

³⁷ Levin and McDevitt, *Hate Crimes Revisited America's War On Those Who Are Different*, New York: Basic Books, 2009, pg.30-31, a process the authors describe as 'infantilisation'.

³⁸ Ibid. pg.31. This particular characterisation of the black object is commonly emphasised in the literature on racism. See generally: Frantz Fanon, *Black Skin, White Masks*. Pluto Classics. London: Pluto, 1986; Clarke, n.35.

³⁹ Marital rape exemption was only legally abolished in Britain in 1991, before which time women had effectively no sexual autonomy in the bonds of marriage. The biased view of women as promiscuous or at fault for inciting unwanted sexual attention is even now a prevalent social attitude given problematic expression in the treatment of rape and domestic abuse victims by police authorities and in trial proceedings. Victim blaming and rape culture is a well documented area; see generally R. Campbell, 'The psychological impact of rape victims' experiences with the legal, medical, and mental health systems', *American Psychologist*, 68: 702-717; Mason et al., 'Social support and risk of sexual revictimization', *Journal of Community Psychology*, 37: 58-72; Banyard, et al., 'Bystander education: Bringing a broader community perspective to sexual violence prevention', *Journal of Community Psychology*, 32: 61-79. See Menaker & Cramer, 'The Victim as Witness: Strategies for Increasing Credibility Among Rape Victim-Witnesses in Court', *Journal Of Forensic Psychology Practice*, 12(5): 424-438 for how rape victims are judged according to gender and victim stereotypes when presenting in court.

such discrimination is justified upon the basis of naturalness and normalcy; it would be unjust to demand from subjects the stringent standards of Reason when they by nature are less capable, so they need not be accorded equal respect since they cannot conform to the dictates of Reason.

Analogous to responsibility, discourse confronts the challenge posed by irrational emotional attitudes by interpolating itself through the body of the hated object, then immediately absolving itself of its emotional foundations. By firstly depicting the problematic aspect of the subject as natural and outside the law, then denying the subject of Reason and full legal subjectivity, discourse effectively changes these subjects into objects. As objects they may be passively regulated and integrated into the law, without their presence and the emotions they invoke posing a challenge to law's normative foundations; in other words it is legally condoned to hate these objects as they are not afforded the protection granted to legal subjects. Owing to the fundamental opposition posited between Reason and emotion, Reason cannot explicitly provide a justification for emotionally driven social attitudes as the basis for law's normativity. Thus Reason obscures the problematic subject of emotion by reducing it to an object whilst reinforcing the illusion that Reason is the defining characteristic of legal subjectivity and the only universally valid legitimization for legal normativity.

It might be objected that law is a social fact and if prevalent social attitudes overlap with or reinforce law's normativity, that is not inherently against Reason. I am not arguing that it is a problem for legal normativity to be dependent or parasitic upon social norms which may or may not be irrational or emotional. Legal normativity is premised upon a disjunction between empirical reality and normative ideal, the latter being determined objectively by Reason. This means that the relationship between empirical emotions and the normative force of law is more than contingent, as the normative integrity of law rests upon a disavowal of emotion and an orientation towards the ideal. Particular legal norms may reflect social attitudes, but their normative aspiration towards the ideal must transcend the empirical and the impermanent. This transcendence of legal normativity is what enables past legal norms to be judged as outdated and deplorable mistakes of thinking in light of current legal norms which represent a progress of human Reason.

One might argue that it is disingenuous to judge past transgressions by the standards of modern enlightened thought, that the past endorsement of prejudiced social attitudes in the law was a result of a combination of contemporaneous social and political attitudes independent of law. Moreover in changing how those substantive emotions may be expressed in society by changing law in light of more progressive thinking proves a triumph for the ideals of Reason, and reinforces the normative force of law as the proper authority of social justice. Despite the insidious continued presence of racist and sexist attitudes in society, what is important is law's recognition of the correct answer, and the renewed normativity of legal standards which will promote a better *nomos*. However this narrative of moral progress towards a better normative position is in my view at best optimistic, at worst apologetic. This may be illustrated in the current popular rhetoric adopted towards the perceived threats of terrorism and immigration in Western societies. Terrorism has been denounced as indiscriminate and senseless destruction, so cast as the very incarnation of evil.⁴⁰ Similarly immigrants are painted as criminals who threaten local culture and value, undeserving claimants of social benefits, economic parasites who threaten local employment and opportunities.⁴¹ Underlying these social caricatures are the same psychological mechanisms which motivate hatred in general, the inability to penetrate the *jouissance* of the other, hence the fear of not knowing what the other desires.⁴² Therefore terrorism is cast as irrational and senseless in order to efface it as a potential source of meaning, and immigrants are cast as possessing a foreign element which gives them unfair advantage in economic competition.⁴³ The discourse of Reason which is capable of only cognising the other as a competing moral agent transforms what is an irrational fear into reasons it can rationalise. However this is not moral progress, but merely a change to the identity of the eternally ostracised column of society predetermined by irrational emotion.

What is capable of change is the specific content of emotion and the legal norm which reflects it; what cannot change is the dependence of legal normativity on the tension between Reason and emotion. Because of the way Reason's discourse has

⁴⁰ See Parrish who describes the violence of terrorism as purely destructive, thus incapable of positive meaning creation; Rick Parrish, *Violence Inevitable : The Play of Force and Respect in Derrida, Nietzsche, Hobbes, and Berlin* Lanham, MD: Lexington Books, 2006

⁴¹ See Margaret Mccartney, 'Racism, Immigration, and the NHS.' *BMJ* 354 : i4477 for a topical discussion on Brexit, immigration, and the NHS.

⁴² Žižek, n.36.

⁴³ Witness how normally positive characteristics such as diligence and hard working are perverted to derogatory meanings when applied to foreigners, and seen as a potential source of threat or competition.

constructed the legal subject and civil society, legal normativity is always premised on the threat of external intrusion, whether that be the disruptive chaos of unbridled emotion upon the rational mind, or the unmitigated war of selfish subjects destroying the precarious peace of society. This threat is made materially present in the foreign body of the other, abetted by the propagation of myths surrounding the object of repulsion. The abstract image of the enemy is made constantly visible in the physical presence of the alien body which is always in excess.⁴⁴ So the black person embodies the threat of black men towards white femininity, and the foreigner embodies the threat immigrants pose towards economic opportunity. The state of competition in the state of nature is perversely recreated in civil society. However, instead of acting the impartial referee between equal legal subjects competing on objective and fair social terms, the law attaches parasitically to partisanship and prejudice and rationalises them to conform to Reason. It carves a space for legal normativity between the imminent threat of social dissolution and ideal *nomos*, all the while disavowing its dependency upon the base emotional interactions between its embodied subjects. For legal normativity the object of emotional trauma is substitutable, but the tension between that and Reason is irrevocable.

The foregoing assertion may appear unduly generalising, amounting to the claim that because humans are naturally emotional beings, the normative role of law lies simply in the promotion or suppression of emotions according to its own normative standard. If so, the connection between legal normativity and emotion would be one-directional as law seeks to order and direct emotion whilst remaining beyond emotional influence. The relationship would be necessary only insofar as legal subjects need to incessantly curb and constrain those emotions which threaten to undermine normative behaviour. However I argue that the relationship is not a simple opposition between emotion and legal normativity, for legal normativity is transformative of emotion as much as emotion is supportive of legal normativity. If legal normativity necessarily resides in the tension between reality and *nomos*, it is dependent upon the constant presence of the threat which reality poses towards achieving *nomos*. Reason is capable of mediating only between rationally autonomous agents competing for relative advantage. However when the base emotional nature of the subject predetermines a class of persons as intrinsically threatening, Reason must discursively rationalise that fundamental impulse

⁴⁴ For Levin & McDevitt this emphasis upon the bodily presence of threat is expressed in the excessive physical brutality inflicted on the victim's body in instances of hate crimes, a characteristic which undermines the notion of hate crimes as 'thought crimes'; Levin & McDevitt, n.37 pg.17-18.

in accordance with its general principles. In doing so Reason rationalises irrational hatred by discursively constructing the threat of the other as a valid and legitimate concern for society. Legal normativity transforms the emotional response into a reasonable social act of defence against threat. This transformative force of law is aptly demonstrated through Reason's discourse on punishment, with its constituting elements of justice and retribution.

3.3.2 Punishment as mortification of the body

The literature on theories of punishment is vast, it suffices to paraphrase the pertinent debate on retribution and the vengeful element in punishment.⁴⁵ For Hobbes and Kant punishment in the state of nature is nonsensical, for there is only force and coercion according to each individual's power. Without publicly determined rights there is no objective standard by which to measure transgression and mete out punishment. The notion of punishment differs from mere physical hardship by the element of social censure and moral condemnation for an action which may not even result in actual harm. To be punished is to suffer a stigmatisation or judgement for a freely chosen act of will. However the situation is arguably different for the victim of crime, who in the state of nature may well find vengeful expression in an unilateral act of retaliation. In civil society such unilateral expressions of emotion must be prohibited to maintain the legitimacy of law. Hence it is equally necessary for law to transform the experience of the condemned from hardship to punishment, as well as the experience of victim from revenge to righteous vindication of his rights. The common element consists in the shared nature of lawful punishment not present in private revenge, what Murphy calls 'retributive hatred' which is defined as an empathy with the victim and shared condemnation of the criminal.⁴⁶

⁴⁵ Theories of punishment range from deterrence; Anthony Ellis, 'A Deterrence Theory of Punishment.' *Philosophical Quarterly* 53(212): 337-51, to moral expression of censure; Thaddeus Metz, 'Censure Theory and Intuitions about Punishment.' *Law and Philosophy* 19(4): 491-512; J. Glasgow 'The Expressivist Theory of Punishment Defended.' *Law and Philosophy* 34(6): 601-31; B. Wringe, 'Rethinking Expressive Theories of Punishment: Why Denunciation Is a Better Bet than Communication or Pure Expression.' *Philosophical Studies* 174(3): 681-708. The pertinent issue for me is that common across these diverse theories is the use of the body as the object for punishment, whether as the receptor of physical pain and incarceration, or as an instrument for some moral message.

⁴⁶ Jeffrie Murphy, 'Retributive Hatred', in Frey, & Morris, *Liability and Responsibility : Essays in Law and Morals*. Cambridge Studies in Philosophy and Law. Cambridge: CUP, 1991. For an account of the expressive element of punishment see Jean Hampton, 'Theory of retribution' in *Liability and Responsibility* ibid.

What is significant in theories of punishment is the inevitable presence of emotion, specifically the hatred and anger of the victim and society which is given legal expression. This facet of sociality and communal experience resonates through the ability of legal norms to transform and mediate personal experience into social action. Human subjects feel hatred, but more importantly they wish to feel vindicated in that hatred. Law is able to achieve this by 'lifting the burden of hatred'⁴⁷ from the individual and placing it onto society and the law itself. Thus the legal subject is able to vicariously share in the punitive experience without directly engaging in its violence, to vicariously express his most irrational emotions and hatred without directly confronting the victim of his hate. Analogous to responsibility, the law takes on the role of repository for society's emotions, structures them according to justifiable objective standards of Reason, and presents them as independent and universal standards of justice.

In contrast to retributivist theories of punishment, deterrence theories represent the prominent alternative approach based on a discourse which ostensibly emphasises utility over retribution. Deterrence has as its object the prevention of future wrongdoing by threat of physical hardship should the subject be tempted to transgress a legal norm, a threat made immediately visible through the bodily punishment of criminals. To suppress present incentive for pursuit of advantage through the threat of future evil or pain resonates precisely with that simplistic notion of the legal subject as primarily a being of sensible desires. That pain will successfully deter the subject from certain action reinforces the conception of the subject espoused by Hobbes and Kant as one who must be presented with a material motivating force, the aversion to pain, to secure conformity to law. Reason's discourse on deterrence is one which implicitly adopts the simplistic conception of the legal subject, the unruly body which shrinks from pain and is the belligerent object of Reason's instructions. The legal subject possesses sensible compulsions of body, so is capable of being deterred from wrongdoing by fear of physical pain, along with a degree of rationality which enables him to take into account the possibility of future punishment as a result of present action, so justifies punishment as the proper response for his present voluntary choice to commit wrongdoing.

⁴⁷ Murphy, *ibid.*

Norrie advances a similar argument in his criticism of liberal ideologies of punishment.⁴⁸ He asserts that there is an inherent contradictoriness within the liberal discourse which is the result of the limits of ideology in the face of material reality. For Norrie both Hobbes and Kant face an irreconcilable disjunction between their abstracted conception of juridical individualism capable of autonomous action and thus the proper object of punishment, and the concrete individuality which is embodied, determined, and irrational. Hobbes' theory stumbles in his empiricist conception of the human subject as both naturalistic, thus responsive to sensual stimuli, and possessed of a reasoning faculty which makes juridical freedom possible. Similarly Kant's theory of moral retributive punishment is only justifiable for fully moral autonomous agents who arguably do not commit crimes from passion. For both theorists the legitimacy of punishment is justified solely through Reason, and yet the entire notion of punishment is articulated in terms of the body's disposition towards pleasure and fear of pain. I would argue that if the threat of punishment and its exercise is efficacious when aimed solely at the body, a purely Reason-based justification presents an impoverished account of punishment.

Fundamentally the theories of punishment have not successfully made redundant the embodied nature of the legal subject, so have sought to discursively anchor their normative arguments along the principles of Reason. In addressing their validity to Reason, theories of punishment ignore their dependence on the body as the instrument of meaning and the site of moral redemption. The idea of retributive punishment is to achieve a form of moral reckoning or redemption by subjecting the body to physical hardship. Similarly deterrence threatens the body with future pain as the appropriate moral exchange for its pursuit of present pleasure. This preoccupation with disciplining the body through brute force or incarceration, a material act given symbolic communicative significance through law is neglected in legal rhetoric. Why the normativity of legal punishment should find its expression through the body of the subject, whilst addressing its legitimacy exclusively to the subject's Reason presents an anomaly in law's discourse.

⁴⁸ Alan Norrie, *Punishment, Responsibility, and Justice a Relational Critique*. Oxford ; New York: OUP 2000.

3.4 The core of counterintuition

I have attempted to penetrate the core of law's counterintuitiveness by tracing the fault lines along two themes. I have argued that the lived experience of the law is often irreconcilable with the predominant legal rhetoric. Legal duties and obligations which purport to place the burden of social responsibility upon autonomous legal subjects are in fact a lived experience of alienation from sociality and an abdication of responsibility; objective and impartial arbitrage between competing rights through law necessarily feeds upon the irrational base of emotions prevalent within society.

At a glance the claim that modern law's counterintuitiveness lies in the disjunction between the theoretical discourse that underpins it and its material operation might appear a straightforward claim: theoretical ideals cannot be fully translated into practice due to the limits of empirical existence. However my claim is somewhat different; I believe that the necessity for law to manifest itself through the embodied beings of individuals, whilst simultaneously attempting to disavow that embodiment leads to the counterintuitive encounter of experience and discourse. The normative force of law is necessarily demonstrated through the actions of legal subjects who are embodied and situated beings, so necessarily encounter law through their embodied and situated positions. Correspondingly the law concedes to this embodiment by addressing its threat of punishment and appeals of attraction to the body and the sensible emotions of these subjects. However it also explicitly disavows this embodiment by presenting itself as aligned with ideals beyond the material, with Reason and the *nomos*, and legal normativity as grounded upon these immaterial ideals. It is this simultaneous dependence yet disavowal of embodiment which highlights the counterintuitiveness of law.

3.5 Conclusion

In summary the inadequacy of a Reason-based account of legal normativity leads to disjunctions between law's rhetoric and its material experience, which emerge as counterintuitive features and stubbornly resist discursive subsumption. I have illustrated this counterintuitiveness through the themes of responsibility and emotion by arguing how their discursive relationship with Reason in constituting legal

normativity is often at odds with reality and the particular legal theories which seek to better represent the experience of law. The source of this dissonance is the intrusively material body of the legal subject who is also the locus of normativity; a dilemmatic aspect for Reason which endeavours unsuccessfully to engulf it under a reified discourse.

This and the two preceding chapters form the field within which my thesis is situated. I have outlined the theoretical pitfalls idealism and determinism pose for a theory of normative action, and identified a peculiar aspect of counterintuitiveness which requires explication. The proceeding chapters will form my attempts to construct a material theory of normative action which avoids the problems, and answers the issues presented thus far. I will begin by reconfiguring the terms used to understand reality, drawing on the concept of habit as the mechanism of action, before combining them to form my vision of material normativity.

4

Re-imagining Materiality

In the foregoing chapters I have advanced my arguments against theories which ground the normative force of law solely on Reason and neglect to account for the legal subject as an embodied being. I have suggested that this rejection of materialism presents an impoverished understanding of legal normativity as it fails to address corporeal being and action as significant aspects of human living. In chapter 1 I analysed the theories of Hobbes and Kant as preeminent representatives of a tradition of philosophy from which much of modern legal theory draws inspiration. My central dissatisfaction with these theories lies in their assumption of a mind/body dualism which exclusively associates the normative with the disembodied cogito, and denies the body normative significance. I asked whether Marx's conceptions of material social relations address this neglect of the body. Whilst Marx offers valuable insight with his notion of man as the nexus of social relations, there is in Marxian theory a tendency to slip either into economic determinism by being overly preoccupied with the primacy of economic relations over other social relations, or to focus excessively on the superstructure and lose sight of the material base of existence.¹

In chapter 2 I explored whether Foucault's theory offered a possible solution to the theoretical chasm between ideal Reason and materiality, and encountered a similar problem of determinism in Foucault's conceptions of subjectivity and social discipline. Whilst Foucault's conception of subjectivity is valuable insofar it begins from a notion of the human body as malleable to social discipline, it does not offer a solution to the primary challenge of establishing an account of embodied normative action. Indeed Foucault's theory presents a different form of determinism in terms of socially determined disciplinary mechanisms.

¹ Gramsci is one Marxian proponent whose claim of overlapping spheres of political and civil society and the manufacturing of consent arguably loses sight of the material conditions which are not separable into force and consent, but present both benefit and constraint as an integrated condition of living. See Joseph Femia, *Gramsci's Political Thought Hegemony, Consciousness and the Revolutionary Process*. Oxford: Clarendon, 1987 chapter 3.

Having established the general outlay of the problems confronting a theory of embodied legal normativity, I proceeded in chapter 3 to analyse what I perceived to be counterintuitive features within the law. Through the exploration of responsibility and emotion as two major themes in legal literature, I attempted to demonstrate how these counterintuitive features are symptomatic of the disjunction between law as a lived and embodied experience, and the rhetoric of a legal discourse which fails to accommodate for that embodiment. I aim to account for these counterintuitive features in my account of embodied legal normativity.

Pursuant to constructing such a theory, I believe it is necessary to reframe much of the elements involved, such as subject, consciousness, norms, and actions, in material terms in order to facilitate a reconfiguration of their interrelations; the terms of representing reality used by theorists hitherto examined are not conducive to relaying the ideas I wish to advance. In changing the terms of representation I will be better placed to construct new conceptions of subject, norms, and action which are not posited as mutually exclusive, therefore combine more easily into a new account of normative action. In this chapter I will construct a material framework for analysing and understanding the material world, as foundation for understanding material norms and action going forward.

4.1 (Re)presenting material reality

My normative framework comprises objects, object-relations, and signifying chains which together form the embodied category.² The 'embodied category' is a term I use to refer to that mode of human existence which consists of acting in the material world in an intentional manner, a way of 'being in the world'³ which is constituted in most part by material action not reducible to simple mechanistic or deterministic descriptions. The fundamental way of being in the world is engaging in meaningful activity, and by this I do not have in mind any content-rich conception of meaningful action, such as

² These are not metaphysical concepts or categories, but are simply terms to denote already familiar and established concepts. My concern is not to establish a new metaphysical foundation for understanding the world, instead my use of these terms is aimed towards constructing a fundamentally material approach to norms and action by separating the material object from any particular symbolic representation of it.

³ Maurice Merleau-Ponty, *Phenomenology of Perception* Routledge Classics. London: Routledge, 2002 Part III Chapter I

being goal-oriented or rational, but merely that any action will contain a minimal element of intentionality,⁴ so that it is not entirely a cause and effect phenomenon explainable in mechanistic terms.⁵

I concede that if measured in terms of the proportion of total action a human regularly engages in throughout the course of his life, mechanistic and involuntary actions likely constitute the vast majority of action. Indeed they are absolutely necessary in maintaining the very life of the human organism.⁶ If this is the case it may appear strange to contend that the sort of action the human being engages in most often and necessarily are not the sort that counts as human activity in the embodied mode of living. My choice to refrain from directly addressing these modes of human action is driven by my intention to separate and identify one specific characteristic of human action which appears to elude such mechanistic descriptions. This is the element of the normative, a characteristic which distinguishes mechanistic from intentional action.⁷ The normative is evidenced in the action, which both constitutes the norm in its embodied modality, and reinforces the norm for further repetitions. Instead of the norm exhibiting its force by determining human action through reason or reflection, I argue that the normative is manifested in the corporeal and intentional actions of humans. These actions are not 'normative' in the sense of being explicitly norm-

⁴ Intentionality is a much philosophised concept, the intricacies of which are not directly pertinent to my thesis. I use the term intentionality to denote that way of relating to the material world which consists of practical action and active engagement with material things. This conception has similarities to phenomenological accounts of intentionality as developed by Husserl and Heidegger. For an overview of phenomenological conceptions of intentionality, see Kriegel, *Phenomenal Intentionality*. Philosophy of Mind Series. New York: OUP 2013. My foremost disagreement with a phenomenological account is its emphasis on experience over material action, and its preoccupation with internal states of being. Cf. John Searle, *Making the Social World*, OUP, 2010, chapter 2 on his realist conception of intentionality which is based primarily upon perception and action. I agree with Searle in most part, except for his claim that intentionality is propositional. Likewise I hesitate to use the term 'intention' due to its connotation of particular philosophical theories of agency and action causation which I do not subscribe to, especially in its robust forms of intending to achieve a certain result. See Antony Duff, *Intention, Agency and Criminal Liability : Philosophy of Action and the Criminal Law*: Oxford: Basil Blackwell, 1990. U. Heuer, 'Intentions, permissibility, and the reasons for which we act' in Pavlakos & Rodriguez-Blanco (Eds.), *Reasons and Intentions in Law and Practical Agency*: CUP: 2015. For an interesting contrast to intentionality as an internal state see William Bauer, 'Physical Intentionality, Extrinsicness, and the Direction of Causation.' *Acta Analytica* 31(4): 397-417. I believe a more realist conception of intentionality better serves my aim of constructing an account of normative action which emphasises the material as opposed to the phenomenology of experience.

⁵ Involuntary muscular reflexes or contractions such as the heart beating, the motions of digestion, flinching away from pain or heat, are examples of actions without intentionality. In neuro-physical terms the body's state is regulated largely through the mechanisms of proprioception and interoception which operate without conscious control by the human being.

⁶ Here I have in mind most specifically those biological mechanisms outlined above.

⁷ The more common understanding of normative action is they are driven by intangible causes such as reasons, and cannot be reduced to purely empirical accounts of cause and effect. Likewise normative action is often described in terms of ought and should. Geoffrey Brennan, et al., *Explaining Norms*. OUP, 2013, chapter 1. Hans Kelsen, *General Theory of Norms*. Oxford: Clarendon, 1991, chapters 1 & 2.

determined, but they are nevertheless an adequate iteration of a norm in its embodied modality.

A human's senses, sensations, and actions necessarily occur through the medium of his corporeal being; humans come to engage both with the world and themselves by incessantly interacting with their material surroundings through the use of their bodies, and not by discovering immutable truths through internal reflection or reasoning.⁸ Materiality is the first significant characteristic of the embodied category, and immaterial norms, ideals, and meanings must be embodied in some tangible form, whether in the guise of intentional action or physical objects. The second characteristic of the embodied category is the aspect of dynamic motion; human living is constituted by ceaseless corporeal and cognitive activity.⁹

Although materiality is the predominant mode of existence in the embodied category, it is overlaid by symbolism. Human living consists of physical interactions with the world, but also of symbolic and linguistic representations of that world and their experiences within it. Symbolism operates to structure meaning in the embodied category and determines the outer limits of its reach; what cannot be represented, either symbolically or linguistically in however tenuous a manner, does not 'exist' insofar as the embodied mode of human living is concerned.¹⁰ The ability to communicate through symbolism is important for the transmission of meaning through discourse.

The embodied category is that mode of human existence characterised by corporeal activity which forms the entirety of lived experience. Put simply it is what confronts us immediately as the world around us, the environment, the field of experience. It is the world we not only see, but perceive through the lens of familiarity, and of which we have a certain degree of understanding. It is the world we navigate with the use of our

⁸ E.g., Cartesian notions of reason.

⁹ By cognitive I do not refer to reflection in the traditional sense of inward thinking, but active cognition such as recognition, identification, intention, etc.

¹⁰ I am not subscribing to a theory which states the world may be faithfully mapped through symbolic representations such as language, only stating that symbolism is fundamental to the human capacity to represent and reiterate meaning.

experience of it, which structures our expectations and in turn influences how we act within it.¹¹

4.1.2 Constructing the embodied category

The embodied category consists of objects, object-relations, and signifying chains which together form the world as we experience it. When humans act in the world, they engage directly with the objects which surround them and make up their material environment. They respond to these objects according to the object-relations which are those contingent reactions appropriate to their situation. These actions and experiences are organised into series and networks by the signifying chains which connect together otherwise disparate events to form a coherent narrative of meaning. The objects, object-relations, and signifying chains form the ternary which serves as the foundation for the ceaseless activity of sustaining and reproducing human living. In turn these objects, object-relations, and signifying chains depend upon human activity to reproduce them in an embodied mode. In other words the embodied category invites us to engage with the world in a familiar way conditioned by the objects, object-relations, and signifying chains, and in doing so creates the conditions for its repetition and reproduction.

I will develop each part of the ternary in turn; I am not concerned with establishing an *a priori* moment from which these events originate, instead pursue an approach which is situated *in media res*, and begin from the immediately available experience of the world. When I refer to the initial moment or to any suggestion of an originating event, I will only be referring to a specific example, or using the term as a theoretical convenience without denoting any metaphysical origin.

¹¹ This definition of the embodied category bears resemblances to Slavoj Žižek's symbolic order as social reality (*The Sublime Object of Ideology*. Phronesis. London: Verso, 1989), and Pierre Bourdieu's conception of the material world as social space (*Pascalian Meditations*. Cambridge: Polity Press, 2000). Similarities can also be drawn with Merleau-Ponty's conception of the material world (n.3), and John Searle's conception of social reality as constituted by institutional facts (*The Construction of Social Reality*. London: Penguin, 1996). I perceive these conceptions of the world to share a common idea that the reality we are confronted with is already saturated with a determined meaning, as opposed to that meaning being subsequently imposed through ideal categories.

4.2 Objects

Objects in the embodied category are those material things which humans are capable of interacting with.¹² They may be inanimate, such as tables and chairs, or animate when they are attached to or form part of an organism, such as animals and body parts. The vast majority are perceivable by the physical senses, and these are what make up the commonplace daily environment for humans. There may be some objects not directly accessible to the senses such as electricity or atoms, which nonetheless may also count as objects due to their being manipulated by human action. Intangible or immaterial objects such as spirits or ghosts I would regard as either a specific modality of an object, or as a specific signification of an object.¹³ Similarly for all intangible ideas, concepts, features, I contend these must be instantiated within a material object as the embodying medium in order to exist in the embodied category.

The human actor encounters the embodied category primarily through his corporeal interaction with his physical environment. This is not an epistemological claim that the foremost or only source of knowledge must come through physical sensation, only that humans experience the world by interacting and engaging with physical objects through their bodies. Rather than a disembodied cogito coming to consciousness of its own existence through reflection, or becoming conscious of the external world through *a priori* categories of understanding, I would argue that physical contact with

¹² I am not postulating a metaphysically or ontologically distinct category of objects, simply grouping ordinary tangible things together under one referent. The exact ontological status of objects and contentions between different philosophies of ontology such as realism or deflationism are not directly pertinent to my thesis. Theodore Sider, *Writing the Book of the World*, OUP, 2011, chapter 9. Neither am I preoccupied with questions such as whether objects would 'exist' without being perceived, as is claimed by Berkeley. For my purposes a theory of ontology similar to Kant's separation of the phenomenal from the noumenal, without proving the latter's existence would suffice.

¹³ I use the term modality to denote a particular mode in which an object exists, such as by being known, represented, or experienced. As I believe an object is capable of possessing multiple modalities, this would imply that I am a 'de re modal conventionalist'; see Sider above n.12. According to Alan Sidelle, 'Modality and Objects' *Philosophical Quarterly* 60(238): 109-25, this would be incompatible with realism about objects, a point with which I am not directly concerned. However I would reject forms of modal monism and essentialism which claim there is only one possible or essential feature of an object.

material objects is a necessary condition before any sort of conscious awareness or understanding of that object can be formed.¹⁴

4.2.1 Naming

Objects in the embodied category are capable of being objects for human interaction, such as use, production, exchange, or knowledge. For this to be possible objects must be invested with a modality in the form of a meaning, function, or value, through which the human actor is able to grasp or express that object.¹⁵ A ubiquitous modality is to invest an object with a name, thereby assigning it a symbolic and linguistic meaning. This enables that object to be identified, invoked, and represented by human actors by the use of its name in speech and other actions. It also enables the object to be placed in relations of difference, similarity, and reference to other objects along chains of signification.¹⁶ The name of an object is no different in theory from any other form of modality, however because naming occurs with frequency I have chosen to present it separately, as the most basic mode of objects' existence. So even for objects which one cannot define or describe, the use of the name is sufficient to designate the object through the act of speech.¹⁷ In the embodied category where the two media of existence are material presence and symbolic representation, assigning and articulating the name of an object is the standard way of interacting with that object. I believe that the names given to objects constitute both their being and modes of being but do not ultimately determine the entirety of their qualities or states;¹⁸ the name specifies the linguistic mode of an object's embodied being.

¹⁴ I am concerned only with practical knowledge and its implications on action, hence I need not deny the validity of theoretical or metaphysical knowledge such as mathematical or *a priori* truths. The claim that a human actor is able to know or understand mathematical propositions without a corresponding physical sensation or experience does not substantially undermine my claim. For example, the knowledge that a triangle is mathematically defined as a three sided shape with angles totalling 180° is feasibly held by a human who may have never seen a physical triangle. However I would suspect that in order to identify or draw such a shape upon request would most likely require prior contact with material triangles. See Goldstone et al., 'A well grounded education: The role of perception in science and mathematics' in Manuel De Vega et al., *Symbols and Embodiment : Debates on Meaning and Cognition*. Oxford ; New York: OUP 2008, chapter 16 for a discussion on how the ability to transfer scientific and mathematic knowledge is aided by learning patterns of similarity within embodied situations.

¹⁵ See Kripke on naming as 'baptism' of an object, which preserves only the name as reference; Saul Kripke, *Reference and Existence: The John Locke Lectures*. OUP 2013, pg.13.

¹⁶ Ibid.

¹⁷ This mode of existence is different from a speech act, since the object must already be materially present, but rendered capable of human interaction, in this case to be cognised or acknowledged through the invocation of its name.

¹⁸ Here I differ from Searle who asserts that objects do possess intrinsic features which are independent of any intentionality; Searle, n.11 chapter 1. Although he does not mention essentialism, as his theory of external reality is a formal supposition rather than substantive theory of essence.

I now discuss the naming process and how it invests an object with meaning, function, and value. For the purpose of clarity I address each modality separately, however these distinctions are largely artificial, and it will become apparent that the modalities of an object are highly intertwined and mutually constitutive.

4.2.2 Meaning

As I am not concerned with tracing the genealogy of objects or their names, I will not attempt to reconstruct what might be the original moment of naming the first object in the world. I assume that there exists numerous named objects in the embodied category, and should any novel objects come into being through discovery or invention, its naming process must take place within the existing network of named objects. If assigning a name is the basic designation of symbolic representation and enables a human to point to an object and utter its name, then assigning a meaning to that name enables the object to be positioned in relation to other objects and to be grasped in that mode,¹⁹ that particular quality or aspect through some more generic reference.²⁰ For example an apple can be understood in its quality of redness, which is itself an already established generic referent consisting of other red objects. So the redness of the apple is a meaning which is grasped through the concept of red, a meaning which enables the apple to be expressed through comparison with other objects sharing that same generic quality.²¹ The public and generic character of

¹⁹ Whilst this sounds similar to Wittgenstein's idea of names signifying that which is the indestructible elements making up the world, and meaning as the ability to use the name in language games, the fundamental difference is that I do not believe there are objects which exist in and for themselves, and which are the proper objects corresponding to names. I would instead regard names of objects in the same vein as meaning, function, and value, but simply a more generic modality which may encompass many of these particular modalities, or none at all. In the sense that names enable objects to be objects of human interaction, so used in some way, it is more akin to Wittgenstein's concept of meaning. Ludwig Wittgenstein, *Philosophical Investigations*. Past Masters. Charlottesville, Va.: InteLex Corporation, 1998 Part I ss.37-46.

²⁰ Kripke n.15

²¹ Insofar as my conception of generic referents are empirically constructed through comparison between objects, my approach is closer to internalism whereby objects are identified according to subjective knowledge, as opposed to externalism which holds that names refer to unwavering facts about objects. See Hilary Putnam, *Philosophical Papers Vol.2, Mind, Language, and Reality*, CUP, 1975, as a representative theory of externalism. However neither do I uphold any form of solipsism, which Putnam has asserted is a result of rejecting externalism. For a critique of Putnam see Crane, T. 'All the difference in the world' *The Philosophical Quarterly*, 41: 1–25. Cf. Jylkka et al. 'Psychological essentialism and semantic externalism: Evidence for externalism in lay speakers' language use' *Philosophical Psychology* 22(1): 37-60, for an argument that psychological essentialism plays a role in lay speakers' apparent externalism. My notion of referents are 'generic' in the sense of being both public and requiring the involvement of at least two objects. The publicity is an implication from Wittgenstein's denial of private language, and the generic from my rejection of essentialism which means no name or reference is unique to any object.

referents implies that specific objects can come to invoke or symbolically represent the other objects which share a referent, and point beyond themselves to other objects through their shared meaning.²²

Most objects will be invested with multiple meanings, and the appropriate reference will depend on the particular context. An object's meaning in any particular context acts almost as a specific embodiment of a generic quality or referent, and can also be used as a proxy for something else. The most straightforward example would be a simile or metaphor where an object is explicitly used as a comparison or stand in. However I would argue that because objects exist only in position and relation to other objects and not independently for or in itself, any articulation of meaning would invoke to some degree the relations between that object and the other objects which share that meaning.

4.2.3 Function

The function of an object refers to its utility and capacity for use or to serve a particular purpose. It also includes symbolic functions whose purpose and effects are not directly materially manifested but create a change in a symbolic fashion which is then materially manifested in other ways, such as by influencing the corporeal actions of humans.

I have argued that mechanistic actions do not form part of my conception of the embodied category, likewise I am not concerned with mechanistic functions of objects such as the heart pumping blood, or plants converting sunlight into energy. Such functions of these objects will persist regardless of any human consciousness of their operation, so for my purposes they are not functions pertinent to intentional action. However that does not mean that hearts and plants cannot serve a normative or intentional function when engaging in their mechanistic functions of pumping blood or absorbing sunlight. When they are taken as objects of action and knowledge²³ their mechanistic function is transformed into an imposed normative function which is

²² I have in mind a very basic form of relationship between objects which share a point of reference, akin to simile. I will argue later that this is a rudimentary signifying chain.

²³ Foucault has argued that taking the subject's body as the object of power and knowledge enables disciplines to fix normative standards by deriving average norms which are then used to judge and train previously inert bodies. Michel Foucault, *Discipline and Punish : The Birth of the Prison* Harmondsworth: Penguin, 1979, chapter 5.

capable of being measured and manipulated, in other words capable of human interaction.²⁴

We only know of the ostensibly mechanistic fact that hearts pump blood because we have studied the human form through the discipline of biology, which is a normatively structured system of knowledge based on a particular understanding of objects in the world, specifically the object of the human body. So what was once a mechanistic function now becomes the object of knowledge, which enables the object to be measured and manipulated through a normative system of knowledge, such as to be judged as faulty or defective and subjected to medical intervention. It might be argued that merely describing a mechanistic function does not change that function from being an objectively mechanistic one to a normative one. However I would argue that any ostensibly objective description is actually an intentional human action of ordering and representing the world through a particular discourse which assigns meanings, functions, and values to objects according to its normative system.²⁵ Humans have been alive long before they have accumulated any scientific knowledge of the conditions of their existence as valorised by modern science. The more important observation is the tendency for humans to produce discourse in order to explain the conditions of their existence, which likely maintains the strong hold of ideas over action.²⁶

Certain functions are relatively more obvious, such as the function of edible items to be consumed for sustenance. Other functions might be results of invention, such as the functions of tools and other human made objects, limited only by the imagination and ingenuity of humans. I am more interested in the symbolic function of objects

²⁴ Searle asserts that all functions of objects are 'observer-relative' and therefore imposed, and are normative in that they are supposed to achieve something; Searle n.11 chapter 1. His category of agentive and non-agentive functions correlate broadly with my own categories of normative and mechanistic functions respectively. Cf. Lindahl who uses the terms understanding and interpretation to refer to these different ways of interacting with objects, where the former refers to the practical manipulation of things, and the latter refers to the thematic reflection upon norms. For Lindahl these different approaches apply to all things, and is not restricted to function, however his assertion that interpretation of action entails making the action the object of knowledge is similar my own argument. Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*, OUP, 2013.

²⁵ That knowledge and truth is not a spontaneous or eternal and free from power is the critique advanced by Foucault towards traditional philosophy; Michel Foucault, *The History of Sexuality. Vol. 1, The Will to Knowledge*, London: Penguin, 1998 Part III. Similar to the power-knowledge structure of discourse, all meanings to be found in the embodied category are also produced through action, and cannot be detached from that material existence.

²⁶ Social psychology has offered many explanations as to this tendency of humans for producing superstitions, beliefs, narratives, in short forms of discourse. For an interesting discussion on the particular topic of souls, see Jesse Bering, 'The cognitive science of souls: Clarifications and extensions of the evolutionary model.' *Behavioral and brain sciences* 29(5): 486-493.

which I believe plays an integral role in how immaterial norms are able to produce material effects by influencing human action. As the foregoing has indicated, function and meaning are intimately entwined, so difficult to demarcate clearly. They are also necessarily embedded in a particular discourse which invests the objects with those particular meanings and functions. It is through demarcating and designating objects that a discourse is able to construct itself and manifest its norms through the corporeal actions of humans.²⁷

Symbolic function occurs when objects come to act as proxies for something else through their meaning, so act as a sign or symbol or sorts.²⁸ Symbolic function operates through that meaning to change the symbolic state of affairs in a discursive system according to its inner logic,²⁹ which is then materialised into reality by influencing the corporeal actions of humans. These symbolic effects are played out in the material reality by humans acting as if these discursive effects are real. In other words the material reality is constructed according to the discursive reality through human actions which simultaneously construct and react to their material world according to a particular normative framework, so construct the normative reality by embodying those norms.³⁰

I will take the example of the ritual of Holy Communion wherein bread and wine are objects serving symbolic functions of standing in as Christ's body and blood. Through the perspective of an observer not familiar with Christian doctrine, the actions of eating bread and drinking wine would only indicate their functions of serving as edible objects. However within the discursive ritual of Holy Communion, the bread and wine are capable of effecting a symbolic change in the supplicant and his relationship to Christ, God, and the Church. Partaking in the bread and wine under those

²⁷ This may be likened to a system reproducing itself and the environment which makes its existence possible, so enters into the autopoetic action of self-referencing meaning; Niklas Luhmann, *Social Systems*. Writing Science. Stanford, Calif: Stanford University Press, 1995 chapter 5.

²⁸ Searle asserts that such symbolic functions are institutional facts which have the constitutive rule of 'X counts as Y in C', whereby an object of action is ascribed a different meaning or significance depending on the circumstances; Searle n.11 chapter 4. Lindahl in drawing upon the theories of Husserl and Heidegger asserts a similar argument that the meanings to be found within the world are 'disclosed' in the formulation of 'the disclosure of something as something'; Lindahl n.24 pg.123-124.

²⁹ Lindahl refers to this as the co-disclosure of the entire system, or the 'unity of ought-places, ought-times...when something can appear as something', *ergo* the legal order which gives these things their legal meanings; *ibid*.

³⁰ Whilst I refer to reality being constructed according to discourse, it is important to state here that it is not the discourse which actively orders reality, but rather the corporeal actions of humans which manifest the discourse into material reality. The specific relationship between discourse and human action I will explore in later chapters.

circumstances symbolises the redemption of the soul and acts as a reaffirmation of that relationship between Christ and human kind. The bread and wine are capable to serving this symbolic function by virtue of their symbolic meaning bestowed through Christ's words in the Bible. In turn the Bible and the ritual in general consist of material objects and corporeal actions invested with their meanings and functions by the wider discourse of the Christian faith so on.³¹

What is important is not what is happening at the discursive level, but rather the powerful influence that exerts at the embodied level of corporeal human action. In this case the action is partaking in the Communion, and its material effects evidenced by the changed experience of the supplicant and treatment of him by others as a result of the ritual. More broadly the actions of going to church, baptism, praying, all manner of rituals involved in Christian worship are evidence of the symbolic functions of objects influencing human action. It is these actions which reiterate the meanings and reinforce the functions of objects according to the particular discourse. Ritual is a highly visible and formalised example of how discourse can influence action.³² In everyday life one can identify numerous mundane symbolic functions; penning a signature serves the function of giving authoritative consent, displaying ID cards as a function of verifying identity, writing names on objects as a function of demarcating ownership.³³ All these and more mundane symbolic functions make use of objects to reiterate the meanings permeating social living according to the particular logic of a legal capitalist society.

4.2.4 Value

The value of an object refers to the relative rank or discursive significance placed upon it. It also acts as the measure of commensurability or equivalence between objects. Like function and meaning, the value of an object is embedded within a particular

³¹ Norman Doe, 'Baptism, Confirmation and Holy Communion.' In *Canon Law in the Anglican Communion*, OUP 1998 chapter 10

³² Rossano & Hinshaw, 'The Essential Role of Ritual in the Transmission and Reinforcement of Social Norms.' *Psychological Bulletin* 138(3): 529-49. Less formalised but more insidious cases of ritual I would equate with the notion of performativity, a process which feminist critics have argued constructs and sustains gender and sexual roles in society. See Judith Butler, 'Performative Acts and Gender Constitution An Essay in Phenomenology and Feminist Theory.' *Theatre Journal* 40(4): 519-531; Butler, *Gender Trouble : Feminism and the Subversion of Identity* Routledge 1990, pg.171-180. Deborah Cameron, 'Performing gender identity' in *Language and gender: a reader*. Malden, MA: Blackwell 1998.

³³ These objects are described by Searle as 'status indicators' which serves to maintain and reinforce the use and acceptance of institutional facts by the community; Searle n.11 chapter 5.

discourse, so must be placed within its discursive network in order to be fully appreciated. Objects with perceived higher values tend to exert more influence over human action, as they become objects of desire or aspiration. Correspondingly they might hold higher value by virtue of some symbolic meaning accorded to them, such as being units of social capital or indicators of status or goodness.

Value can also sustain a greater degree of personal investment, such as objects which hold sentimental value because they serve as a material embodiment of some personal experience. Such sentimental value objects may be said to possess a meaning or serve a function for an individual which is difficult to communicate through language or physical interaction. I would interpret such situations as indicative of the relatively mutable character of the value modality, compared to the meaning and function modalities which require a greater degree of common action to sustain. However that is not to say value is radically mutable depending on any arbitrary position, as there are hegemonic discourses on value which tend to render all objects commensurable according to a particular set of norms.³⁴

I would propound that capitalism is at present the most hegemonic value discourse, converting value into monetary terms and rendering objects commensurable according to its model of exchange. Within the capitalist system all objects are imposed with the meaning and function of commodities to be used and exchanged.³⁵ In turn the values of those commodities are reduced to their exchange value expressed in the unitary measure of money. The object is still capable of sustaining other values not commensurable with money or commodity, however due to the hegemonic status of capitalist discourse the predominant value of objects is their commodity value. In evidence when we speak of some object as being valuable, the preeminent meaning is of monetary value, and should that be contextually inappropriate we can only appreciate non-monetary value in a vague moral, sentimental, or idealistic way. I am highlighting what I perceive to be the most concrete and material experience of objects

³⁴ Here using hegemonic in its meaning of dominating ideologies in society, a concept developed by Gramsci; see Femia n.1. For concise overview see David Coghlan, and Mary Brydon-Miller. *The SAGE Encyclopedia of Action Research*. 2 vols. London, : SAGE Publications Ltd, 2014, pg.400-403.

³⁵ Karl Marx, *Capital*. Everyman's Library ; No.849. London: Dent, 1951 v.I chapter I section 4.

in their value modality; humans in a capitalist system overwhelmingly confront their material surroundings as a collection of property or commodity objects.³⁶

4.2.5 *Naturalisation of object modalities*

Why is it that certain names of objects and certain meanings, functions, and values tend to present themselves as intrinsic, therefore natural attributes of those objects?³⁷ The pertinent claim is there are facts or states in the world which occur independently of any human action, so are objectively true and valid in all given situations. I would argue that this is a result of a process of naturalisation³⁸ which occurs with strong and incessant repetition of an object in a particular modality.

As an object's meaning, function, or value is reiterated and reenacted by human action which invests the object with its modalities, the action becomes obscured by the material object itself. The active process of investing meaning through action is obscured behind and reified onto the object, which alone suffices to invoke meaning, function, or value, and the action relegated to a secondary reaction to, or an effect of the object.³⁹ This process is repeated *ad infinitum* and with every objectified action the meaning, function, or value is increasingly grafted onto the object, until it comes to be

³⁶ This would be an instance of commodification described by Marx which is a result of alienation from the products of labour and reification of the commodity form; Karl Marx, *Economic and Philosophic Manuscripts of 1844*. New Ed.]. ed. London: Lawrence & Wishart, 1970 pg.331-333. More detailed discussion on Marx see chapter 1. The object which most obviously defies this monetary value is the human body which is portrayed in common discourse in terms of an absolute value. Although in actuality the human body has already undergone substantial commodification, in the selling of labour, body parts, surrogacy, ownership of organs etc., the predominant discourse determining the meaning, function, and value of the human body in its guise as living being remains one which valorises life and idealises human rights.

³⁷ Searle, n.11 claims that things have intrinsic properties.

³⁸ I have chosen this term in reference to the social psychology category of natural kinds and their integral role in explaining psychological essentialism. Basically psychological essentialism demonstrates a 'natural kind belief' which elides social categories into natural categories, along with beliefs of the latter's immutability, inherence, etc. See Haslam, Rothschild, & Ernst, 'Essentialist beliefs about social categories' *British Journal of Social Psychology*, 39(1): 113–127. Haqanee, Lou, & Lalonde, 'Natural kind and entitative beliefs in relation to prejudice toward mental disorders' *Journal of Applied Social Psychology*, 44(2): 145–153. Social psychology works usually focus on the human categories rather than material objects, which are largely viewed as proper natural kind categories. However my argument is that objects' modalities are norms imposed by human action, thus social in a true sense of being socially constructed in their meanings, which are mistakenly perceived to be natural and immutable as a result of 'natural kind beliefs' in human psychology. I do not use naturalisation to refer to philosophical naturalism, which is similar to materialism and a philosophical stance I agree with.

³⁹ This is akin to the 'inductive potential' of essential categories where category membership itself is furnishes information regarding the member. Rothbart, & Taylor, 'Category labels and social reality: Do we view social categories as natural kinds?' In Semin & Fiedler (Eds.), *Language, interaction, and social cognition*, London: Sage 1992 pg.11-36. In my case the object itself is believed to be the originator of meaning, rather than the product of a meaning imposing human act.

perceived as an innate and natural property of the object itself. Instead of wearing its modality on its surface like a veneer, the object appears to be the potent source of that modality.⁴⁰

Naturalisation is how power is invested in objects.⁴¹ Whilst I agree with Foucault's argument of how power-knowledge relations define reality, his matrix is constructed through immaterial social relations which take material bodies as objects of manipulation. Foucault's power is limited to human agents, so loses that element of external constraint and necessity imposed by non-human factors illuminated by Marx.⁴² My aim is to preserve the true locus of power within the human actor, but integrate materiality into power such that the limit of human action is not subjectivity, but material reality. In short it is to find a middle path between determining action through immaterial subjectivity and material economic conditions, while preserving the agentive capacity of the human.⁴³ I believe this may be achieved by naturalising power onto objects through their modalities.⁴⁴

4.3 Object-relations

The ceaseless activity of human living fundamentally consists of physical interactions between human actors and the objects which make up their material world. I term this activity object-relations,⁴⁵ for it refers to the relations between humans and objects in

⁴⁰ The process is very similar to Marx's argument of productive potential becoming alienated from living labour which is the true source of production, and reified onto capital which is only the accumulation of dead labour; Karl Marx, *The German Ideology* Great Books in Philosophy. Amherst, N.Y.: Prometheus Books, 1976 p.99. Deleuze & Guattari refer to the 'socius' of a social body which is its imaginary sign or determinant, and for the capitalist social body it is capital; Deleuze & Guattari, *A Thousand Plateaus : Capitalism and Schizophrenia* London : New York: Continuum, 2004. chapter 1.

⁴¹ Discussed below 4.3.2

⁴² Foucault's agents are limited by their subjectivities and general discipline, which I find dissatisfaction for the same reason of their being immaterial social processes; Foucault n.23 and n.25.

⁴³ On this issue my position is closer to Foucault's in positing a non-ideal self-determining subject who is socially conditioned.

⁴⁴ This process may sound as if it is occurring on an ideological level of alienation, however I claim that the power invested in objects is real at the level of material composition of objects and bodies. The theoretical tools which enable this is habit, to be discussed in chapter 5.

⁴⁵ The term 'object relations' appears in the psychoanalytical works of Freud to denote the object of drive, although the term 'object relations theory' has now become detached from Freud's original usage to encompass a range of approaches in psychoanalytical theory. For further exposition of the use of object relations in psychoanalysis, see Jay Greenberg & Stephen Mitchell, *Object Relations in Psychoanalytical Theory*, Harvard University Press 1983. My use of the term object-relations is in no manner connected to the similar term used in psychoanalytical theories. Mine is a much more limited concept which is restricted to denoting a moment of human action as a reaction towards material objects, without any implication for that actor's external or internal states of being.

their active dynamic aspect. An object-relation is the reaction a human actor has towards an object. Object-relations are normative in the sense of being instituted through intentional action. They can be appropriate or inappropriate according to the normative standards which pertain to the object-relation. Object-relations constitute the totality of human activity within the embodied category; whenever humans engage in action or cognition, they are engaging in an object-relation.

4.3.1 What is an object-relation?

The basic definition of an object-relation is a reaction to an object, and it must be one of dynamic action; it refers to the relation between human and object in its active modality. Such action can be a physical action observable through the senses, but can also be a cognitive or mental action which, whilst not directly exhibited in physical action, are nonetheless active in the sense of effecting a change in the state of the human, whether by him taking up an attitude, belief, or knowledge.⁴⁶ Some if not most of these cognitive object-relations are precursors of, and intimately related to any physical actions which may follow. Theoretically there is no difference between physical and cognitive object-relations, but for clarity I will artificially separate them. In so doing I hope to avoid any confusion which may arise regarding the exact relation between these two types of actions, such as the cognitive causing the physical, which can descend into idealism, or physical causing cognitive, which suggests some form of determinism. I am satisfied at this stage to proceed with a theory of action which assumes a non-causal concurring relation between mental states and physical action.

Object-relations include interrelations between human beings in their guise as composites of corporeal body parts, who interact with others in a manner akin to objects.⁴⁷ A human being is never simply a discrete being, but rather a collection of embodied objects, of limbs and organs, sexed and raced body parts.⁴⁸ The object-relations pertaining between humans, but also between a human and his own body are multiple and complex, and implicate the interpellation of self and subjectivity. This inter-object character of human interrelations aims to subvert notions of relations

⁴⁶ I have in mind actions such as an act of identification which may entail the articulation of an object's name; or an act of recognition which may entail acknowledgement of an object's meaning or value; or an act of understanding, etc.

⁴⁷ Not in the Kantian sense of objects as means.

⁴⁸ Foucault's theory of disciplines fixing the truth and individuality of subjects onto their physical bodies. Foucault, n.23.

between rational subjects, not by reducing others to objects, but recasting the terms of subject. Suffice to say that humans are also objects to which others react, and the object-relations will vary according to the objects which compose that human's corporeal being.

Object-relations include those mindless or habitual actions which form the majority of action, as well as those deliberative and conscious decisions which occur less frequently. Object-relations are triggered when a human is confronted with an object which prompts him to react in a certain way, by physical action or by taking up a cognitive state. Non-deliberative bodily reactions do not require any conscious reflection or decision, and operate on auto-pilot response triggered at the corporeal level. In other words the object has triggered a reaction in the body before any conscious mental decision of what to do has been arrived at.⁴⁹ However these actions are not strictly automatic in the mechanical sense, such as a body being manipulated through physical force. Auto-pilot actions still maintain a degree of intentionality by having a purpose or point to their enactment; they are simply not actions arrived at through a process of conscious deliberation.⁵⁰

I believe that such auto-pilot actions form the vast proportion of everyday activities; waking up, walking, sitting, talking, are all actions we do unthinkingly.⁵¹ In order for humans to live it is necessary to relegate as much action as possible to this muscle memory to relieve the burden of conscious deliberative action. In evidence recall how difficult it was initially learning to tie shoelaces, then imagine what would happen if we never mastered that task so that we must spend five minutes struggling with our shoes every time. Then multiply that scenario to all the tasks we accomplish everyday without conscious thinking, and the result would be a dysfunctional life.⁵² So, the majority of object-relations consists of such automatic physical and cognitive reactions.

⁴⁹ Searle also uses the term 'intentionality' and describes it as being 'potentially conscious' in the sense that whilst not necessarily a fully conscious state, it can be brought into conscious awareness. Searle n. 11 chapter 1.

⁵⁰ Non-conscious goal pursuit, see Kruglanski, et al.. 'A theory of goal systems' In M. P. Zanna (Ed.), *Advances in experimental social psychology*, 2002 pg.331-378.

⁵¹ Referred to under the umbrella term of 'automaticity' in psychology, although precise models of the concept remain in dispute. See general definition in A. Moors, 'Automaticity' in *The Oxford Companion to Consciousness*, 2009.

⁵² There are such people with cognitive disabilities which prevent them from accomplishing these tasks and necessarily live under constant care, for example Parkinson's disease. For an interesting account of how well functioning physical sensations are a vital but overlooked aspect in the philosophy and psychology of action, see Christopher Eccleston, *Embodied : The Psychology of Physical Sensation* : OUP: 2016, who argues that the physical sensations are complex mechanisms vital to supporting human action, and explores instances of when these sensations are disrupted.

The other part would consist of those actions which are the result of conscious deliberation and decision-making.⁵³

4.3.2 Power of objects

My conception of human action as object-centric is premised on a notion of power as it pertains between human actor and object which rejects the view that objects are simply inert and passive objects for manipulation. Objects exert a certain power of influence over human action. Restructuring the relationship of power between human actors and objects is instrumental to grounding normative action in materiality, and preventing it from floating into metaphysical notions of agency.

My conception of power is not a force or ability which is able to be possessed or exerted by an entity or organisation.⁵⁴ Power is not a capacity to mechanically manipulate or psychologically coerce other humans to certain action; in other words it is not sovereign power. Neither is it a formative force constituted by relationships between humans.⁵⁵ I understand power as something which is gradually reinforced and built up through the repetition of a specific object-relation, which through habituation and discursive reiteration becomes detached from the action and reified onto the object. When an object-relation is strongly reinforced, the space where the moment of action occurs becomes increasingly obscured, such that the object almost appears to exert a causative force upon the reaction which becomes a natural and expected effect of the presence of the object.⁵⁶ The stronger the connection between the object and the reaction the more power can be said to be exerted in that object-relation.⁵⁷ This is how objects exert power over human action, by triggering a reaction which is experienced as compelling beyond question. So material objects make up

⁵³ I will argue in the next chapter that this is achieved through the mechanism of habit. It is a debated issue amongst psychologists as to the precise mechanism which enables automaticity in action.

⁵⁴ Contrast to Searle's conception of power as the ability to do something, such as performing a speech act; Searle, n.11 chapter 4. Similarly Hobbes' conception of power as the mechanical ability to perform actions without physical impediment; Thomas Hobbes, *Leviathan : Or, The Matter, Forme and Power of a Commonwealth, Ecclesiasticall and Civil*: London: Printed for Andrew Crooke, 1651: Reprinted Cambridge, 1904, chapter X.

⁵⁵ Foucault's conception of power as being formative of relationships between subjects, and power as something which must be exercised in a relational context; Foucault, n.25 pg.91-93.

⁵⁶ Akin to Marx's notion of the move to M-C-M where money becomes the reason and result of exchange; Marx, n.35 v.1 chapter 3. The object here is money, and the reaction desire, attachment of value, etc.

⁵⁷ Concurrent to the process of naturalisation; the actual locus of power remains with the human actor who actively invests objects with their 'power' by interacting with his environment in particular ways.

our external surroundings and in their forceful presence the human is pulled to and from and is forced to react in a compulsive manner.⁵⁸

The power that objects exert over human action is not one of causation, either in the mechanical sense or in the reason for action sense.⁵⁹ It can be likened more to a catalyst which when introduced into a solution causes the expected reaction. However that analogy is inexact, for unlike the chemical solution which is predetermined, the 'solution' which is the human as active being is constituted by the totality of his object-relations which together represent his experience of the world. As such if the reaction has only one possible outcome, it would become a cyclical self-fulfilling tautology. Instead the force acts more like a strong influence by creating the positive conditions for action and simultaneously reinforcing the action as positive.⁶⁰ Characterised in this way the possibility of change or difference opens up in the moment of action which resists the influence.⁶¹

4.3.3 Instituting object-relations

Object-relations are instituted in various ways, not necessarily in an explicit or conscious moment of action or decision. An object-relation can arise gradually through an action which is repeated in a non-reflective manner; simple customs or habits generally exhibit these traits. An object-relation can be formally instituted by explicitly designating actions with authoritative status, such as the case with formal legal rules and regulations, or be non-authoritatively instituted, such as media and advertisements designating social status onto action. Most importantly all object-relations institute the normative terms of human to object relation, regardless whether they are explicitly expressed as such.⁶²

⁵⁸ Akin to Marx's notions of commodity fetishism and the reification of capital which appears as the social relation between things, which in turn confronts humans as an independent determining power; Marx, n. 56 pg.80.

⁵⁹ Causative force either physical or psychological over human action in the sense of determining the action. However the object exerts force more than simply posing a negative physical obstacle constraining possible human action, such as how a cliff might obstruct a human from advancing on foot. I would phrase the force as akin to strong positive conditioning, which precipitates strongly reinforced patterns of behaviour without negating the possibility of alternative behaviour.

⁶⁰ Similar to how Searle asserts the primacy of process of over, of institutional facts as collections of activities which are also 'conditions for possible future activities'; Searle n.11 pg.56-57.

⁶¹ This might be achieved through the breaking of habits and becoming aware of the aporia of decision. I will discuss this issue in later chapters.

⁶² By this I mean object-relations need not be expressed explicitly in terms of ought, should, or other prescriptive terms; apparently descriptive expressions of behaviour are equally prescriptive by being embedded in a particular normative framework.

Customs, norms, and social attitudes are not causes or reasons which prompt reflection and action. Instead these immaterial norms are embodied in the object-relation and manifested in their material aspect through corporeal human activity. So when I say that object-relations are norms and vice versa, I am referring to the norm as it exists in the embodied mode, as action rather than as an abstract idea. I would argue that when humans refer to norms as their reason for action in the sense of taking it into deliberation or acting because of the norm, that is a case of rationalisation which refers to the proliferation of discourse behind the object-relation.⁶³

Assuming that object-relations are so instituted, their manner of dissemination and transmission throughout a group can also be explicitly reinforced or implicitly spread. Object-relations may be transmitted through imitation, a method of learning most common during the early stages of human growth.⁶⁴ Object-relations may be explicitly taught through instruction and reinforced through positive affirmation and punishment for breach.⁶⁵ They may be transmitted quickly to a wide audience through the use of modern media and advertising techniques, so become popularised amongst a large group. I would posit that the majority of a human's object-relations are resultant of the process of socialisation which occurs by simply inhabiting a particular social world or a particular position within the social world.⁶⁶

4.3.4 Object mediated relations

Hitherto I have discussed object-relations only as between human and object. I will now discuss the relations between human actors in terms of object-relations, and argue that human interaction is mediated through objects.⁶⁷ In oversimplified terms,

⁶³ I am rejecting the notion that human agents' reported reasons for action are adequate and true causes of their action. See Kieran Setiya, *Reasons without rationalism*, Princeton, N.J.: Princeton University Press 2007 for a view on reasons as cause of action. However I do not deny the possibility that agents' reasons can precipitate action, only the claim that such reasons are the only valid cause of agentive action.

⁶⁴ Imitation is a basic learning mechanism humans share with members of the natural world, including certain birds, mammals, and social animals. It is not a simple concept of simply mirroring action, and can be sensitive to context and effect. See Richard Byrne, *Evolving Insight*. OUP, 2016 chapter 11.

⁶⁵ Foucault and discipline, n.23.

⁶⁶ Marx's conception of human nature as the nexus of economic relationships, chapter 1.

⁶⁷ Girard's theory of mimetic desire which is acquired by two human actors both desiring the same object, shares similarities with my claim that human relations are all object mediated, although Girard's claim is based in psychoanalysis. R. Girard, 'Mimesis and violence: Perspectives in cultural criticism', *Berkshire Review*, 14: 9–19.

humans relate to each other primarily through how they interact with objects, which determines the terms of their mutual relationship. Instituting object-relations is an act which involves multiple human actors, either acting in concert or simply implicating others as another object factor in action. Formally instituted object-relations such as legal regulations are characterised by thorough discursive articulation and explicit designation of the various roles and positions of the human actors interacting in that context.⁶⁸ The object mediates the relation between human actors in a clearly defined way which is less susceptible to variation. For example an authoritatively instituted object-relation which dictates that a material object bearing the marks of ownership cannot be appropriated except with the owner's consent is clearly dictating the terms of the relationship between the proprietor and all other humans engaging in that object-relation. However it is not by establishing relations between humans which make the object private property, but a mode of interacting with objects which creates certain relations between humans, abstracted and formalised into authoritative rules of property. This mode of interaction with others is not deduced from *a priori* natural rights or freedoms,⁶⁹ but is likely one particular mode of object-relation amongst many already extant within a community, whose continued existence depends on its manifestation through repetition of the relevant action.

The priority of object-relations in establishing the terms of human relations means the latter is necessarily mediated by objects. The possibility of a way of human interrelation is first established through interaction with objects, before its implications for human interrelations are made evident or explicit.⁷⁰ Objects are able to serve this mediatory role due to the power they exert over human action.⁷¹ Because the object-relation not only constitutes the reaction to the object, but also the terms of how one human relates to another in respect to that object, acting in conformity with the object-relation is acting in regard to the other according to the terms of that object-relation. If I refrain from unilaterally appropriating objects, I am acting in conformity with an object-

⁶⁸ This is akin to Lindahl's formulation of ordering, which he states as 'we jointly disclose something as something in order to'; Lindahl n.24 pg.125-127. The similarity with my argument lies in both the disclosure of something as something, and instituting an appropriate object-relation entails a change in the treatment or significance of the object concerned.

⁶⁹ Contrast Hobbes and Kant, chapter 1.

⁷⁰ This might seem to undermine my earlier contention that object-relations may be instituted by mutual decision and collective action, which seems to suggest a form of collective agency. The answer to this is that the central role afforded to objects as the topic of collective action demonstrates objects are pivotal rather than incidental to human relations. If human interactions always seem to revolve around or implicate objects in some form, it is an indication of the indispensability of objects to human relationships, hence the pivotal locus of such relationships.

⁷¹ See 4.3.3 above.

relation pertinent to the norms of private property, so I am effectively bringing about a state of affairs wherein other human actors are proprietors of objects. Importantly this reaction is primarily triggered by the presence of the object and not the presence of the other who may be physically absent. It is not the proprietor whose presence or words demand the recognition of his status as proprietor, rather it is the presence of the object in its modality as private property which exerts a power over human action. If the action conforms to that power then by proxy the status of the proprietor is affirmed, and the objects has mediated human relations according to the norms of private property.

Whereas for formally instituted object-relations the terms of that mediated relationship are relatively stable across contexts, for informally instituted object-relations the mediating effect is much more context- and actor-sensitive. An example of informally instituted object-relations may be a child imitating others' actions and repeating that action with external reinforcement until he becomes adept.⁷² As the relevant object-relation is not presented in isolation or explicitly instructed, but is embedded within particular contexts and placed amongst various other object-relations, what is learned through imitation and observation is a more holistic and intuitive understanding of the object-relation in its contextual variations.⁷³ As such it is difficult to pinpoint the exact moment in which the object-relation is instituted. It is also difficult to articulate the precise content or terms of the object-relation, and it is likely that there is no discrete object-relation standing in isolation, but rather a myriad of variations which share points of commonality.

Informally instituted object-relations mediate human relations in the same manner that acting towards objects brings about a certain relationship between human actors, with the difference that terms of the relationship are not explicitly specified. However object-relations do not remain in this implicit state, for there appears to be an inclination to proliferate discourse in order organise and explain the object-relations and attribute to them an explicit purpose or meaning.⁷⁴ Such inquisitiveness into the reason or motivation for human action is what drives the proliferation of discourse which seeks to order action and experience. For now let me only emphasise that although most object-relations arise in an informal and non-deliberate way, the drive to

⁷² Byrne n.64

⁷³ Essentially a process of socialisation. Similar to pre-interpretive practices as described by Ronald Dworkin, *Law's empire*, Oxford: Hart. 1998.

⁷⁴ Akin to Dworkin's stage of pre-interpretive and interpretive practice; *ibid.* chapter 2.

theorise is applicable in equal measure to formal and informal object-relations. The important effect is human actors tend to rationalise their actions in terms of these theories, particularly in the case of those unconsciously assimilated object-relations where the norm of action is not so immediately transparent.

4.4 Group object-relations

I have stated that objects' modalities are public and require social action to maintain. That social action comprises of object-relations which are instituted by a collection of human actors, whose interrelations are constituted by these object-relations. These claims imply that object-relations rarely, if ever, pertain to an individual in isolation without mediating the relation between him and any other individual. This leads to the conclusion that object-relations must arise from and be embedded in a setting consisting of multiple human actors, in short a group. This raises the issue of group formation and action, especially pertinent to law as a group phenomenon; how these concepts may be constructed from my theory of object-relations will form the topic for this section.

Object-relations are different from imperatives or motivations of individuals which are usually thought of as exclusive to the individual will or subject.⁷⁵ Motivations such as desire, fear, passion are generic categories applicable to all humans who have capacity for feeling, but the manner in which these motivations are theorised into causes for action posits an atomised human actor as the locus of internal causation of action.⁷⁶ Similarly categorical imperatives which ostensibly apply to all humans with equal force are completely dependent on the individual will of the actor to determine action.⁷⁷ Neither conceptions of motivation or will take account of the object except insofar as a potential object of desire, or of the other humans whose presence lies behind the object and for whom the object acts as a proxy.

On the assumption that object-relations necessitate or implicate a situation where multiple human actors are acting with minimal conscious coordination, there is a need

⁷⁵ Immanuel Kant, *Groundwork of the Metaphysics of Morals*. Rev. Ed. / Translation Revised by Jens Timmermann. ed. Cambridge Texts in the History of Philosophy. Cambridge: CUP, 2012 4.446-4.448. Hobbes n.54.

⁷⁶ Hobbes n.54.

⁷⁷ Kant, n.75.

to construct a model of group action. I have discussed in previous chapters the dissatisfaction I have with the theories of group action which depend on atomised conceptions of the individual as a conduit of motivation and will.⁷⁸ Such theories ultimately seem to collapse action into a purely subjective issue and reduce group action to a simple aggregation of individual action multiplied by a constant to create a homogeneous mass consisting of individual units.

In contrast I would argue that object-relations which are instituted and engaged in by a group form the building blocks of group action; these are group object-relations by virtue of their particular relation to the group. Where object-relations constitute the appropriate reaction to objects simpliciter, group object-relations constitute the appropriate reaction to those objects designated as group objects. Where objects mediate between human actors, so group objects mediate between the individuals and the group itself, and also between the individuals within the group. The relational structure of the group is a dynamic conglomeration of human actors and objects which are not prior to the group entity, but constituted by and through group relations. The group entity maintains its existence only insofar as the individual actors respond to group object-relations in the appropriate way, which is to say the group entity maintains its integrity by the individual human actors behaving as if the group entity is real.⁷⁹

4.4.1 What is a group object?

The group object is prior to the group entity, being the material embodiment of the latter which is a non-physical conceptual entity. For the following discussion I will simply assume there is a ready formed and identifiable group comprising multiple human actors. A group object is an object which has been designated a name by the group, so invested with a meaning, function, and value specific to the group. These group modalities need not be unique in the sense of being wholly novel meanings or inventions, but they must be additions which invest something more in the object that is specifically pertinent to the group. That is whilst the objects' modalities may remain the same in actuality, it must gain some significance for the group which is not

⁷⁸ Chapter 1.

⁷⁹ This is because group entities lack a direct material presence in the world, unlike human beings and objects, so their material existence must be manifested through group objects and the corporeal actions of humans who uphold the integrity of those group objects.

accorded to non-group objects. Dubbing the object as a group object is sufficient for this purpose.

The first objects to undergo this group designation are likely to be the bodies of the individual humans who together constitute the group. This occurs by designating their bodies the name of 'group member', so they now hold a meaning, function, and value which is particular to their relation with the group. A 'member' denotes being an integral part of a whole, being an object and extension of a group and its associated discourses. A member's function is to embody the group and its norms, to act as a conduit for the group's actions and objectives. A member's value may be to bolster the group's capital and presence in the wider community.

It is important to note that even though the individual members are materially prior to the group, it is the group which is conceptually prior to the members. A collection of individuals do not make a group, but by acting as if they are a group through group object-relations, that is by treating others as members of the group, they are constituting the terms of group membership. Take the case of the social contract which is the coming together of all members of community to form the group known as civil society. It is not a matter of individuals each exerting an act of autonomy individually by binding themselves to the social contract. Rather they are already acting in the manner of a social contract before being constituted as individuals equipped with those capacities necessary for the formation of such contract, namely Reason and autonomy to place oneself under social contract, endowed with freedom which is voluntarily curtailed. Just as the human body is composed of disparate parts which take their names and meanings from life sciences,⁸⁰ so too do human objects as the members of a group take their names and meanings from the group discourse. These might be State and its collection of individual citizens with rights and freedoms, or capitalist economy and its collection of rational and selfish property owners. This discursive individual is manifested into material form by the human acting in conformity with the relevant group object-relations and in turn constituting the group entity.⁸¹

Other objects may be designated as group objects by being controlled, owned, used, or coming into any other relation with the group entity. A group entity cannot be

⁸⁰ Foucault n.25 Part V

⁸¹ I will argue in later chapter that this is a process of interpellation, which in conjunction with the proliferation of discourse contributes to the foundations of forming normative frameworks.

without some material object which embodies it and acts as the group's material aspect. Aside from the bodies of its members, any group will likely require some further material object to serve as a sign of its existence, such as physical or virtual territory, possessions and products, emblems, symbols. These group objects are invested with modalities particular to the group and its members, which also means such group objects will have object-relations instituted at the group level which constitutes the particular terms of interacting with group objects and with group members.⁸² Instituting object-relations at the group level entails both formalised instituting whereby group members act in concert to determine the object-relation, and informal instituting whereby group members by prolonged repetition of certain actions form customs and conventions pertinent to the group.

4.4.2 Group objects and obligation

Given that group object-relations are instituted at the group level, the appropriate form of a group object-relation uses the identifying pronoun of 'we', hence 'we think' or 'we do'.⁸³ This 'we' is not a purely conceptual construction based on the amalgamation of multiple 'I's', rather it is an aspect embodied in the group object-relation itself.⁸⁴ This 'we' is not like 'we the people' in social contract theory, which is a retrospective reconstruction of political fiction.⁸⁵ The group entity is constituted by humans acting

⁸² Searle defines such group object-relations in the form of 'we accept (S has power (S does A))' as the permissive form of allowing the exercise of power by individuals under certain conditions; Searle n.11 chapter 4.

⁸³ Group intentionality is a contentious issue, with views ranging from the collectivity as a phenomenon distinct and separate from the individual, to claims that there is a continuity between individual to group. Searle posits the collective intentionality as a 'primitive phenomenon' which cannot be reduced to individual intentionality and meta-beliefs. He also uses the term 'we' to denote this collective intentionality; Searle n.11 chapter 1. Whilst I agree group or collective intentionality cannot be reduced to a 'I think that you think that I think...' series of meta-representations, I do not agree with Searle in positing the group intentionality as something qualitatively different from individual intentionality. Cf. Lindahl n.24 who denotes this collective intentionality as the 'first personal plural perspective' which is not reducible to a multiple of first person singular perspectives, and is characterised by a form of joint action wherein all the group participants are engaged in acting together in accordance with the point of group action. My view tends towards reductionism, meaning that I do not believe there is a metaphysically separate category of collective minds or agency, but only a complex of individual minds and agents. See Michael Bratman, 'Shared Intention.' *Ethics* 104(1) :97-113. Cf. Kirk Ludwig, *From Individual to Plural Agency: Collective Action* / OUP 2016 chapters 15 & 18. I would venture further towards reductionism and claim that plurality in the form of intentional planning and coordination is not necessary for collective action, including large scale group actions such as maintaining a legal system. Cf. Scott Shapiro, *Legality* Cambridge, Mass.: Harvard Univ. Press, 2011.

⁸⁴ The conceptual and temporal unity between the group intention and the individual action which embodies it amounts to my rejection of planning, agreement, or any other conscious coordination between individuals as the providing the source of group action. There is no prior formation of group before the collective action, so the action itself constitutes the collective, whilst remaining 'individual' in the sense of originating from a singular actor. I will develop my conception of group action further in chapters 5 & 6.

⁸⁵ See chapter 1.

‘as if’ they are already members, this acting ‘as if’ is simply acting in accordance with group object-relations; it is the group object-relation which constitutes terms of acting in the ‘we’ sense. The ‘we’ is not conceptually prior to group action, but is embodied in the group object-relation, and materialised at the same moment of the various members acting in conformity with the group object-relation of ‘we do x y z’ norm.⁸⁶

This ‘we’ indicates a significant effect of group objects and their object-relations, which is to found the conditions of obligation. Obligation is an other-regarding or other-directed attitude which is characterised by a mutual demand. Group objects are able to mediate obligation between group members because they are controlled by the group and not by any individual member unilaterally, so are shared objects in the sense that each member has some claim or connection to the object by virtue of their membership status.⁸⁷ The terms of the mediated relationship can sustain any content, and must be set at the group level. So a group might institute a norm whereby only certain members may have access to group objects, which would constitute the respective object-relations of the privileged and non-privileged members towards that object. Excluding access or denying positive claim does not sever the shared aspect of group object, it is simply instituting a positive object-relation with a negative content. In contrast if any member unilaterally monopolises group objects without regard to group object-relations, such action undermines the shared aspect of group objects.⁸⁸

Obligation arises from this shared aspect of group objects as members have a minimal capacity to enforce this sharing, in other words to demand that group object-relations be upheld. Conforming with group object-relations constitutes forming and maintaining the group entity, so conversely any action which undermines group object-relations

⁸⁶ I am assuming groups exist and interpellate the human as member; in other words humans cannot exist in isolated or atomised fashion, but are always designated through a wider discourse.

⁸⁷ Margaret Gilbert makes a similar assertion in relation to joint action, which she claims is the source of entitlements, claims, and obligations between the participants of that joint action; Margaret Gilbert, *On social facts*, London: Routledge 1988 Part IV s.3

⁸⁸ If a group places absolutely no constraints on access to objects, it cannot be said to either control the object or to be instituting group object-relations. When I say shared I am not implying any notion of equity or egalitarian ideal, but only that the object-relations instituted by the group constitutes the terms of member to member, and member to group relations which cannot be arbitrarily altered by individual members. The group object mediates a three-way relationship which constitutes its existence as group designated object. Its name and modalities, and its object-relations are shared, so used in common amongst the group and are imposed by and onto members, without necessarily implying that its concrete terms must also be substantively equal.

threatens to undermine the group entity.⁸⁹ Members whose interrelations are mediated by group objects to which they share a connection have a mutual obligation by virtue of the object-relation they each hold towards that object. Put simply their respective object-relations instituted at the group level already set out the terms of their respective positions and actions. By acting in conformity to that object-relation they will be acting with regard to the group and other members and so acting according to their obligation to both parties.⁹⁰

I am keen to recast group action and obligation in terms of material objects and object-relations in order to avoid relying on immaterial notions of agency as foundations for group phenomenon. Group entities such as institutions, State, family, which lack an immediately observable physical entity must be manifested into physical form through the actions of their human members. However these entities also exert a very material force in the form of objects which they control, and object-relations which they institute and use to influence human action. Their method of realisation is not simply through discursively rationalising human action, but physically using the power of objects to mediate human relations in a way conducive to the perpetuation of a particular set of object-relations.

In summary object-relations constitute the appropriate physical and cognitive reactions of humans towards objects, including other humans as composites of objects. These reactions are triggered by the forceful presence of objects which exert an influence over human action by compelling or pressuring a certain reaction. This power exerted by objects enables them to act as mediating objects in between human interrelations, by operating as the proxy for the other who is physically absent, or for the group entity which lacks a physical presence. The object-relations constitute the terms according to which humans act as if those relations are real, and in doing so (re)creates that normative reality and constructs their material world.

⁸⁹ Whilst Lindahl makes a similar assertion that the group or collective is sustainable by each individual acting in accordance with the terms of joint action, however inarticulable, his conception of the collective is overall a more cohesive conception, built upon the notions of selfhood and sameness. Whereas I would argue that my notion of group, constituted through group object-relations, is a more open textured concept. Lindahl n.24 pg.191-193.

⁹⁰ My conception of obligation is not one consisting of rights, claims, or powers, but a something less discursive. It denotes a sense of being put under obligation, of being compelled by the membership status towards certain appropriate actions.

4.5 Signifying chains

Throughout the foregoing I have made frequent references to discourse and discursive meaning without explicitly defining or explaining those terms. I will now elaborate on the signifying chains which overlay the material framework of objects and object-relations with symbolic significance, and together constitute the embodied category as normative reality.

Signifying chains are formed through the medium of symbolism, linguistic or other. They differ from objects and object-relations in that they lack an immediate material presence in the world.⁹¹ Objects can point to a material thing as the reference for its name, and object-relations can point to a human action as its material aspect. In contrast signifying chains have no immediate material presence, but must be embodied in some other material thing such as an object or a human action.⁹² Signifying chains form the networks which transmit meaning; they enable communication, understanding, and reasoning. A basic signifying chain is formed when an object's modality refers to a generic referent through which its meaning is grasped, and the object placed in position and relation to other objects which share that referent.⁹³ These relations and references which connect objects together constitute a rudimentary signifying chain. It figuratively strings objects into a coherent series which is identified by the common generic referent through which each object in that series is grasped in that specific modality.⁹⁴ The common referent is the signifier, the objects in the series are the signifieds.⁹⁵

In a spurious way a signifying chain can be described as word associations where objects indicate or call to mind other objects based on their shared signifier. Objects

⁹¹ I refer to the semantic aspect only, and not to material signs or symbols, which I would classify as objects.

⁹² Invoking meaning involves activation of motor or perceptual features in the brain; see de Vega, 'Levels of embodied meaning: from pointing to counterfactuals', in *Symbols and Embodiment* n.14 pg.285-292.

⁹³ The meaning of symbols, in this case words, are determined by their relation to other symbols in context; Walter Kintsch, 'Symbols systems and perceptual representations', in *Symbols and Embodiment* n.14 chapter 8. The use of imagery is integral to human understanding and retention of symbolic meaning; Paivio and Cofer, 'Mental Imagery in Associative Learning and Memory.' *Psychological Review*, 76(3): 241-63.

⁹⁴ For example the object of an apple can be understood in its meaning modality as being a red object; here the generic referent is the quality of redness which is acting as the signifier for a signifying chain of red objects such as blood, red roses, red flags, etc.

⁹⁵ This structure of signifiers and signifieds forming chains or networks of reference is very similar to that posited by Slavoj Žižek, *Enjoy Your Symptom! : Jacques Lacan in Hollywood and out* Routledge Classics. New York: Routledge, 2008.

can act as proxies of other objects by invoking these signifiers and signifying chains and calling to mind the relevant quality they attempt to represent.⁹⁶ Objects may do this through the medium of language, such as in straightforward similes and metaphors, or through their material presence, by presenting visual or other sensory stimuli to invoke memory. It may seem a spurious observation to say that objects and words remind us by association of other objects and meanings, however I would argue that human symbolic communication occurs precisely in this spurious fashion.⁹⁷

Although signifying chains form connections of meaning between objects, these signifiers must be embodied in material signifieds in order to sustain their meaning. In other words there is no quality of redness that can be expressed except through red objects, and when we think of red, we think not of the idea of red but of a red object, grasped in its particular shade of redness exhibited by the object in mind.⁹⁸ Furthermore we do not simply think of redness in a purely mental fashion, but in a perceptual act of sight which registers redness in our material world as a quality of objects, and connect them together under their shared generic referent.⁹⁹ Objects are capable of being integral signifieds of multiple signifying chains, which enable them to symbolically invoke meanings and references which share no apparent visual or linguistic relation.

Signifying chains form a symbolic network from material objects by connecting them through their various modalities. These chains of meaning are not fixed, but are capable of fluctuation and change. Some will prove more stable, some more fluid; their character could be described as one of plasticity. The meanings, functions, and values of objects are capable of changing through being ascribed different meanings and being put to different uses. This plasticity is evidenced in the relative stability and endurance of certain objects' modalities which resist change due to strong naturalisation and reinforcement. These more stable modalities can operate like nodal reference points which prevent the signifying chains from fluctuating radically.

⁹⁶ Similarity of appearance is a significant factor in human identification of common properties between objects; Solomon and Barsalou. 'Representing Properties Locally.' *Cognitive Psychology* 43(2): 129-69. Calling to mind is analogous to the process in psychological literature referred to as 'priming'.

⁹⁷ I would point to the abundant use of symbolic techniques in rhetoric, poetry, and humour which are designed to evoke affect and empathy by invoking as greater a number of signifying chains as possible.

⁹⁸ Paivio et al., n.93.

⁹⁹ Referent is not limited to meaning, but encompasses function and value modalities. A doorstop designed for that purpose and any wedge shaped object would share a function signifier; gold and precious stones share a value signifier as being intrinsically valuable.

4.5.1 Discourse

Signifying chains form the symbolic structure of discourse by organising objects' modalities into series and networks by reference to common signifiers. The question is whether these series and networks amount to discourse in the sense of propounding an internally coherent view of the world. I argue even rudimentary signifying chains do amount to discourse; by designating the relevant objects to be included in its network and determining the particular modalities of these objects, the signifying chains are really constructing a normative narrative of the material world.¹⁰⁰ This capturing of objects into networks of signifying chains forms the foundations upon which more complex discourses are proliferated. In the embodied category there are no objects which are free from being integrated into signifying chains, so no objects which do not hold some discursive import.

The material world is encountered in the form of normatively significant objects.¹⁰¹ However this does not imply that the world is represented through sophisticated forms of discourse, but rather encountered foremost in the form of objects in their material immediacy. The significations of objects are understood at a bodily level without the need to refer to more complex or schematic discourses through cognitive reflection.¹⁰² This is connected to my argument that most object-relations are automatic reactions triggered by the forceful presence of objects, which entails a combination of embodied understanding of an object's signification and a response triggered by bodily compulsion without any need for deliberative reflection or decision.¹⁰³ This bodily conditioned response is important to avoid collapsing all action into an effect of reflection, and maintains the materiality of discursive objects by grounding their embodied modalities at the bodily level.¹⁰⁴

¹⁰⁰ Much like how systems of discourses differentiate themselves from other systems by determining both their inner functions and outer environment; Luhmann n.25 chapter 5.

¹⁰¹ Akin to Heidegger's 'referential whole', or 'readiness'; Martin Heidegger, *History of the Concept of Time*, Bloomington: Indiana Univ. Press 1985 pg.187.

¹⁰² Ibid. pg.189.

¹⁰³ Bourdieu describes a very similar situation when he asserts that the habitus is disposition inscribed at the bodily level, alternatively describing the habitus as history objectified in bodies; Pierre Bourdieu, *Pascalian Meditations*. Cambridge: Polity Press, 2000 pg.150-155.

¹⁰⁴ The specific neurophysical mechanism which enables how semantics are related to their material counterparts, is not pivotal to my thesis. It is sufficient for my purposes that human actors react in an embodied manner, either by action or active cognition towards objects, such that action is not solely determined by ideal notions of agency.

4.5.2 Organising meaning

Signifying chains organise objects into series and networks of meaning to form a discursive construction of the material world into a normative context with which human actors are able to navigate and engage. Simultaneously signifying chains organise object-relations into networks of cohesive actions and transforms them into social practices and behaviours. The discourse behind object-relations organises disparate actions into a systematic network which refers to something beyond the immediate act. That is to say discourse invests action with a point¹⁰⁵ or purpose which is not immanent to the action,¹⁰⁶ but is imposed upon and reconstructs the action's meaning according to the terms of discourse.

Discourse achieves this by organising a collection of object-relations into an orderly group connected by signifying chains, and imposing the shared signifier as the quality of those object-relations. This gives meaning and significance to disparate actions which would otherwise be mutually unintelligible by imposing a common quality to form a coherent activity, a series of actions in chronological, spatial, or symbolic order.¹⁰⁷ Discourse is to some extent reflexive¹⁰⁸ as it makes action the object of knowledge and analysis, and posits reasons, justifications, and rationalisations for action. I would characterise this as a reflexive process of reconstructing action according to a particular normative system of understanding, likely in order to determine future paths of action informed by a contrived purpose.¹⁰⁹

¹⁰⁵ I do not use the terms point or purpose to mean a normative ought or end, but in a more mundane sense of simply being intelligible or comprehensible action. That is action which serves some meaning, function, or value beyond the physical motion itself.

¹⁰⁶ Immanent in its ideal sense of some ultimate end or value being realised through action. Although I conceive of action as embodying norms and values, the embodiment is a material process of ascribing meaning to action, so different from the ideal notion of meaning being immanent within action.

¹⁰⁷ The discursive order of action can be as rudimentary as the activity of walking, which comprises of a chronological series of bodily movements, to the symbolically complex such as the activity of purchasing goods. Likewise the discourse can be more or less complex irrespective of the complexity of the activity; the apparently straightforward activity of walking may be the subject of immensely complex theories of human biology. What is important is the discourse as a particular frame of normative understanding which imposes meaning *post facto*.

¹⁰⁸ Used in the same sense as reflexive practice, both entails a folding back and reexamination of action. If discourse were purely reflective, it would undermine my claim of cognitive activities occurring at an embodied level, so I use the term reflexive to differentiate reflection which I associate with ideal forms of reason. See 'Being-in-the-world as incarnate reflexivity.' 275-290; and 'Practical reflexivity' 291-317; *In Reflexivity & The Crisis of Western Reason*, Taylor & Francis Ltd / Books, 1995.

¹⁰⁹ This is akin to Lindahl's notion of taking up the mode of interpretation, which consists of reflexively theorising actions and practices which were previously undertaken in the mode of understanding; Lindahl, n.24. Similarly Dworkin's notion of interpreting pre-interpretive practices also entails previously unquestioned practices coming under reflexive examination; Dworkin n.73.

Social practices are instances of discourse proliferation as they seek to (re)organise object-relations according to contrived normative terms. Human actions and interactions display substantial similarities across both temporal and geographical space, however the discourses of human experience are variable and contingent. That is to say we find ourselves engaging in repetitive actions displaying great historical and cultural resemblance, yet our particular narrative which is the way we reconstruct our experience can greatly vary or be in direct conflict with the narratives of others.¹¹⁰ Focusing on discourse obscures the more predominant mode of experience which is the object-relation itself. The social imaginary might be constantly changing, but the menagerie of human activities remain relatively stable.

4.5.3 Proliferation of discourse

Humans exhibit a tendency to communicate along with a capacity for reflexive meta-cognition; these assumptions for my purposes are sufficient to set up the conditions for the proliferation of discourse.¹¹¹ Put simply in their compulsion to understand and control the world, humans not only engage in physical actions within the world, but also make up narratives which gives their actions significance.¹¹² In that process the objects in the world are normatively structured into a familiar environment, and the activities of humans are discursively represented as having meaning, affect, purpose.¹¹³ Groups are one potent source of proliferating discourse, especially coherent and complex discourses such as systems of knowledge or ideology. Other

¹¹⁰ Evolutionary social psychologists would tend to argue that all forms of human culture are borne from evolutionary drives common to the human race, so similarities in cultural practices, in particular sexual and religious practices, are necessary. See generally Barkow, Cosmides, & Tooby, *The Adapted Mind : Evolutionary Psychology and the Generation of Culture*. New York: OUP 1992. Cf. Geoffrey Lloyd, *Cognitive Variations: Reflections on the Unity and Diversity of the Human Mind* Oxford : New York : OUP: Clarendon Press 2007 chapter 7. Although I do not subscribe to the evolutionary psychology argument that human culture is directly conditioned by genetics, I would agree with the idea that cultural differences across human populations do not reflect fundamental differences in human character or behaviour, but am not concerned with discovering the proper cause of that behaviour. In regard to my thesis cultural narratives as signifying chains do have a role in constituting human living as a normative and intentional activity permeated by meaning and symbolism. However the predominant mode of experience remains that of corporeal engagement with the material world.

¹¹¹ I refer to the empirical concepts of folk psychology and theory of mind. Stich & Nichols. 'Folk Psychology.' In *Collected Papers, Volume 1* OUP 2011 chapter 15.

¹¹² Scott Atran, *In Gods We Trust the Evolutionary Landscape of Religion* Oxford: OUP 2002, presents the religious drive in humans as evolutionary urges to overcome the unknown of death and other natural forces.

¹¹³ Žižek's symbolic order presents many similarities to my conception of discourse as a proliferating network of signifying chains. Specifically the symbolic order also takes on the role of giving meaning and identity to human subjects by covering over the original loss or lack; Žižek n.95.

forms of discourse such as customs and folk beliefs might be gradually developed by being transmitted through generations and widespread social imitation.

I believe this tendency to proliferate discourse is significant as discourse is easily reified into the source of normative meaning and obscure the object-relations which constitute it. Signifying chains which are symbolic connections between object-relations subvert that relationship and come to dominate object-relations by claiming to be their determinant. The claim discourse makes is that without it there can be no meaningful or purposeful action, that all action takes its direction and significance from the discourse, specifically the ideal it espouses.¹¹⁴ This valorising process can lead to particular discourses gaining hegemonic influence over human action, hence limiting the possible fields of action and homogenising meaning. When human actors take the discourse as their guide to action, they reflexively change their reactions to objects, so effect a change in the object-relations according to the logic of the discourse. However they also simultaneously render other potential paths of action impossible, which may problematically foreclose choice and change. Although signifying chains are necessary to the constitution of normative action, ossification of discourse does not promote, but limits the space for potential normative action.

I do not believe that this process of reifying and valorising discourse over human action is the inevitable result of the interaction between signifying chains and object-relations. Owing to the ease of discourse proliferation, their influence over object-relations is likely much less than suggested above. Humans in majority of cases do not take discourse as the reason for action, and even if they did the sheer amount of discourse or reasons applicable means that none are determinative over action in the final instance.¹¹⁵ The ordering of object-relations through discourse is a highly volatile and arbitrary process, and only hegemonic discourses which are those clusters of object-relations deeply entrenched in the population possess the privilege of exerting significant influence over human action. Such hegemonic discourses are sustained not only by their signifying chains, but by the strong force of habituation in their object-relations. Although object-relations and signifying chains mutually constitute and reinforce each other, material object-relations form the necessary foundation upon which discourses proliferate and seek to impose their particular meanings and orders.

¹¹⁴ This is akin to the discourse of Hobbes' and Kant's Reason which claims that all morality stems from a particular conception of Reason, without which the human as corporeal being is not capable of realising a meaningful existence.

¹¹⁵ I am rejecting the notion of conclusive reasons.

The tendency for proliferation is coupled with a drive towards totalisation of object-relations under a particular discourse,¹¹⁶ and the expulsion of outliers as anomalies, mistakes, exceptions.¹¹⁷ In order to form an internally coherent narrative of the world, foreign elements such as meanings not designated by the particular discourse cannot be recognised or reconciled into the narrative.¹¹⁸ I believe all discourse assumes a totalising perspective, such that whilst there is communication between discourses, their mode of existence through determining the signification of objects and object-relations cannot be completely reconciled.¹¹⁹ By this I mean that every discourse insofar as it claims to be a distinct normative account of the world must claim prerogative over determining the names of objects and meanings of object-relations it subsumes within its signifying chains. This leads to situations of mutual reinforcement between discourses, but also situations of conflict which reveal the space for choice and normative action.¹²⁰

4.6 The Ternary

I term the combination of objects, object-relations, and signifying chains ‘the ternary’; the variables are separate but mutually determinative, and all serve as functions of the whole which is the embodied category. The three components interrelate on a constitutive level, there can be no objects without the object-relations which constitute their material manifestation of meaning, function, and value. Nor can these be without the signifying chains which order objects’ modalities by positioning them into series and networks. Likewise signifying chains depend upon the signified objects and object-relations for their material embodiment, and its basic form is the relations between objects which construct the world into normative space.

¹¹⁶ Bourdieu on elision of ‘is’ and ‘ought to be’, n.103 pg.111-127.

¹¹⁷ Lindahl refers to this as designating that which is unorderable, so non-significant for the ordering system; n.24. Unlike Lindahl I do not believe normative discourses or systems achieve closure by expelling the unorderable, rather my conception of discourse as normative systems is more open-textured.

¹¹⁸ Ibid.

¹¹⁹ For Žižek that which cannot be integrated into the symbolic order is the Real which is the source of trauma, from which the symbolic order cannot completely detach, so seeks to cover up by producing the *objet petit a*, or the object of *jouissance*; Žižek n.95. For Luhmann this would be a case of interpenetration between systems; Luhmann n.25.

¹²⁰ Discussed in chapter 6.

The embodied category is constructed along this ternary framework of objects, object-relations, and signifying chains. All three components exhibit plasticity which enables change to occur, so that the *status quo* is not set in stone, the meanings and human actions found in the world are always in flux, and the particular contents of objects and object-relations are contingently determined. However the embodied category also exhibits a remarkable stability and familiarity across temporal and geographical space, which indicates that whilst theoretically radical change is possible, in actuality change is generally stilted and haphazard.

4.7 Conclusion

My aim throughout this chapter has been to establish the beginnings of a normative framework thoroughly grounded in materiality, especially for the concepts of cognition and agency. Pursuant to that I have (re)presented a method of construing and analysing the world by recasting it in terms of the ternary. Material objects form the physical units of reality and compel human actors to interact with their material surroundings. These human reactions are object-relations which constitute the entirety of human activity and manifest human interrelations into materiality. This material frame is overlaid by symbolism and semantics transmitted along signifying chains which connect object and action into coherent normative orders. Each component occurs in unison in a material moment of world-building. Having established this workable framework, I proceed in the following chapter to elaborate on the aspect of action and explore how habit may be integrated without jeopardising the element of normativity.

5

Habit and Action

In the previous chapter I established the foundations of an alternative normative framework which takes a fundamentally material approach to developing a theory of normativity. I represented the world in terms of the ternary of objects, object-relations, and signifying chains, which together constitute the mode of human activity in the embodied category. I have so far defined action in terms of object-relations, which are human reactions to objects triggered at the bodily level, and have referred to how repetition of particular object-relations functions to entrench patterns of behaviour. I have not yet explained how both are made possible. My aim in this chapter is to explore the concept of habit as the mechanism of transforming disparate object-relations into enduring patterns of behaviour. Habit is suitable for my purposes as it is primarily treated as an empirical phenomenon in philosophy, along with other bodily aspects such as emotion and passion, and opposed to the metaphysical aspects of Reason and rationality. Habit as an embodied mechanism of action offers an alternative to notions of ideal agency. As a driving mechanism it does not ultimately determine action, so allows a role for deliberation and choice which saves action from external determinism.¹

This chapter will focus on analysing the concept of habit particularly in relation to object-relations at both the individual and group levels.² It will also address questions of habit and discourse, the public nature of habit, and habit and normativity. I will proceed by analysing habit and object-relations first at the individual level, before extending this to the group in order to construct an account of group action which is capable of sustaining social practices such as law.

¹ Habit is often treated as antithetical to normative legal action by many legal theorists, Hart being a preeminent opponent and fierce critic of Bentham's 'habit of obedience'. See H.L.A. Hart *The Concept of Law*. 2nd Ed., 1st Pbk. ed. Oxford : New York: Clarendon Press ; OUP, 1997; I will address the problems of habit and normative action in the next chapter.

² I will not be analysing habit as a general concept in great depth, so questions such as the psychological conditions of habit will not be addressed in detail. My approach to habit will be based on social theory as opposed to neuropsychological theories.

5.1 What is habit?

Let me start with a preliminary account of what I conceive to be characteristic of habit.³

First, there is a conservative aspect to habits of any kind; the engagement of a habit or habitual action implies a repetition of a same or similar action enacted previously. Habit is the repetition of action, and possessing a habit means consistent reenactment of the action over time. Habit in its conservative aspect is repetition of the same or similar action under certain enabling conditions.⁴ Conservative habits tend towards an automatic quality such that the habitual action may be triggered solely by the presence of a certain set of enabling conditions, and become correspondingly more unthinking.⁵

Two observations can be made about this conservative aspect of habit. Firstly this habituation operates on a bodily rather than mental level; as implied by the increasingly unthinking quality of the action, the cognitive element is reduced as the body becomes the primary site for triggering the action.⁶ Secondly and related to the previous point, the action becomes increasingly easy and natural to perform, and there may be an increase in the level of dexterity of the performance.⁷ The conservative aspect of habitual action does not reduce intentional action to a strictly mechanistic action in the sense of being beyond conscious awareness. The action itself is still intentional,⁸ but habituation has reduced active cognition of the various efforts involved in its enactment by inscribing the sequence of efforts onto the body and making the action feel effortless. Likewise awareness of the various efforts is changed from direct

³ In setting out my conception of habit I am merely emphasising those characteristics of habit which I perceive to be most salient to my own argument. I am not claiming that these characteristics are representative or paradigmatic of habit as a general concept, of which there is a rich theoretical history. For a more in depth analysis of the general concept of habit see Clare Carlisle, *On Habit. Thinking in Action*. 2014.

⁴ Carlisle discusses in greater detail the philosophical intricacies of repetition as a defining aspect of habit; *ibid.* chapter 1.

⁵ Dewey also details this deadening effect of habit which renders action mechanical and repetitive, however he identifies the cause of this deplorable result as the rigid attachment to old customs and habits in the external conditions which stymie the expression of contemporary instincts; John Dewey, *Human Nature and Conduct : An Introduction to Social Psychology* New York: H. Holt, 1935 Part I Sections III, IV, V.

⁶ This claim is reflective of Bourdieu's arguments on bodily hexis which he defined as a 'durably modified body' imprinted with social forces; Pierre Bourdieu, *Pascalian Meditations*. Cambridge: Polity Press, 2000 pg.141-144.

⁷ Merleau-Ponty's description of the acquisition of skill beginning from novice to expertise stage; Maurice Merleau-Ponty, *Phenomenology of Perception*, trans. Smith, London: Routledge, 1962. Interestingly he refers to the acquisition of skill as 'habit', so even the seemingly innate motor skills of the human body is for him an acquired habit, such as walking, dancing, etc.

⁸ For my definition of intentionality see chapter 4.

attention into an instinctive feel or appreciation of the action in its holistic form.⁹ For example; in the learning of a new sport the actions feel unnatural and stilted in the beginning, and requires constant attention to the body's form, but through repetition the actions themselves begin to feel natural, and attention gradually changes to an instinctive ability to survey the state of the game and one's own performance.¹⁰

Another characteristic common to all habits, but particularly noticeable in the case of undesirable habits, is their active driving force and the feeling of compulsion towards fulfilling the habitual action. Here the habit itself becomes a trigger for the action, so rather than passively waiting for habit to be triggered, there is an impulse to engage in the habitual action.¹¹ I would state this marks the difference between acting in line with habit, and acting from or out of habit.¹² This compulsive or 'spring like' aspect of habit contributes in large part towards its perpetuation and the drive to create the external conditions which enable its enactment.¹³ Having an active habit will drive the actor to seek out or create opportunities for the habit to assert itself. This compulsive force of habit implies an overriding of its automatic quality, for its strength is most starkly evidenced when bodily impulse overrides other drivers of action such as conscious deliberation. The quality of action has gone from unthinking to compulsion which resists conscious control.¹⁴

⁹ This would be akin to the expertise stage in Merleau-Ponty's theory, n.7

¹⁰ Dewey refers to this dexterity as 'mechanism of action' which he claims is 'indispensable' and distinguishes from 'unintelligent automatism'. For Dewey skill is another term for habit, and artistic practice is repetition of skill rather than the mechanical acquisition of skill; Dewey n.5 pg.70-72.

¹¹ This compulsion is similar to Merleau-Ponty's description of solicitation by the environment which is attuned to the skills of the body; n.7.

¹² Carlisle discusses this active aspect of habit under various headings such as disposition and inclination, all of which share the common theme that habit is causative of action. She also refers to this as the potentiality of habit, as opposed to the actuality which consists of habit's repetition; Carlisle n.3 pg.7-9.

¹³ Bourdieu defines habitus as actively working to bring about the conditions most conducive to its actualisation; Bourdieu n.6 pg.147-150. He also notes that in times of crisis where the habitus is confronted with radically different conditions, they can become dysfunctional; pg.160-161.

¹⁴ Three points: 1) this rendering between bodily action and mental deliberation may appear to affirm a body/mind dualism which argues that the contumely body should be brought under control. I would argue it affirms the opposite, as the control of mind over body is evidently not a simplistic matter of issuing orders for action, as the body seemingly rebels even against its own passions and desires. 2) on the issue of motivation, I have not presented any detailed conception of what motivates an actor, beyond rejecting that reported reasons for action are adequate drivers of action. Motivation as a mental exercise tends towards notions of agency I have rejected, whilst motivation as solely doing what one desires fails to capture the experience of being compelled by habit against one's (reported) desire. I believe my thesis may progress without a detailed account of motivation and habit, since I reject a body/mind dualism, habit and conscious deliberation may serve equally as sources of motivation. However insofar as motivation is constituted by habit, its internal workings are likely not penetrable by mental effort, and as I am not concerned with how habit works neuro-physiologically, I will simply treat habit's effects as *prima facie*. 3) the compulsion against control is a quality of experience; the action appears to be beyond control as the actor is not able to fully resist the habit, but the physical action itself remains intentional and within the locus of motor capacity.

Another facet of the compulsive aspect of habit is the drive to adapt to varying conditions which expands the situations conducive to that habit, so creates greater opportunities to compel its fulfilment. This is a mode of creating conditions favourable for habit's fulfilment, by adapting one's actions to support and maintain the habit. For example, in financially straitened circumstances an individual might maintain certain luxuries to which he has become accustomed and feels unable to do without, and save on more essential expenditures despite its economic irrationality. In this way he may be said to be driven by habit to alter his actions in the face of changed conditions in order to bring about habit's fulfilment.¹⁵ The habit has effectively expanded itself into a new situation, and due to its conservative aspect may quickly settle into a new habitual routine. The greater the compulsive force of habit, the greater this expanding tendency.¹⁶

Although all habits exhibit both the conservative and compulsive aspects, some actions become compulsive more easily than others, and require less repetition to establish its influence over action. What explains this difference lies outside of the action itself, in some incidental external trigger or effect of the action. These might range from physiological changes to the body, such as in the case of drug use, to the state of external group conditions which make the performance of certain actions disproportionately opportune or easy, such as engaging in excessive consumption of commodities.

These conservative and compulsive aspects form the basic functions of habit and habituation, and can be used to explain habit's other, more wide-ranging effects. In the following I will examine how habit can construct a body with a particular normative

¹⁵ The internal structure of habit and how it drives these sorts of actions is unclear; the individual might justify his choice in terms of luxuries being important for various reasons, or have formed an emotional and psychological attachment which causes anxiety when denied. The specific cause which gives habit this compulsive force is beyond this thesis, which requires only that habit *prima facie* exhibits the features I describe. What is evident is the inability to explain these complex internal structures in terms of desire, motivation, or rationality; habit is arbitrarily allied and opposed to these states, and is not transparent even to the possessor of habit.

¹⁶ I would argue that this expansive force of habit is an active mode of its preservation and resistance to change. Hence this would fall in line with Carlisle's double law of habit in its active and passive aspects. Carlisle in reading Proust noted how habit formed the 'mould' by which the Proust's successive romantic relationships were shaped, resulting in similar obsessive romantic attachments; Carlisle n.3 pg.87-89. This expansive force of habit is also reflective of how *habitus* actively shapes the individual's environment by surrounding him with those things which are most adjusted to his *habitus*; Bourdieu n.6 pg.150. For Dewey this expansive force of habit may be likened to his discussion on how the body is incessantly trying to achieve a state of equilibrium between habits and instincts through manipulation of the external conditions; Dewey n.5 pg.178-179.

orientation towards the world, and condition action by virtually constructing possible future courses of action according to a human actor's history of object-relations.

5.2 Habit and object-relations

To recapitulate, object-relations are reactions by human actors towards objects presented in their various modalities. These reactions can be physical in the sense of movements of the body, or cognitive in the sense of registering, recognising, identifying. For the purposes of analysis I will refer to a particular object-relation to designate a simple discrete action, and multiple object-relations to designate composite activity, although this distinction is artificial and will later be abridged.

If all action can be understood in terms of object-relations and habit in its conservative aspect is the repetition of action, then the relationship between object-relation and habit consists in the latter being constituted by repetitions of the former. Object-relations, when repeatedly enacted, come to cultivate a habit, and habits comprise a series of object-relations in repetition. The object-relation reenacts a particular modality of the object by instituting a peculiar and contingent reaction towards that object; peculiar in the sense of being unique or specific to an individual, group, or discourse, and contingent in the sense of being arbitrary and coincidental, as opposed to necessary or integral. As objects are invested with multiple modalities, there are multiple object-relations which may be the appropriate reaction to an object in any given instance. The effect of habituation upon a specific object-relation is to strengthen the connection between the object and that specific object-relation as the appropriate reaction to that object, tending towards a unity between the object and the human reaction.¹⁷ The result is that particular reaction to the object, which is peculiar and contingent, comes to be perceived as the natural and necessary way of interacting with that object.

This tendency towards automatic reaction relates to the conservative aspect of habit which renders action unthinking as well as enables action to become natural and

¹⁷ Similarly Dewey states 'stimulus and response are mechanically linked together into an unbroken chain' through the operation of habit, which results in absentminded, thoughtless action. Dewey, n.5 pg.173.

effortless.¹⁸ In terms of objects and object-relations, habituation in an object-relation correlates with the naturalisation of the object's related modality; as objects increasingly subsume a modality into a natural property, so is the object-relation reaction to that modality further entrenched through habituation and vice versa. In other words as a certain reaction to the object becomes habituated and unquestioned, the modality to which the object-relation responds appears to the human actor as a natural property of the object, rather than something which his action imposes on it. This is because habit is a reiteration of a particular meaning, function, or value through acting out that modality in material action.

So the conservative effect of habit on object-relations is to strengthen the association between the object and the object-relation facilitating the ease and likelihood of future repetitions. Let us call the result 'habitual object-relations'. These are characterised by their automatic and effortless manner of enactment, their being highly likely to be triggered by the presence of the object, and their reduced deliberative aspect which renders them unquestioning and obvious actions.

Moving on to the compulsive aspect of habit and its relation to object-relations, the effect operates in parallel with and reinforces the conservative force that habit exercises. Recall the power that objects are capable of exerting over human action by compelling a certain reaction to their forceful presence. The compulsive aspect of habit is what enables objects to exert such power over human action. The power exhibited by objects is invested in them through the processes of naturalisation of their modalities and habituation in the relevant object-relations which reenact these naturalised modalities. These processes together reify the human action, which is the real source of power, onto the object and gives it potency. This may be illustrated by the example of objects of desire, wherein objects are perceived to be the cause of

¹⁸ The two trends share a strong correlation, so the higher the degree of automaticity, the less cognitive and physical effort is expended, and the more unthinking the action becomes. I make no claims as to whether these correlations are necessarily related, i.e., whether increasing automaticity requires a corresponding decrease in mental activity. Mindfulness ostensibly offers an alternative of attentive and skilful action, through severing the connection between stimuli and intention, thereby breaking habitual reactions. See Bishop, et al.. 'Mindfulness: A Proposed Operational Definition.' *Clinical Psychology: Science and Practice* 11(3): 230-41.

desire such that it is because of the object and its innate features that desire is elicited within the human actor.¹⁹

This is not a case of projecting some inner desire onto external objects, then misattributing to objects the cause of desire. The desire itself is rather an effect of the compulsive aspect of habit which strives to perpetuate itself by obtaining the external conditions conducive to its enactment.²⁰ The desire exists because of the habit which is not fulfilled. The conditions of that desire, namely the presence of the habit and the absence of the object, are reified onto the object itself, and invest it with a potency as the cause of desire.²¹ In this way each repeated instance of satisfaction of the desire by the presence of the object reinforces the power of that object over future action. It also reinforces that particular modality of the object as an innate natural property which is causative of desire in general, thereby making the relevant object-relation into the inevitable, matter of course reaction to the object. For example, if my felt lack of satisfaction is alleviated every time by buying things, then I come to see every problem or dissatisfaction as capable of being solved by having more things or more money, so I attribute the cause of my desire to these objects and in turn my behaviour becomes increasingly influenced by their power, such as engaging in more actions aimed towards their acquisition.

Thus the interaction between habit and object-relation results in repetitions of the object-relation which entrench the reaction by strengthening the connection between

¹⁹ This notion of desire is almost diametrically opposed to theories which posit desire as an inherent human capacity which is exercised arbitrarily, or according to some predetermined order of natural goods. I believe any notion of desire as organic or spontaneous, and not subject to external manipulation may be refuted by the ubiquitous presence of marketing, advertising, branding, and other media activities designed explicitly to manipulate consumer desires. Similarly the amount of financial investment by food producers into researching and developing taste combinations most guaranteed to replicate addiction in consumers, I would argue are ineluctable indications that human desire is subject to extensive external manipulation. See Kornberger, *Brand Society: How Brands Transform Management and Lifestyle* : CUP: 2010, chapter 8 on the ethical questions of branding. Even seemingly personal expressions of desire such as sexual partners are revealed to be largely determined by racial discourse and fetishisation. See Chong-suk Han, 'They don't want to cruise your type: Gay men of color and the racial politics of exclusion.' *Social Identities* 13(1): 51-67; D. Murray, 'Laws of Desire? Race, Sexuality, and Power in Male Martinican Sexual Narratives', *American Ethnologist*, 26: 160-172. Insofar as desire is conditioned to such an extent by external factors, I would argue that this amounts to the cultivation of habits of desire, in the same manner as other bodily habits.

²⁰ Bourdieu n.6 pg.147-150. Dewey n.5 pg.178-179.

²¹ Dewey advances a notion of desire as the driving force of living beings, which is experienced as desire when the drive encounters obstacles in the environment. The relevant object presented as the goal of desire then becomes that object in the environment which, if present, would unify the partial and competing life activities. Dewey n.5 pg.249-251. I agree with Dewey insofar as desire is a creation or a result of a misalignment of a human's habit or impulse and his environment which obstructs the assertion of that habit or impulse.

object and reaction. It also reinforces the power of the object and renders it capable to exerting more influence over future action.

5.3 Habit and individual

I will now discuss how this combination of habit and object-relations operate at the level of the individual human actor. The main argument is that habit enables the human actor to engage with the world by providing the basis for practical knowledge as appreciation of the present, and by establishing continuity between past and future which enables goal-oriented and anticipatory action. But firstly I would like to address the reasons for this artificial distinction made between the individual human actor and the human as integral to a group.

The material aspect of the embodied category means that it is not reducible to a purely discursive or symbolic description, whilst the embodied aspect means that the activities which construct the embodied category are not reducible to purely mechanistic action. Material reality is constructed through human actions which establish and reinforce the meanings and activities in the world. The human actor by engaging in his life activity is actively constructing his reality, whilst simultaneously responding to that reality in a cycle of production and interpellation of meaning operating in synchronic rhythm.²²

I believe it is important to maintain emphasis on this material aspect in order to avoid hypostatising the normative into a system of abstraction. This might be difficult to achieve if analysis proceeds from a group perspective. There is a tendency to take the group as a collection of homogeneous individuals engaging in mass undifferentiated action, which obfuscates the primary locus of activity generated by the individual units of that mass. Moreover by positing the group as the primitive unit begs the question in that it takes as given what ought to be the subject of analysis. In the interest of establishing a theory of group action as a continuation of individual action, and keeping the material aspect at the forefront, the individual human actor will be posited as the locus of study.

²² Very similar to Marx's conceptions of human senses only coming into being through being objectified, and humans creating their conditions of living from the world passed onto them. See See Erich Fromm, *Marx's Concept of Man. Milestones of Thought*. New York: F. Ungar, 1961.

Another important aspect of the embodied category which needs reemphasising is its active, dynamic aspect. Things and concepts are the results of processes and mechanisms which must be analysed, rather than unproblematic foundational units of analysis.²³ By taking the practical perspective this active and dynamic aspect may be kept at the forefront. By practical I simply mean that the human actor is placed in the urgency of the situation, and his perspective constrained to the immediate practicalities of action as material possibilities and effects, as opposed to their normative status or validity.²⁴ This situated view does not amount to a 'subjective' view in the sense of it being informed by subjective or personal preferences. It is to say that all questions are framed in the form of the practical; the question of 'what ought to be done' is changed into 'what must be done in this situation in order to...', without any reference to universality in the form of action.²⁵ The practical perspective is the only stance a human actor is capable of taking in his present urgency, and it is the perspective most conducive to action and activity.²⁶

In advancing an account of how the practical actor is capable of constructing his embodied reality through his habitual object-relations, the crux rests on how arbitrary actions may be transformed into meaningful activities, and how the activities generated are capable of constituting the embodied category when taken in their entirety. In chapter 4 I argued that object-relations are organised by signifying chains into coherent networks which transmit meaning along the disparate object-relations, but they are not the source or cause of meaning or action. I now develop these

²³ In similar fashion Dewey asserts that things are always processes and events, not finished objects. Things are hypostatised states of their histories. Dewey n.5.

²⁴ This does not deny that human actors are capable of engaging in theoretical or meta-cognition. I am primarily concerned with the quality of action from the first person perspective and its associated bodily aspects, and not cognitive states in general.

²⁵ Dewey in discussing the nature of aims asserts that ends are always 'ends in view', understood as a means in present action, as guiding the direction of present activity rather than as a remote and immutable goal to be attained. For Dewey any ends which are attained are only positions from which further ends may be pursued. In this way I read Dewey as advocating a practical or pragmatic conception of aims which parallels my own conception of the practical perspective. Dewey n.5 pg.223-237. He applies this contextually mediated conception of ends also to moral principles and explicitly rejects Kant's universalisation as the principle of action in attempting to establish fixed moral laws; pg.245-247. My approach of taking a situated practical perspective is in opposition to Kant's universalisation as the principle of action, and I would agree with Dewey that this situated perspective also applies in the case of moral and normative actions.

²⁶ In his discussions on the proper method of sociology, Bourdieu frequently remarks that the site of primary experience must be the perspective of the participating agent, which excludes the objectification of the scholastic point of view, defined as the theoretical reconstruction of the participating agent's experiences. Bourdieu points to the tendency of imputing the scholastic viewpoint onto the experiences of others; Bourdieu n.6 pg.50-56. I agree with Bourdieu insofar as he places as the proper site of experience the agent engaging in the practice.

arguments by drawing on habit and its effects of conditioning knowledge and generating anticipation to argue that habitual object-relations drive meaningful activity by constructing an enduring picture of the world and compelling repetition in human action.

5.4 Habit and activity

The crux of the problem is how to transform arbitrary and disparate actions into meaningful activity. Object-relations reenact an object's modality into reality and manifest the human actor's grasp upon the object through a particular modality. For example, if I use a screwdriver to tighten a loose screw then evidently through my action I manifest my understanding of a particular function of the screwdriver. Moreover it may be further inferred that my grasp of the object is not limited to that specific object in that specific modality, that I have a grasp of the relevant signifying chain in which that specific modality is a signified. So it would not be unwarranted to infer that I also grasp the object of the screw, and the common signifier between screwdriver and screw as tools.

Modalities of objects must be grasped through something beyond the specific object itself, namely the common signifier. This signifier is public in the sense that other humans also grasp these objects through the same signifier, so enabling communication amongst humans. These signifying chains are reiterated every time an object-relation reenacts their connections through material action.²⁷ However this still begs the question of how these seemingly disparate object-relations, these instances of human action can be understood as embodying a meaningful gesture, or as modes of communication. If I point to a rose and utter the word flower, it is taken for granted that I am invoking the meaning of the object, but what is there to deny the possibility that all I am uttering is a meaningless grunt, or that in pointing to something I am not indicating to that object but only making a rude gesture?²⁸ In general terms how are the meanings, functions, and values of object-relations, of actions themselves to be

²⁷ Further see chapter 4.

²⁸ For a discussion on the relationship between gestures and embodied cognition see Mitchell Nathan, 'An embodied cognition perspective on symbols, gesture, and grounding instruction', in Vega, et al., *Symbols and Embodiment : Debates on Meaning and Cognition*. Oxford ; New York: OUP, 2008.

understood such that they are capable of communication and intelligibility? The problem is framed as one of transforming arbitrary actions into meaningful activity.

Just as an object points to something beyond itself for its meaning, so too does an object-relation point to something beyond itself, to the common signifier which connects disparate object-relations together to form networks. These networks of object-relations are what I would designate as activity. Activity is action under a particular modality, that is action which is integral to, and directed at a certain meaning, function, or value which is beyond the action itself. For example, a human actor by drinking water is indicating by his action towards the activity of satiating a physical need, a common signifier which might also include the actions of eating or sleeping. Similar to the common signifiers of objects, the signifier of physical need is not reducible to any one particular need, so in this sense it is somewhat independent of the actions it signifies. However in order to grasp the meaning of the signifier, the human must have undergone actual experience of, and engaged in the actions of physical needs before he can understand the concept of having physical needs.²⁹ The common signifiers of object-relations are abstracted points of similarities and differences between object-relations which enable them to be linked together in relative positions to form a signifying network. Engaging in intelligible activity manifests a grasp of the action and its position and reference within the network of connected actions.

This grasp upon objects amounts to knowledge, which I would define as appreciation of the modalities of objects and object-relations encountered in the world. This conception of knowledge is uncontroversial in that it entails a discriminatory filtering of all available data into an ordered and normative body of facts which then form the content of knowledge.³⁰ From the practical perspective knowledge is not static appreciation of abstract ideas or concepts, but is always in the service of actions; know-how or practical knowledge.³¹ Finally, knowledge is not some ideal or innate

²⁹ Dewey makes a similar argument that food cannot be understood as a good until one has undergone the experience of eating food; Dewey n.5. Cf. Marx and human senses, in Fromm n.22. More broadly the idea that purely ungrounded symbolism alone may provide only a limited source of meaning, see Arthur Glenburg, 'The Limits of Covariation', in *Symbols and Embodiment* ibid. Although his arguments are in the field of semantics, I would view the same criticisms may be applied to my conception of object-relations, since they are reactions to an object's semantic meaning.

³⁰ Kant's categories of understanding which operate to organise the data of sense experience may be read as an ideal conception of a similar mechanism of filtering and organising the raw data encountered in the world. Immanuel Kant, & Norman Smith, *Immanuel Kant's Critique of Pure Reason*. London: Macmillan, 1933, section III.

³¹ Merleau-Ponty's n.7.

capacity of the human, but is the accumulation of experience, recollection, and anticipation which are synthesised into a particular bodily orientation towards the world. Moreover this depends in large part on the operation of habit in buttressing action against volatile change, which makes possible the syntheses of past actions into reliable predictions of future actions.³² In short habit is the condition of a conception of knowledge which depends on repetition of actions and events to construct the present reality, and from that reality virtually construct the future paths of action.³³

5.4.1 Habit and present

I propose that the process of forming a habit is a process of learning and accumulating knowledge through the accumulation of experience. These historical experiences are sedimented and synthesised to form a vision of the world through which the meanings and significations of the present can be appreciated.³⁴ This knowledge of the present entails appreciating the material objects in their various modalities and the appropriate object-relations towards those objects through contextual discrimination. The actor is able to recognise the various objects, to grasp their relative signifying positions, intuitively be aware of their various modalities, and readily react to any particular modality. The world is ordered into an intelligible space and situation which are permeated with meaning and significance.

³² This conception of knowledge as bodily habit shares many similarities with Merleau-Ponty's; 'To understand is to experience harmony between what we aim at and what is given, between the intention and the performance - and the body is our anchorage in the world'; n.7 pg.144.

³³ This assertion of habit as the condition of knowledge is contrary to ideal philosophical traditions, which either relegates habit to the empirical state of being removed from the ideal concepts of knowledge, or denigrates habit as restrictive of thought and truth seeking. Philosophies which advocate a mind and body dualism, such as Descartes, Kant, and to an extent Hobbes, tend to conceive of habit as belonging to the empirical body along with passions, desires, emotions, whilst the proper attainment of knowledge lies at the level of the abstracted cogito. In contrast are the philosophies of empiricists, notably Hume, phenomenologists, and pragmatists who advance a more naturalistic conception of knowledge. For more in depth discussion see Carlisle n.3 chapter 2. In the pragmatist tradition Dewey explicitly asserts that habits are the conditions and means of intelligence; Dewey n.5 pg.176.

³⁴ Although I use the term recollection, I do not denote any representational form of mental recollection, such as content from a memory database. Likewise my conception of knowledge is not representational or content based, in the sense that practical actors when engaging their knowledge to achieve certain goals or actions need not form mental representations of their goals, or compare the substantive elements of their current situation to past experiences in order to act. From the practical perspective, knowledge is skill and ability which is obtained through repetitive practice; see Hubert Dreyfus, 'The Current Relevance of Merleau-Ponty's Phenomenology of Embodiment', in *Perspectives on Embodiment*, Haber and Weiss (eds.) Routledge, New York and London 1996. In the moment of action, knowledge is a synthesis of recollection and anticipation working to move the body without conscious mental representation. That the actor may be inferred to have a certain 'knowledge' is a post facto discursive understanding of his actions in normative terms and context.

Space and situation are normative structures of the material world which condition the interaction between human actor and the world. Space denotes that materiality which directly confronts the human actor as a bounded and situated piece of the embodied category. Knowledge includes a discriminatory filtering of available data into a normative body of facts, which for the practical human actor constitutes his understanding of the present space he finds himself in. The raw data is filtered and structured into an intelligible space by bringing the actor's history of experience to bear on the world and ordering it into a space wherein he is able to interact with objects according to his experience.³⁵ A bounded space is constituted by the objects within that space, all connected together through their modalities and signifying chains and located in relative positions of spatial and symbolic signification. An example of a space would be a bedroom, which the human actor constructs from his experience of similar spaces by identifying the various objects within that space, such as walls, door, bed, and so on. The objects present their appropriate modalities; the walls constrain the spatial expanse, the bed functions as place of rest, and the human actor makes practical sense of the space by virtue of his past experiences of such spaces. A disjunction might arise where an object is not easily integrated into the network of signifying chains constituting a space, such as finding a bed on a beach. In that case the modalities of the objects may need to change in order to integrate the disjunctive object into the space, in effect changing the signifying chains and the meaning of that space and the objects within it.³⁶

Situation is the dynamic mode of the embodied category. Whereas space suggests a static network of objects connected through their appropriate modalities, situation suggests a dynamic potentiality of interaction. The objects inhabiting a space condition how the human actor interacts with that space by compelling the object-relations appropriate to the objects' spatially relevant modalities. Situation is simply the dynamic mode of space manifested through the material actions of the human actor. Where space is constituted by objects and signifying chains, situation is

³⁵ This practically or purposively constructed space is akin to Merleau-Ponty's account of how the external world is opened up by a body of skills, such that the world solicits a bodily response. Merleau-Ponty n.7 Part I s.3; Part II s.2.

³⁶ This conception of space as a normatively constructed setting is largely in agreement with what Bourdieu conceives of as the 'social space' which is 'a structure of juxtapositions of social positions'. Moreover Bourdieu also asserts that the relative position-takings, that is the points of views of the agents within that space are both determinates and determinants in reconstructing the social space. Bourdieu n. 6 pg.182-185. This is parallel to my argument that space as the bounded instance of the embodied category is actively constructed by the human actor.

constituted by the object-relations which pertain to those objects in their spatially appropriate modalities.

This combination of space and situation together constitutes the present moment as it is known by the human actor. He constructs a bounded space from the raw data of the material world according to his past experience, and within that space is able to interact with the objects in their appropriate object-relations. All space is situated in the sense of being embedded and constrained by a setting of particular objects connected in their particular modalities. All situations are spatial and material in the sense of being manifested through the potentiality of objects to compel human action. The present is made up of space and situation, which may be equated to the material and dynamic modes of the embodied category respectively.

This knowledge of the present does not arise from a formal faculty which transcends the material world it orders into intelligible facts, but is forcefully invoked by the objects confronting the human actor, and triggering that body of knowledge to reaction.³⁷ Knowledge of the present is a familiarity with the objects, object-relations, and signifying chains presented within a constrained space, and is attained by synthesising multiple past encounters of similar spaces. These synthesised encounters are recollected when confronted with objects placed in a familiar space or situation. The presence of the material objects which constitute the space and situation are crucial for knowledge of that space to arise, both in order to trigger reaction in the human actor, and to provide the material space within which he can interact with the objects. His knows the space and situation he is presently located within by knowing its familiar objects and knowing how to conduct himself. Moreover this knowledge is built up in

³⁷ This transmission of knowledge onto the external world is known as cognitive offloading, a process which serves integral functions in learning and evolving adaptive behaviours. Basically it entails storing information in the external world instead of in the internal mind, and retrieving that information when needed. The concept is central to literature on embodied and embedded cognition, as knowledge is effectively made part of the material world and connected to the actor through his bodily reactions. See Wilson, 'Six views of embodied cognition' *Psychonomic Bulletin and Review*, 9, 625–636; Droll & Hayhoe, 'Trade-offs between gaze and working memory use' *Journal of Experimental Psychology: Human Perception and Performance*, 33: 1352–1365. That cognitive offloading does not prevent cognitive progress or development, see Martin & Schwartz, 'Physically distributed learning: Adapting and reinterpreting physical environments in the development of fraction concepts' *Cognitive Science*, 29: 587–625; Carvalho, & Nolfi, 'Cognitive Offloading Does Not Prevent but Rather Promotes Cognitive Development' *PLoS ONE*, 11(8).

habits of the body, hence my claim that habit is the condition of practical knowledge, since the latter is really a hypostatisation of the former.³⁸

For example, a human actor encountering a glass of water is instructed to drink, and in doing so may experience a quenching of thirst. This object-relation is repeated until a habit is formed whereby the presence of water triggers the recollection of past experiences of drinking, so furnishes the present knowledge that the appropriate reaction to water is to drink it. In this case it may be said that the human actor has cultivated a habit of drinking water, a habit which is triggered to action by the presence of the object associated with the habit. However I would extend the example beyond this simplistic conclusion and say that the human actor has acquired both a habitual knowledge of water as drinkable, and a habitual knowledge that drinking quenches thirst. This formulation opens up the object and object-relation to their wider respective modalities and signifying chains connecting them to other objects and object-relations. In doing so the human actor is not limited to knowing that water is to be drunk, but can grasp the function of water in its modality as drinkable liquid, and through that signifying chain understand other liquids as sharing the same function.³⁹ As a result, when confronted with a liquid he can have recourse to his accumulated experiences of drinking in order to discern whether the liquid is drinkable or not. This reaction to liquids in perceiving their potentiality as beverages is a habitual response which has recourse to a history of experience also sustained through habit.⁴⁰

What has been described so far is exhibitive of habit's conservative aspect. Habit's compulsive aspect is exhibited by the human's drive to seek for water or other liquids

³⁸ Dewey describes knowledge as a combination of recollection, observation, and planning, which together discriminates and identifies objects; Dewey n.5 pg.182. He explicitly states that 'what we known...are the conditions which have been mastered, incorporated in the past'; pg.184. It would appear that knowledge in the sense of knowing the meanings and significances of objects is a result of the functioning of habit. For Dewey the operation of habit alone would result in mechanical and repetitive action without place or necessity for thought. He asserts that it is a combination of habit and impulse released by the perpetually changing environment which generates an intelligence, defined as practical knowledge. This knowledge is geared towards unifying the old habits and new impulses so bringing the organism back into equilibrium with its environment; in short it is used to guide action. For Dewey habit 'supplies content, filling, definite, recognisable subject-matter' for the impulse to action into unknown territory; pg.172-180.

³⁹ See generally on the topic of learning by analogy; Vosniadou, 'Analogical reasoning as a mechanism in knowledge acquisition: A developmental perspective'; Cf. Bransford,et al., 'New approaches to instruction: Because wisdom can't be told' in Vosniadou & Ortony (eds), *Similarity and Analogical Reasoning*. Cambridge: CUP, 1989.

⁴⁰ Interesting study on how children learning fractions exhibit more or less receptivity to the external environment depending on their level of conceptual mastery; Martin, & Schwartz n.37. Cf. Study of how actions serve not only an instrumental, but also epistemic function; Kirsh & Maglio, 'On Distinguishing Epistemic from Pragmatic Action' *Cognitive Science*, 18: 513–549.

in response to a feeling of thirst. The knowledge that drinking provides the desired effect of quenching thirst is again a habitual response to the feeling of thirst, built up through past experiences of quenching thirst by drinking.⁴¹

The foregoing analysis of how habitual practical knowledge may be cultivated is an artificial and simplistic account. In reality such experiences are not presented as isolated object-relations to be habituated, but as composite and complex situations involving multiple objects and object-relations. Furthermore the most fundamental object-relations which I believe form the foundations for more sophisticated actions come as they are embedded in every moment of living. The habits of living are less explicitly instructed and repeated, but are necessarily engaged in, and through gradual corrections come to be inscribed onto the bodily knowledge of the human actor without any great level of cognitive attention. So surreptitiously through the passing of time and maturation of his biological being, the human actor has connected his arbitrary actions into a meaningful activity of living. He knows how to sustain his life by engaging in those object-relations relevant to living, such as finding sustenance, finding shelter, resting in safety.⁴²

Although it might be argued that simply knowing how to fulfil a biological need does not amount to knowing the meaning of that action, from the practical perspective meanings come in the form of effects and consequences; knowing the meaning of foodstuffs and the consequences of eating amounts to a knowledge of their normative import. The discursive knowledge of the biological digestive system, mechanisms of hunger, energy density of foods, are not expressions of a higher or more objective knowledge, but a different normative ordering of the world which entails a different set of habits and habitual object-relations.

5.4.2 Habit and future

In the foregoing I advanced my conception of a habit conditioned knowledge as bodily familiarity with present contexts which enables interaction with the world. This is

⁴¹ Dewey argues that a man must have experienced water as a good in some concrete past experience in order to know it as an end, a goal of action. This is analogous to my argument of habitual knowledge.

⁴² Dewey states that the 'sensible intimation of the practical function of knowledge has led men to identify all acquired practical skill, or even the instinct of animals, with knowledge', although this must be read in light of his later statements on the deadening of thought by rigid habit. Dewey n.5 pg.177-178. However insofar as this applies to the know-how of living, which is a process of bringing habit to bear upon changing environments, it does amount to knowledge as Dewey defines it.

reinforced by how habit functions to maintain temporal order and continuity in action. The dual functions of habit, namely of making the present familiar through recollection, and making the future accessible through anticipation,⁴³ together transform arbitrary action into meaningful activity which constructs the embodied present and future.⁴⁴ My aim in exploring the temporally dynamic aspect of action is to establish how habitual object-relations condition not only behaviour in the immediate present, but also possible paths of future action, such that human activities display a temporal stability sufficient to maintain and ossify into enduring group institutions and practices. If theoretically object-relations are unique instances of action capable of radical alterity, their degree of predictability and the limited range of imaginably feasible future actions present an issue.⁴⁵

From the human actor's perspective the present moment is both the concrete material space which confronts him, and the ephemeral situation which quickly extends into the next moment. As the present is constituted by bounded space and situation, the possibilities of the future are also bounded by the present objects which compel the object-relations appropriate to their situated modalities.⁴⁶ This predictable stability allows the human actor's perception of time to be congealed into blocks consisting of actions and events, rather than as infinite ephemeral present moments. This simply means that we tend to think of the past, present, and future in terms of repetitions of events.⁴⁷ This 'thinking of' does not mean conscious examining or even visualisation

⁴³ I use the term anticipation, rather than projection, in order to avoid the representational or propositional connotations of the latter. Anticipation is the term used by Merleau-Ponty to describe the bodily response by skilful actors towards a situation, a form of looking into the future without mental planning or representation of future scenarios or goals. Merleau-Ponty n.7 Part I s.3. I use the term in a very similar fashion.

⁴⁴ Dewey refers to this process as deliberation, which is a process of furnishing possible future courses of action through the imagination, as constructed by recollections of past experiences. Dewey n.5 pg. 190-192.

⁴⁵ The issue as I perceive it is essentially how human actors, with or without innate freedom, become subjected or subjectivities to a particular narrative of ideas or behaviours. Social theorists have offered various answers such as the oppressive force of doxa (Bourdieu n.6), hegemony (Antonio Gramsci, Hoare, & Nowell-Smith, *Selections from the Prison Notebooks of Antonio Gramsci*. London: Lawrence and Wishart, 1971), ideology (Karl Marx & Friedrich Engels, *The German Ideology*. 3rd Rev. ed. Moscow: Progress Publishers, 1976); and on the bodily subjection side, discipline (Michel Foucault, *Discipline and Punish : The Birth of the Prison*. Harmondsworth: Penguin, 1979), libidinal desire (Herbert Marcuse, *One-dimensional Man : Studies in the Ideology of Advanced Industrial Society*. 2nd ed. London: Routledge, 1991), etc. In my answer I aim to relate the acting body with its material environment in a fundamentally contingent relationship, stabilised by the mechanism of habit.

⁴⁶ Dewey remarks on the impossibility of accurately calculating the future because it is dependent on some future state and circumstances which are independent of the present. He argues that imagined future pleasures and pains are inevitably evaluated through the present circumstances. Dewey n.5 pg. 202-203. I would read this as analogous to my claim that the future is bounded by the present.

⁴⁷ I refrain from using terms such as experience or memory here for the same purpose of avoiding connotations of the past being stored and recollected as mental representations. Event is a relatively neutral word which unifies both the objective reality and the action.

of the past or future, but rather an intuitive sense that the past and future are not here in the present, but have the same or similar qualities as the present. In other words there is a sense that the past was how the present is right now, and the future will be how the present is right now.⁴⁸ What determines the quality of the now are the objects which we directly confront, the situation which requires urgent action.

Habit constructs this continuity of past and future in very specific terms according to the specificity of the present situation, and with it the human actor's body of knowledge. The knowledge furnished by the present is a synthesis of past history which is extended backward into the past, and forward into the future; recollection is not simply an act of remembering the past accurately, but involves an element of discriminatory reconstruction based on the urgent qualities of what is directly present. Likewise anticipation of the future is not a faithful transposing of the past, but a prior identification of those salient factors which function as the signposts for paths of action. These are not purely mental exercises in the sense of remembering and planning, but material bodily reactions compelled by the forceful presence of specific objects, and sustained through the force of habit.⁴⁹

Objects also exhibit a temporal dimension by their enduring presence, which affects how human actor's react in anticipation. For example, if I see a coin lying on the table, I would not expect it to disappear in the next few seconds. In contrast if I see a soap bubble, I would expect it to burst in the next few seconds. In grasping the temporal dimension of these objects I am actually making predictions about their future based on my past experience of them. Since I have habitually encountered coins as maintaining their shape for long periods of time, I will habitually anticipate that coins do not change in shape or form, and attribute the disappearance of coins to some external action rather than as a modality of the coin itself, such as it was taken or spent. Applying this temporal dimension to objects in a situation constructs a dynamic

⁴⁸ Husserl has addressed this overlaying of past, present, and future in terms of similar experiences invoking the similar, an approach which Merleau-Ponty rejected; see Hubert L. Dreyfus, 'Intelligence without Representation: the Relevance of Phenomenology to Scientific Explanation', *Phenomenology and the Cognitive Sciences*, 1(4): 367–83. Cf. Dermot Moran, 'Edmund Husserl's Phenomenology of Habituality and Habitus.' *Journal of the British Society for Phenomenology* 42(1): 53-77. My notion of the intuitive sense is more akin to bodily familiarity as opposed to mentally drawn comparisons or analogies of experiences, regardless of how unconscious or instantaneous they are. Moreover my agreement with cognitive offloading means that information need not be stored in the human actor's mind, so it falls to the external objective environment to provide the conditions of familiarity.

⁴⁹ Similar point made Aarts & Dijksterhuis, 'Habits as knowledge structures: Automaticity in goal-directed behavior.' *Journal Of Personality And Social Psychology*, 78(1): 53-63.

picture of the present in terms of arcs of time and motion.⁵⁰ For example, the activity of walking consists of arcs of actions such as moving my legs in a synchronised fashion, avoiding external objects, directing movement towards a destination. These actions are linked together temporally into a meaningful activity which we understand as walking, without the need to have regard to each component action.⁵¹ Moreover this intelligibility of walking as a composite action is sustained through habit; we walk if we wish to get somewhere, without paying attention to the mechanics of the activity which is ingrained through the conservative aspect of habit. If we were to consciously regulate our walking, we would find it jolting and unnatural.⁵²

The important point is that when a human actor responds to the forceful presence of objects which compel him to enact his habitual object-relations, the reaction is not fragmented into disparate actions which are later synthesised into coherent activity. Rather entire organic activity is what is being compelled.⁵³ The content of these activities might be relatively simple or complex; the simple act of drinking is as familiar as the complex act of repairing an engine to the seasoned mechanic. This is because these actions have been habituated in their holistic contexts, rather than as isolated component actions. It is habit in its conservative aspect which binds these actions together into coherent activity, and a triggering situation sets off the entire chain of actions, rather than having to trigger each component action.⁵⁴ This is not to say that the activity becomes wholly automatic; any component part may be brought into conscious awareness, usually by being interrupted, such as reaching for an object only to find that it is not there.

Habit functions to link multiple object-relations together into sets of meaningful activity through associated action repetition. That is how habit is able to construct the future through anticipation of these arcs of action as possible future courses of action. Operating in conjunction with the habitual knowledge of the present which enables the human actor to discern and discriminate situations, the appropriate series of object-relations may be recalled and anticipated. In this way habit is also able to link together arcs of action into more complex networks which may be referred to as patterns of behaviour. The salient factors of the present situation trigger those bodily habits of

⁵⁰ Similar but not exactly corresponding to Merleau-Ponty's intentional arc, n.7 Part.I s.3.

⁵¹ Dewey n.5.

⁵² Dewey n.5. Merleau-Ponty describes this state as 'I can', n.7 Part.I s.3

⁵³ Merleau-Ponty *ibid.*

⁵⁴ *Ibid.*

anticipating the possible courses of action according to a past body of knowledge and skill which is continually adapting and regenerating to the future.⁵⁵

5.5 Habitual object-relations and signifying chains

Thus far I have referred to meaningful action only from the strictly practical perspective, as temporally and spatially coherent arcs of action which are meaningful in the sense of being appropriate to the context. In this section I will explore how such actions are symbolically and discursively meaningful, or how they are made sense of in light of generic significations beyond the first-order experience of action itself. The discussion will be brief, focusing around the relationship between social practice as discourse and the habitual actions constituting the practice, and how habit can explain why such practices are not determinable through discourse alone.

The arcs of action and networks of these arcs which are linked through habitual association are the networks along which signifying chains connect and proliferate. Because of the tendency for signifying chains to proliferate into discourse, the discursive constructions of these networks of habitual object-relations are prone to variation and fluctuation. However the networks themselves, that is the arcs of action which are closely associated through habitual repetition, remain relatively stable. I have said that the meanings of activities will change with changes in the signifying chains and discourses, which might appear to undermine my earlier argument that signifying chains do not determine the meanings of object-relations. To clarify, whilst the practical meanings of actions with reference to their immediate situation do not change, their discursive meanings do.⁵⁶ The differentiation between practical and discursive signifying chains is one of degree and perspective, as arcs of actions are simply norms of action habituated to the degree of automaticity, and discourse is *post facto* reflexive reconstruction of the action under a different signifier.

⁵⁵ This is similar to Merleau-Ponty's notion of habit as 'knowledge in the hands', acquired skills which are able to adapt to changing demands n.7 Part.I s.3

⁵⁶ This could be rephrased as the relationship between pre-reflexive actions and their interpretation, although the significant difference lies in that interpretation of action in this case does not necessarily entail a change or reflexivity of the action itself. I would surmise that the more entrenched habitual object-relations are, the less prone they are to change through discursive reflection.

For example, I move to open a door and notice there is a person on the other side also moving towards the door and my reaction is to hold the door open for them to pass first. This situation may be analysed through its component object-relations; my object-relation to the door is to push or pull it open, my object-relation to the other human is to avoid collision by going through the door first or standing back to allow them to pass. The situation analysed as a composite of object-relations would be an example of an activity of social etiquette, that is my arc of action exhibits the meaning of showing politeness. This meaning is attributed to this set of actions by virtue of the signifying chains which link together these object-relations along with other related object-relations into a discursive network denoted as social mannerisms. However the discourse is not what drives me to engage in this particular set of object-relations, of holding the door open rather than barging through. It is more likely that I have cultivated a habitual association of these component object-relations through repetition, and being confronted with the triggering situation sets off the arc of action. My habitual object-relations enable me to discriminate the salient factors of the present; the door, myself, the other person. They also virtually construct the various possible paths of future action; opening the door, waiting for the other person to open the door, barging through. The option most strongly anticipated is taken, usually the one most habituated and ingrained. The entire exchange is performed effortlessly and unthinkingly, out of habit rather than out of a discursively constructed reason to act politely.

This is not to argue that signifying chains and discourse do not influence action whatsoever, or that actions cannot be deliberately oriented towards a discourse. For actions not yet ingrained into habit, engaging in that action often involves a concerted effort or pause between opportunity and action, which I believe is due to the greater cognitive effort needed to construct the present situation and anticipate the appropriate future action.⁵⁷ For example, in learning the social etiquette of a foreign culture the human actor will orient his actions towards the predominant discourse of what constitutes good manners in that culture. In this way discourse plays a potentially significant role in structuring the associations and meanings of object-relations.

Nevertheless, signifying chains and discourses are dependent upon the object-relations and their habitual reenactment. The human actor cannot grasp the meaning

⁵⁷ Akin to Merleau-Ponty's 'novice' level of skill. Analogously see Martin & Schwartz n.37 on how children in learning process are more or less receptive to environmental structures.

of a signifier until he has engaged in an object-relation which refers to that signifier. He must first be habituated in the actions of opening doors, pulling out chairs, expressing thanks, before he can discursively link these disparate actions together as activities exhibitive of manners. Moreover he cannot think of manners except through these concrete examples which are simply reconstructions of his past actions under a particular signifier. Becoming cognisant of this particular discourse colours both his recollection of the past, such that he reconstructs as instances of good or bad manners actions which previously went unnoticed or understood in a different signification, and transforms his virtual construction of the future such that mannerisms now feature as an added modality to possible paths of action. His habitual object-relations have been linked together in a new network under the signifier of social mannerisms, and from there it may grow in sophistication by subsuming further object-relations into its network as his experience increases.

5.6 Habit and group

Throughout the foregoing I have focused on the artificially isolated individual human actor as the locus of habit and object-relations. In what follows I will focus analysis upon habit and its relationship with the group entity, specifically how habit affects group level object-relations. This requires dissolving the artificial division between individual and group, and restoring the human actor to his proper place as an integral unit within the wider group entity. This does not entail a conception of the group entity as either a homogeneous mass, or a collective of individuals acting in coordination. Neither will I adopt an approach which assumes or attempts to construct some notion of a collective will which is capable of replacing the individual as the locus of action.⁵⁸ My intention is to advance an account of how group level action is made possible through human action as hitherto set out, constituted by habit and object-relations, without resorting to notions such as ideal Reason, social covenant, social planning, or consensus. In doing so I hope to establish a theoretical foundation upon which social

⁵⁸ My approach is similar to Lindahl's notion of the first person perspective and the first person plural perspective, which is equivalent to my own notions of the individual and group respectively. However Lindahl's notion of the collective, or the plural perspective, is characterised by a closure based on inclusion/exclusion which my notion of group does not contain. Although Lindahl asserts that the paradox of representation means there is no original closure, only reclosure by the collective joint action, I would still envisage my own conception of the relationship between individual and group action to be relatively more contingent and open textured than Lindahl's account. Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality*, OUP, 2013 pg.180.

norms, customs, and institutions may be analysed through the familiar terms of the ternary, by establishing continuity between the actions of individuals and the actions of the wider group.

To recapitulate, group object-relations are object-relations pertaining to group objects, and group entity is constituted through the material actions of members engaging in group object-relations. The group exists because its members respond to certain objects in ways appropriate to their group membership. This means the group entity is not merely an intangible connection or idea shared amongst a collection of humans, but manifests a very material existence through the objects it controls, namely its members' bodies, things, places. If human actors by engaging in group object-relations constitute the group entity, it follows that habit's conservative and compulsive effects will affect these group object-relations in the same way as any other object-relation.

The conservative aspect will preserve group object-relations from change, and through repetition render their performance natural and predictable. The primary effect is to stabilise and maintain the group entity by enabling a high level of stability in its dynamics, so ensuring its preservation. In other words, as the individual group members become habituated in their group object-relations, they will engage in those object-relations with a high level of reliability, and be able to anticipate the actions of other members with corresponding reliability. Since the group entity depends entirely upon the continued engagement in group object-relations by its members, this effect also extends to maintaining the very group entity itself. Insofar as group object-relations embody norms relevant to the group, the conservative effect of habit is to entrench and strengthen those norms and increase the likelihood of their expression by habituating individual members to those object-relations.

If the conservative aspect of habit contributes to the maintenance of a group *status quo*, then the compulsive aspect of habit is likely to contribute to a drive for group expansion. In the individual a compulsive habit drives him to engage in the habit, and to adapt action to varying conditions to support the habit. In the case of group object-relations this compulsion amounts to an expansion of the group entity by increasing the expression of group norms. In other words insofar as individual members may be conceived of as vessels of the group entity, by compulsively engaging in group object-relations they are effectively manifesting the group's norms and expanding the group's

presence. This drive to adapt both the external conditions and the member's own behaviour in accordance with habitual group object-relations will have a knock-on effect when it comes to establishing the hegemony of certain groups in constructing conditions conducive to their dominance.

In reality all object-relations are group object-relations in the sense of belonging to some institution, practice, custom, or social norm. And insofar as individual actors' histories, experiences, and knowledge are constituted and enabled by their habits, it could be said that the human actors are composed of a myriad of group object-relations vying for expression. This point may be spuriously observed in that we are simultaneously members of multiple groups, and often find our loyalties to these groups at odds with each other. To take an extended illustration, object-relations constituting the group entity of capitalist market economy typically involve acquiring and disposing of objects through exchange with a view to maximisation of value, so members of the market economy group are habituated in their bodily knowledge of objects as valuable goods, and anticipate relations with other members to be defined by gains in value. In contrast, the habit of value maximisation does not feature as typically in the object-relations constituting group entities such as family or friendship, where exchange of objects operate more along a gift economy. The same human actor who is a member of both groups may find a stable balance between his potentially conflicting habits, such as demarcating by context. Conflict may arise where the group entities overlap, such as the case in family businesses or market transactions with family members, and the respective group object-relations come into opposition and throw the smooth functioning of habit into disarray.⁵⁹ The human actor cannot fulfil his market economy habits when confronted with a family context and vice versa, hence he perceives the situation to be problematic.

⁵⁹ Interesting study into the dynamics of family businesses which preliminarily suggests that the demarcation between family and business relations are blurred; Stoilkovska, et al., 'The Influence of Family Relations on Decision Making in Family Businesses', *UTMS Journal of Economics* 4(1): 17-26. Cf. Study of genetic ties in the boardroom and implications for nepotism; Collin & Ahlberg, 'Blood in the Boardroom: Family Relationships Influencing the Functions of the Board.' *Journal of Family Business Strategy* 3(4): 207-19. Cf. Context of family inheritance and conflicts arising between family members; Titus, et al., 'Family conflict over inheritance of property.' *Family Coordinator* (1979): 337-346.

Habitual behaviour is performed unthinkingly, and often only when its performance is interrupted does the situation become problematic.⁶⁰ Moreover often the habit itself remains unquestioned, and attention is focused on the perceived problem which is actually the conflict between habits vying to be fulfilled. In the ordinary course of life the human actor experiences no such conflict as his various habits find a settled rhythm which is maintained by their conservative aspect. As such he feels no difficulty in resolving the many moral choices he encounters when engaging in his habitual object-relations. He does not even perceive them to be moral questions as his habitual object-relations construct the context in normative terms consistent with his habitual knowledge and actions.⁶¹ It is often a change which precipitates a conflict, by changing the normative terms of the present and future into a problematic one.

For example, a non-vegetarian habitually responds to meat products in their modality as edible goods, so engages in the relevant object-relation of eating meat. A change in external conditions or experience, such as visiting an abattoir might become a catalyst for a violent rendering of his habitual object-relations relating to meat, such as associating it with violence or slaughter. In responding to meat there is now a possible alternative meaning of the object, so a different object-relation arises in conflict with his previous habits. Although this example might be phrased in the discourse of ethics or morality, as a moral dilemma between the treatment of animals and the assertion of human preservation, I would instead argue that it is a change in the human actor's bodily knowledge which now colours how he constructs the present. Meat objects once constructed in their modality as edibles is in accord with the habitual object-relation of eating meat. Now they are constructed in another modality as objects of slaughter which is not in accord with the habitual object-relation, so conflict arises and demands to be resolved in order for action to progress, such as by giving up meat, or only eating organic.

Rephrased in terms of group object-relations, the human actor might be cast broadly as first engaging in object-relations of those groups for which eating meat is appropriate, which would include the majority of Western populations. Then engaging

⁶⁰ This is akin to what Heidegger terms 'presence at hand', where tools cease to be useful and hence becomes the object of thematisation; see Gail Soffer, 'Phenomenologizing with A Hammer: Theory or Practice?' *Continental Philosophy Review* 32(4): 379-93 for critique. Cf. Dewey who would view this as an example of disequilibrium between the organism and its external environment, which releases the instincts and necessitates a choice; Dewey,n.5 Part.3 s.3.

⁶¹ Similar to Bourdieu's claim that practices can only remain in their practical state if their fundamental principles are taken for granted; Pierre Bourdieu, *Outline of a Theory of Practice*. Cambridge, CUP, 1977.

in object-relations of those groups for which avoidance of eating meat is appropriate, such as animal rights groups, certain religions, environmentalists, and so forth. Insofar as the human actor engages in a group object-relation, he materially constructs the respective group entity and reiterates in some part those peculiar objects, object-relations, and signifying chains pertinent to that group. He achieves this through his action of not eating meat, which reenacts a particular modality of the object of meat products as products inappropriate for consumption. This is not to say that by not eating meat the human actor somehow invokes the entire body of politics of animal rights groups, or that he has effectively avowed his loyalty to some political or moral camp. The reasons or rationalisations for his actions are of secondary importance; the primary change is the change in his habits and how he constructs past and present and virtually anticipates future paths of action. He acts as a vessel for a certain group, without necessarily explicitly realising or endorsing their discourse. His view of the world has changed and become aligned contingently with certain discourses or politics.

5.7 Group habits

I have argued how group entities are constituted by the material actions of individual human actors engaging in relevant group object-relations which reinforce a particular network of significations pertinent to a group. I have also explained how being habituated in their object-relations extends directly into human actors becoming vessels for certain group entities. Actions which are practically meaningful for the actor, are simultaneously symbolically meaningful in their invocation and reenactment of particular discourses; they constitute the signifying chains of group discourse, but are conditioned and maintained by habit. Building on this foundation, I will now explore how certain sets of group object-relations come to be habituated by large proportions of a population to the extent of approximating collective action, such that their group entities appear to exert hegemonic influence over human behaviour. I will term these actions group habits, a reference to group object-relations which are those pertinent to multiple individuals, and habit which is the driving mechanism of action; essentially group habits are object-relations which are habitual for large proportions of a group population.

Group habits comprise networks of group object-relations which are sufficiently common and stable throughout a population to the extent that they appear to be coordinated collective action rather than coinciding actions of individuals. Prevalent social norms and institutions exhibit this trait of apparent independence, as the actions which sustain them are reified into entities and forces which determine human action.⁶² For example, the law is presented as a collection of written laws and courtrooms which are determinative of legal norms, rather than the activities of law-abiding and law-making, punishment and enforcement, which together constitute the group habit of legal action.

Group habits are fundamentally habitual object-relations, however the degree of influence they are capable of exerting over human action warrant their separate analysis. Group habits construct the landscape of the external conditions according to their peculiar discourse by constructing the past, present, and future through the group members' bodies of knowledge. These individual normative visions of the world then coincide to give the appearance of a collectively determined normative discourse. In other words the way in which individuals in a group understand the significations of their present overlap to a sufficiently high degree that they appear to share a particular knowledge of the world. This also applies to how they envision their shared past and future actions, such that they act in sufficient concert to approximate collective action.⁶³

For example, it is common knowledge that we live in a world where money is exchangeable for goods and services. This modality of money compels human actors to engage in actions which attest to the value of money, such as to spend, save, or invest in anticipation of its continued value. This institution of money, or rather this group habit towards a modality of the money object, constitutes a large part of the social reality we live in, and demonstrates how group habits can effectively structure the normative external conditions. The proceeding discussion will centre around these

⁶² Much like how labour power is reified onto capital and makes the latter appear productive and powerful; Karl Marx, *Capital*. Everyman's Library ; No.849. London: Dent, 1951 v.1 chapter I section 4.

⁶³ I emphasise that whilst I speak of actions instituted at the group level, I do not intend any conception of group as a collective or a joint entity. The group entity is entirely composed of the coinciding actions of individuals acting in accordance with group object-relations, as such it is a highly volatile entity maintained by the contingent forces of habit and the external conditions. In this respect I differ from Lindahl's notion of a collective which he defines as sharing a normative point or practice, with its individual participants viewing themselves as acting in joint fashion, or 'collective self-identification'; Lindahl, n.58 pg.191-197. For my notion of group it is not required that the members view themselves as participating in the group action, either deliberatively or unthinkingly; it is sufficient that they act in alignment with relevant group object-relations irrespective of their reason or attitude.

group habits and how they are produced and maintained, specifically in relation to the cultivation of habit and the external conditions. I aim to address the question of how hegemonic norms and institutions are constructed and maintained by analysing them through the mechanisms of object-relations and habit.

Group habits are those actions which exhibit sufficient similarity amongst individuals. This does not mean they are replicas which are directly interchangeable. The individual human actor is the locus of embodied action, and this means that all individual actions are unique in the sense that they are produced from a unique personal history. These unique actions are not harmonious; rather they coincide to a significant degree. Group habits as collective action do not proceed from some prior plan or agreement reached through rational discussion. There is agreement in the basic sense of having in common a particular body of knowledge which is not explicitly articulated, however this agreement is not consensus, but denotes the coinciding of individuals' habits which are manifested through their actions. In this sense it could be tentatively likened to a common presupposition which forms the foundation for group habit, until it is rendered explicit through disagreement or conflict.⁶⁴

5.7.1 Cultivating group habits

Group habits are essentially networks of group object-relations, so cultivating these into habit follows the same process I have outlined above. Owing to the ubiquity and hegemony of group habits in the external environment, exposure is systematic, but habituation likely occurs in an organic and haphazard manner. In other words an individual living in society will be persistently exposed to its prevailing norms and institutions in his everyday life. These encounters are most likely not in formalised situations, but are insidiously woven into mundane routines, which gradually familiarise the individual with complex social norms through repetitions of simple actions.⁶⁵ For the purpose of analysis I will assume that group habits are present and well established within the group. As I have indicated previously, the majority of a human actor's habitual object-relations are not presented singly, but contextually as variations and permutations in a network of object-relations. The group habit lurks in the background and particular object-relations and signifying chains are selectively

⁶⁴ Similar to Bourdieu's doxa, n.6 pg.98-102. The difference lies in that I do not view this implicit presupposition to entail any organising principle.

⁶⁵ Similar to Foucault's description of the ubiquity of discipline and punishment in society; n.45 chapter 7.

brought to the fore depending on the context. Through repeated exposure and engagement in this group habit the human actor gains knowledge of the network of object-relations by synthesising the haphazard partial exposures to form a picture of the whole.

Despite my using terms which suggest there is a predetermined whole picture which is immutable, the picture of reality is interpellated through the particular history of the individual. There is no universally coherent system of group habits, only innumerable interpellations by disparate individual histories. However this does not preclude these interpellations from sharing considerable commonality, which I would argue is achieved by the cultivation of group habits holistically as shared experiences in contexts of physical proximity.

The process of cultivating group habits begins from the moment of birth, and the contact a human actor has with his surroundings. His alien environment is gradually made familiar through his accumulation of experience which synthesises into knowledge, which entails the learning of names of objects, their modalities, and their appropriate object-relations and signifying chains, by being taught, instructed, and repeatedly exposed to similar contexts. For example, a child being instructed in the group habit of social manners will be exposed to various contexts demanding permutations of appropriate object-relations, such as being instructed on how to express gratitude in different situations, which synthesise into a knowledge of the intricacies of reciprocation.

This general process is replicated to some extent by human actors' being in the same space of the same group, so encountering the same collection of individuals whose actions they mimic, whose instructions they follow, whose teachings they absorb, resulting in substantially overlapping bodies of knowledge. This space might be as limited in scope as the classroom, or as enlarged as the town, city, or country. In general as the human grows so does his scope of contact with the world expand to accommodate different experiences and persons. Generally the foreign is approached through the lens of the familiar, and the matured human actor who has already cultivated group habits will selectively assimilate foreign experiences through minor shifts in his existing habits. This is due to the plasticity of habit which operates to entrench habitual object-relations, so limiting the scope of change whilst shoring up those changes which have occurred.

The spaces and human actors involved in cultivating group habits are synthesised holistically into knowledge of that space and situation as permutations of appropriate object-relations. Because human beings in a shared space will have shared histories, the particular objects, object-relations, and signifying chains presented in that space will constitute some part of their respective individual histories. I believe this is how humans as distinct members of a group can assimilate very similar bodies of habit and knowledge, whilst maintaining their unique compositions of experiences.⁶⁶ Group habits are characterised by bounded multiplicity, a multiplicity of unique individual histories contained by the contingent forces of physical proximity and habit.⁶⁷

5.7.2 Group habits as presupposition and discourse

Group habits comprise of entrenched networks of object-relations and those signifying chains which connect them into a coherent order according to their common signifiers to form an intelligible and meaningful pattern of activity. These signifying chains constitute group habits' discourse, prosaically presented as customs, normative systems, and institutions, and although they perform the crucial function of transmitting meaning, they are not determinants of action. Signifying chains change depending on the modalities of the objects and object-relations specific to the context, which are mostly conditioned by the histories of human actors, so the same set of actions may bear different meanings for individuals and different significations depending on context. Group habits are relatively more stable in their particular composition of the ternary across different individuals and contexts; in other words the same set of actions are connected together in the same set of significations for a large proportion of human actors and contexts. This commonality and stability allows group habits to condition the foundations of public meaning and communication, and act as centres for proliferation of discourse.

I have argued that arbitrary actions are given intelligibility by reference to their immediate situation and associated actions to form an activity which is intelligible within its normative context. Whilst this may be true of the individual actor, the question remains how other human actors are able to make sense of that action, or

⁶⁶ Experience is not replicable; Merleau-Ponty n.7 Part.I s.3.

⁶⁷ Bounded multiplicity entails a lesser degree of cohesion between the individual units than accounts of joint or collective action, since their relationship is conceptually contingent.

conversely how a human actor through action is able to communicate meaning or intention to others. It is group habits that enable that seemingly effortless phenomenon of communication. The greater the shared commonality of group habits, the more intuitive is the understanding of the actions of others, which obviates the need to explicitly examine the foundations of communication. In other words humans proceed from an intuitive presumption of mutual understanding until something disrupts that effortless operation of habit, causing communication to become more consciously reflective.⁶⁸

Recall that group habits are cultivated through incessant exposure to shared spaces and histories, which results in the development of very similar habitual object-relations in the bodies of all those human actors involved. This also involves shared dynamic situations which cultivate habitual knowledge of the actions of others, and from there infer their past intentions and anticipate their future actions. The human actor synthesises this knowledge and comes to anticipate how others will react to certain objects and stimuli, and correspondingly infer what has occurred based on presently observable actions. The accuracy of inference and anticipatory ability grows in sophistication as the breadth of knowledge widens and the human actor is able to make increasingly fine discriminations according to the context and the actors involved.

This ability to anticipate and infer the meaning and intention of others' actions enables communication through a material form of intersubjectivity.⁶⁹ Insofar as the human actor has experienced a situation, likely from various relative positions, he is able to anticipate how each actor in that situation is likely to respond with a degree of sophistication. It is a process of virtually constructing the future by placing different actors into different relative positions and bringing his personal knowledge to access the intentions of others. This requires a certain level of identification with other humans, but I would limit this to a recognition of others as the same species of living being as oneself. Just as the human actor can recognise all apples in their sameness, so too can he recognise all humans in their sameness.⁷⁰ This means he can virtually

⁶⁸ Bourdieu n.6. Lindahl and difference between understanding and interpretation n.58.

⁶⁹ See Gallese on how second person simulation is a form of intersubjectivity; Vittorio Gallese, 'Bodily Selves in Relation: Embodied Simulation as Second-person Perspective on Intersubjectivity.' *Philosophical Transactions of the Royal Society of London. Series B, Biological Sciences* 369, no. 1644.

⁷⁰ Human are psychologically prone to essentialist judgements; Haslam, Rothschild, & Ernst, 'Essentialist beliefs about social categories' *British Journal of Social Psychology*, 39(1) :113–127.

project himself into the place of others by constructing them as versions of himself and interpellating the situation according to his personal body of knowledge.⁷¹

I argue that in this model of communication, group habits condition the most basic and intuitive conditions of human interrelation by virtue of their sheer ubiquity and entrenchment. The most apparent example is the act of speech, which is an almost universal human mode of communication. The practice of speech is made possible through habit and object-relations; we are habituated in the act of making sounds towards other humans as a mode of communication, and grasp the meaning of this action as attempts at speech, which explains why even incomprehensible sounds such as foreign languages are acknowledged as attempts at communication. We ascribe to the act of speech the intention and meaning of attempting to communicate some content, because we ourselves habitually engage in speech with that intention and presume the same for others. We respond to any sounds issued towards us as addressing us, because we so habitually address others.

The above implies that there is a highly intuitive presupposition amongst humans when it comes to the action and meaning of speech, which is disrupted with relative infrequency. Same for those most prevalent group habits where humans tend to approach a situation with the presumption of shared knowledge.⁷² So for group habits such as bodily and facial gestures, manners, paying for goods, and such, the human actors involved tend to take for granted that everyone present is in possession of the same habitual object-relations as themselves which enable comprehension and mastery of the situation. In contrast to when in an unfamiliar neighbourhood or in company of persons of a different culture, the human actor might find his habitual object-relations ill-equipped to master the situation. In consequence it is likely that he will often ask for explanations, in order to grasp the modalities of objects and meanings of object-relations as they pertain to that unfamiliar context.

In actuality all confrontations with the world are gradations of the familiar and the novel. We intuitively presume a fundamental understanding of the world that we share with all other human beings, and depending on the particular situation our intuitive knowledge, determined by our personal habitual object-relations, might be sufficient to enable us to operate without attention, such as for everyday routines. Or the situation

⁷¹ Gallese n.69.

⁷² Akin to Bourdieu's common-sense, n.6 pg.98.

might stymie the procession of intuitive habit by posing unfamiliar objects in our path, in which case we resort to those more foundational habits in order to orient ourselves, such as inquiring for information through speech, gestures, and such.

Let me now discuss the proliferation of discourse centring around group habits, which entails the creation of complex signifying chains in greater permutations of objects and object-relations. A paradigm example of discourse would be theory, which claims to propound practice by ordering action into a coherent and internally logical system. Group habits are prime sources for proliferating discourse, owing to their widespread and entrenched character. Their widespread enjoyment means significant numbers of individuals each have a unique interpellation of that habit, so a correspondingly vast number of mediums through which the habit is expressed. Their entrenchment means the material actions which constitute the group habit can withstand conflict and irreconcilable differences in discourse. For example, you and I may have irreconcilable discursive understandings of whether consuming meat is a moral wrong, yet we will likely continue in our habits regardless of the other's persuasions. The more object-relations are entrenched through the conservative aspect of habit the less they are prone to change in spite of rational argumentation and conscious effort. Group habits insofar as they are deeply entrenched habits are likewise relatively immune to any destabilising effect of discourse, so are able to support the proliferation of multiple discourses. In other words strong customs, institutions, and social norms are relatively immune to change simply by arguing or theorising about them. Discourse is unable to significantly direct the development of group habits, which implies that neither is discourse the foundation of their longevity.

5.7.3 Group habits and external conditions

I remarked earlier that group habits structure the external conditions by constituting large parts of what is perceived as normative reality. Group habits as a collection of objects, object-relations, and signifying chains presenting their particular modalities enjoy a privileged and hegemonic status in constructing the embodied category according to their peculiar meanings and logic. In physical terms group habits have greater mass compared with other object-relations, so distort the social space with

their magnetic influence.⁷³ They form present reality into landscapes, in which they are the guiding normative landmarks for navigating that reality.

This influence group habits exert on the external conditions is two fold. The first lies in their hegemonic influence over human action. By being the more deeply habituated set of actions, group habits induce human actors to engage in the response appropriate to their significations, and in doing so they ensure future repetition through the conservative aspect of habit. The second effect lies in the compulsive aspect of habit which drives human actors to bring about the external conditions favourable for the expression of group habits. The tendency to resort to intuitive presuppositions in order to orient oneself in foreign situations means group habits have the privilege of being default guides when deliberating action. In other words the external conditions are distorted by group habits into conditions conducive to the fulfilment of those habits, so makes their perpetuation easy and opportune. A change of the conditions into something unfamiliar will prompt a drive to change them back to the familiar, so that entrenched habits may find fulfilment. Group habits make certain actions easier, and compel human actors to construct their surroundings in accordance with those actions.

Thus the pressure exerted by group habits towards conformity is so strong, both externally and habitually, that they suffice to ensure widespread and enduring patterns of behaviour which may be likened to collective action. I have hitherto discussed group habits mostly from the perspective of the acting individual, as if his internal habits and narratives are causative of action and communication. Now that I have established that group habits actively shape the external conditions, I will supplement the foregoing account by arguing that human actions and their meanings are compelled and imposed from without by the external conditions of the situation.

Objects compel reaction by their forcefully presented modalities, and object-relations relevant to group habits are constantly being compelled, as group habits actively structure the external conditions according to their particular significations. This applies also to other human actors and their anticipated reactions. For example, I refrain from making loud noises in public, likely not out of some conscious decision to appear polite, but through habit and the forceful presence of those around me who might resort to tutting and nasty looks if I make nuisance. Insofar as I am habituated

⁷³ Akin to Bourdieu's assertion of social space as the site of struggle for knowledge; n.6 pg.187-8.

to the reactions of others towards my actions, their presence in my surroundings exert a forceful influence over my actions. To further illustrate how group habits construct normative situations, consider how public displays of affection are reacted to with averted glances, jeering, and contempt, which are reenactments of object-relations reiterating the message that sexual activities are only appropriate in private situations. These significations of actions are not sustained through discourse or through the relatively impotent actions of any one individual, but the coinciding of multiple human actors engaging in their common group habits. In doing so they are actively constructing the normative reality and sustaining its future reproduction. For any particular human actor, finding himself in this normatively charged and pressured situation, his acting in conformity is rendered highly likely, and seen from the overall perspective, such conformity with group habits does indeed appear to be discursively determined collective action.

5.8 Conclusion

In this chapter I advanced my analysis of the mechanism of habit, and combined it with my conception of the ternary to form a preliminary account of how habit drives and sustains human action. I have argued that habit enables meaningful activity by conserving experience into a form of bodily knowledge, and compelling repetition by structuring the external conditions according to a particular set of habits. Throughout I have emphasised that habit is the active mechanism which conditions and drives human action, and discourse is proliferated upon the stable foundation of behaviour sustained through habit. Although I have presented such a preliminary account of human action, it remains to be explored whether this form of habitual action is capable of sustaining normative action without collapsing into determinism. This issue of habitual action as the embodiment of normativity will form the topic for the proceeding chapter.

6

Normative Action

In the preceding chapters I presented a material framework of reality, and explored the concept of habit as a driving mechanism for meaningful action. This chapter will address norms and normativity in greater detail, and combine them with the mechanism of habit to advance a conception of normative action. The foremost challenge is to combine norm and habit, which are often treated as antithetical concepts in theories of legal normativity.¹ Habit is philosophised as an empirical fact falling foul of legal normativity, either because habitual action is not determined by morality,² or it lacks the ‘internal aspect’ which distinguishes rules from threats.³ Whilst habit does not pose an existential challenge to normativity, in the sense that there may be an habitual element to normative action, to ground and justify the normative basis of law on habit would appear to undermine law’s normative status in its standard understanding.

My approach is to reconfigure both the constitution of norms and normative action in order to incorporate the mechanism of habit as the condition of both. I will focus on norms in the first section of this chapter, by firstly reimagining normativity in terms of

¹ Natural law theories are not overly concerned with habit as they tend to base law’s validity on morality or other natural values. However for positivist theories Hart’s critique of Austin’s and Bentham’s theories which severed completely the positivity of law from any normative aspect, and relied on the ‘habit of obedience’ to establish the grounds for law’s validity, complicated the neat dichotomy between law’s conditions of existence and validity. For me Hart’s insistence on the ‘internal point of view’ in the very conceptual constitution of law as rules, which I understand to denote an irreducibly normative aspect, and his rejection of habit’s adequacy of serving this role revived a search for a new nonmoral basis for law’s validity aside from coercion, force, or habit. After Hart’s critique it is difficult to claim that law is obeyed either out of habit or coercion, for both would undermine the internal point of view which distinguishes the ‘ought’ from ‘is’. H.L.A Hart, *The Concept of Law*. 2nd Ed., 1st Pbk. ed. Oxford : New York: Clarendon Press ; OUP, 1997. For further discussion on Hart’s concept of normativity, and law’s relation to habit, see Sylvie Delacroix, ‘Hart’s and Kelsen’s Concepts of Normativity Contrasted’, *Ratio Juris*, 17(4):501-520; Sylvie Delacroix, *Law and Habits* (January 8, 2016). Available at SSRN: <https://ssrn.com/abstract=2744694>. Other theoretical efforts to substantiate Hart’s internal aspect of rules include conventionalism (Andrei Marmor, ‘The Conventional Foundations of Law’, in Berte, Stefano, and Pavlakos, *New Essays on the Normativity of Law* Hart Publishing, 2011), social planning (Scott Shapiro, ‘Planning agency and the Law’, in *New Essays*), variants of practical reason (Joseph Raz, *Law and Authority*; Stephano Berte, ‘Law and Obligation’, in *New Essays*).

² Immanuel Kant, and Mary J. Gregor, *The Metaphysics of Morals*. Cambridge Texts in the History of Philosophy. New York: CUP, 1996, 6.389-398.

³ Hart, n.1.

the ternary,⁴ and secondly by constructing a material account of norms. This will facilitate the combining of norms with the mechanism of habit in the later sections to develop an account of action which is both habitual and normative. The relationship between norms and action is one of embodiment and manifestation occurring in material unison. Norms are embedded in the very materiality conditioning action, so normative action will not be undermined by habit.

6.1 Materiality of norms

The embodied category is constituted by the ternary and characterised by materiality and activity, therefore norms must also be materially embodied and actively manifested through the same ternary framework. I take norms to be phenomenal⁵ and dependent on material embodiment as their basis of existence, as opposed to common understandings of norms as abstracted and independent from material facts. Abstracted norms are posited as general and independent from specific facts, which are not a sufficient condition for norms' criteria of validity.⁶ Even social conceptions of norms still posit them as something qualitatively different from actual events or actions from which they are abstracted.⁷

I reject this abstracted notion of norms in favour of a one which is constituted by materiality and activity. Insofar as norms exert a perceptible influence in the world, they do so through human action which manifests them into materiality by embodying them in objects, spaces, and bodies.⁸ Norms in the embodied category are material things and not immaterial ideas or values. For the purpose of analysis I will artificially hypostatise 'norms', and separate these from 'normative action', the latter denoting action which manifests the norm. I will first address norms, focusing on their material

⁴ Chapter 4.

⁵ Reference to Kant's position of phenomenal and noumenal planes of existence, with norms belonging to the latter. Kant n.2 Critique of Pure Reason.

⁶ Hans Kelsen, *General Theory of Norms* OUP, 1991, chapters 1-2 for categorical assertion of the Is/Ought dichotomy. For more detailed criticism of the dualism between fact and norm and its genealogy within philosophy, see John Dewey, *The Quest for Certainty : A Study of the Relation of Knowledge and Action*. Gifford Lectures ; 1929. London, 1930, chapter 3.

⁷ Cristina Bicchieri, *Norms in the Wild : How to Diagnose, Measure, and Change Social Norms*, New York: OUP, 2017; in chapter 1 she presents a diagnostic toolkit to identify social norms from what she terms 'independent behaviours' which explicitly includes habit. In legal theories which conceive of law as a social phenomenon would include conventionalism and social planning.

⁸ I am not endorsing an ideal theory of immanence, such as Hegel's theory that the actual is rational. My own conception of norms is thoroughly based on a material approach.

aspect, before proceeding to address normative action, focusing on its active aspect. This division between norms and normative action is artificial and solely for the purpose of clear analysis of norms understood in their common, but I would argue mistaken, guise as rules or ideals. I will elaborate on how norms are related to each part of the ternary separately for the purpose of clarity, however this distinction is also artificial as the three component parts occur in unison.

6.1.1 Norms as objects

Norms as they relate to objects express a hypostatisation of a particular meaning, function, or value of the object in relation to a particular context; a norm is simply a representation of an object in a particular modality in a decontextualised fashion.⁹ Norms hypostatise a particular modality of the object by invoking that modality and reinforcing the connection between the object and that particular modality. Moreover since norms are usually expressed in a decontextualised manner, they explicitly hypostatise a particular modality of the object, and assume the contextual conditions of that modality. So an object is presented as having a particular modality without referencing how that modality is made possible by a particular material and discursive context.¹⁰

As objects are capable of sustaining multiple modalities, it follows that objects are also capable of multiple normative representations. Since the modalities most strongly presented by objects change according to the particular space and situation which renders certain modalities more or less appropriate, an object's normative representation is always changing depending on the context within which it appears. At any particular moment, an object will have a meaning, function, or value depending on how it is positioned in relation to other objects around it, but only so long as that particular space persists, and changes in the space will precipitate changes in the object's modality.

⁹ I use representation in the direct sense of norms portraying or presenting objects in a particular modality, usually symbolically.

¹⁰ The important point is not whether the norm designates a context, such as 'in case of x, norm is y', but assumes the material conditions of the possibility of both contextual facts and generalised norms, usually as different. In other words what is necessary and sufficient to establish an object, is not identical to establishing a modality; the former is usually presented as empirical fact and the latter as norm. My claim is there are no two distinct phenomena, and objects which are necessarily grasped through a modality are therefore necessarily normative.

As the norm represents a particular modality of the object, it is embodied in the object, and its materiality is manifested through the particular meaning, function, or value the object presents in the world. For example, the norm that banknotes function as a measure of value is embodied in the material objects of slips of paper placed securely in wallets and pockets. As the material objects of banknotes continue to be produced and used as a measure of value, so their normative representation hypostatises its modality as monetary value and object of desire.¹¹ The existence of the norm is evidenced in the force the modalities of objects exert in the embodied category, produced by their influence on human action. It is the act of placing money into wallets, or exchanging money for goods which embodies money with its normative import as measure of value, not the normative discourse of the money institution. The hypostatised norm as value is only a limited representation of a material reality already present in the world through the objects it invokes and the actions it influences.

Insofar as norms are embodied within objects, those objects exert normative import and cease to be merely inert things.¹² To say that objects are normative is simply another way of expressing the idea that objects embody those modalities which are invested in them through human action, and norms which represent particular modalities are embodied materially in the object presenting that modality in the world. In conjunction the process of naturalisation renders certain modalities so closely associated with the object that they appear to be innate qualities, so the norms relating to those naturalised modalities can appear to be the norm, in the sense of being the axiomatic or irrefutable value of the object.¹³

To summarise, norms in relation to objects are hypostatised representations of a particular modality in a particular but inexplicit context. Norms are manifested materially in the embodied category to the extent that the relevant modality of the object is actually effective, such as through being used or acknowledged. Norms are embodied within objects, and depending on the strength of association between the object and the relevant modality, norms make their existence more or less palpable through the forceful presence of the objects which embody them.

¹¹ Marx's account of money value subverting exchange priority; Karl Marx, *Capital*. Everyman's Library ; No.849. London: Dent, 1951 v.1 chapter 1 section 4.

¹² Chapter 4 wherein I rejected the notion that objects can have intrinsic features which are natural and non-normative.

¹³ Ibid.

6.1.2 Norms as object-relations

Norms, as they relate to object-relations, are representations of a particular object-relation towards a particular object as appropriate to the implicitly assumed context. Since object-relations are reactions of human actors towards objects appropriate to the context, the relevant norm may be said to hypostatise the object-relation as the proper action in a decontextualised manner, so making norms and object-relations similar in content. For example, the norm which states that goods should be purchased with money hypostatises the object-relation towards money as a valuable object, and connects them in an explicitly normative manner.

Although in terms of content object-relations bear the closest resemblance to norms, both being prescriptions of action, the two remain distinct. Norms are not translatable directly into object-relations for the simple reason that norms are hypostatised representations of object-relations in a decontextualised manner, whereas object-relations are unique responses to the unique context within which the action occurs. Norms are able to be reiterated, whereas events are unique and unable to be repeated in replica.¹⁴

Norms are manifested into materiality through the human actions which constitute the relevant object-relations. The human actor's physical action and the effects it produces by reacting to an object in a particular way produces a materiality according to the terms of the norm, thereby making it real. Norms are not the causes of actions which are their material effects, rather the norm gains materiality simultaneously and by virtue of the action which manifests it, and the effects of that action which linger in the world by changing the objects and external conditions to be conducive to future repetitions of the norm. Neither is this manifestation of norm in action the realisation of an ideal immanent in the action,¹⁵ rather the material action always comes first, and in that moment a norm is manifested into existence. There is no norm independent of the action, which means the norm does not *ex ante* cause, nor *ex post facto* validate the appropriateness of the object-relation. Object-relations simply are normative in themselves, the significant aspect is only which particular normative terms they manifest and reinforce over other possibilities.

¹⁴ This is not a barrier to the manifestation of norms through action, as I will argue later artificial and outward conformity with norms is sufficient to materialise them.

¹⁵ Such as Hegelian ideal immanence.

6.1.3 Norms as signifying chains

Norms, as they relate to signifying chains, invoke a particular signifier and its relevant network of significations which operate as the context in which the norm becomes meaningful and intelligible. This context is not the concrete material context which I define as constituted by space and situation, but a symbolic context which connects objects and object-relations together into a particular order of relations such that their meanings have reference to a common signifier.

Unlike objects and object-relations, signifying chains have no direct material existence, so must be embodied in the objects and object-relations which are its signifieds. In this respect signifying chains are the same as norms, which are also symbolic expressions devoid of material substance. Norms presuppose a particular set of signifying chains, which they invoke by reference to an object's particular modality and its appropriate object-relation,¹⁶ and by implication the wider network within which that particular modality is integrated. For example, the norm of purchasing goods with money presupposes the banknote's modality as measure of value, so invokes the signifier of monetary value and implicates the symbolic context of a money economy. In other words the norm presupposes a context in which goods are measured in monetary terms, and placed in relations of comparison with commodities and contrast to gifts. The norm presupposes that money is a meaningful object which can be identified in the world, along with the action of exchange, and connects the two in a normative or prescriptive relationship. In this way the norm may be said to have explicated a signifying chain by explicitly hypostatising the connection between an object and an object-relation.

Norms and signifying chains overlap to a significant degree, especially in the case of discourse and its proliferation. Discourse includes formal theory, practices, institutions, and belief systems. A norm necessarily presupposes a network of signifying chains in order to establish meaning within a stable symbolic context, or explicitly refers to the broader practice or normative system of which it forms a part. For example, a norm which refers to law or legality will invoke the entire institution of law as a social phenomenon, with its signifying implications of State, coercion, and the like. It is

¹⁶ This is not a theoretical presupposition like Searle's 'Background', but a simply assuming a state of affairs persists which is evidenced by the action. John Searle, *The Construction of Social Reality*. London: Penguin, 1996, chapter 6.

easier in such cases to appreciate how norms presuppose a network of signifying chains, since the norm explicitly refers to the discursive context which gives it meaning and significance. However, all norms must presuppose some normative understanding of the world in order to communicate any meaning effectively. Although norms and signifying chains often overlap, signifying chains have much greater reach than norms, so norms may be said to explicate a small part of a wider network of signifying chains by explicating a particular modality or signifier. Norms bring into sharp relief a small part of a network of signifying chains by denoting particular objects and object-relations in relation to a particular signifier, over and above the wider network of meaning which fades into the background of presupposition.¹⁷

So far I have discussed how norms relate to each of the ternary in isolation from each other. This artificial division may now be abridged, since objects, object-relations, and signifying chains form a unity and occur in simultaneity. A norm is embodied in material form in the shape of objects presenting particular modalities. Those modalities are manifested in material fashion by the human actions which constitutes the object-relations appropriate to those modalities, compelled by the forceful presence of the objects. These material occurrences happen against a context which is not only material, but imbued with symbolic import and constituted by the signifying chains which connect the relevant objects and object-relations into meaningful action.

6.2 Habit and norms

It might be objected that norms are only embodied in objects and manifested by object-relations by virtue of their being posited against a particular symbolic context. In other words it is the posited norm which imbues the material with normative import, and without the continuing validity of the norm any normative representation of reality would not be possible. In this section I aim to ground the force of norms as it were in the same materiality which embodies its content. I propose to do so through the mechanism of habit, specifically how it conditions knowledge and action. By combining this with the foregoing account, I hope to advance a thoroughly material conception of norms by grounding both its conditions of existence and validity in the same empirical reality.

¹⁷ Pierre Bourdieu, *Practical Reason : On the Theory of Action*. Cambridge: Polity Press, 1998.

To recapitulate, habit makes the world familiar and accessible to human actors by constructing a meaningful and intelligible vision of the present reality. It does this through habitual knowledge of the objects directly confronting the human actor, who through his habitual object-relations is able to navigate and interact with his surroundings. Habit also serves virtually to construct past and future through recollection and anticipation, so habitual knowledge conditions deliberation and the construction of possible courses of action. Habit forms the foundations of the human actor's personal history and knowledge, so conditions how he constructs and interacts with material reality.

Norms in the embodied category are an hypostatisation of particular modalities of objects and their appropriate object-relations. However they cannot exist dormant inside objects, but must be manifested into materiality through human action. Habit enables repetitive manifestations of particular norms by entrenching the modalities and object-relations which embody them, so cementing their dominance over other norms. This is achieved through the force of habitual knowledge and action. Knowledge is an active bodily stance the human actor takes towards the world, constituted by an amalgamation of cognitive actions such as recognising, identifying, registering.¹⁸ Knowledge is identifying objects and their salient modalities to construct a coherent vision of the world, and anticipating possible future developments of the dynamic situation.¹⁹ Knowledge is an active state of knowing, a bodily reaction triggered by the objects confronting the actor.

Extending this conception of knowledge to norms means to know a norm is to recognise a particular modality of an object relevant to the norm, which is also to embody it in an object and manifest it materially through the act of knowing. The norm now constitutes a part of material reality by forming part of the knowledge of that reality, invoked by the forceful presence of the object which embodies it. Normative knowledge means recognising objects in a particular modality, appreciating the object-relations appropriate to that modality, and discriminating the relevant network of signifying chains within which that modality is signified. Insofar as reality is constituted by the ternary, it is also constituted by norms; it is normative *ipso facto*. Abstract

¹⁸ Dewey n.6 chapter 9

¹⁹ Ibid.

norms are secondary reports of that knowledge of the world which was already established the moment the human actor interacts with his surroundings.

Having established that norms are constitutive of material reality by forming part of the knowledge of reality, the next step is to explore how habit might affect this conception of norms. The conservative aspect of habit strengthens the association between an object and a particular norm, and renders action increasingly unthinking and automatic.²⁰ This effect of habit when applied to the object-relation of knowing results in unreflective and uncritical patterns of thinking, causing habitual normative constructions of the world to appear natural and necessary. In other words certain norms of objects and object-relations become so habituated and strongly reinforced that they are taken as the proper order of the world without further question. In this way what is an active construction of a normative order of reality through human action is turned into a hypostatisation of a particular normative order which ossifies into a fixed order of reality. Habit operates to obscure the normative aspect through a process of entrenching particular normative constructions as inevitable. This effect occurs at a bodily level, by habituating the human actor's body into fixed relations with his external environment according to particular norms, so drives their repeated manifestation through habitually compulsive actions. These actions change the external conditions by affecting and acting upon objects and other humans to produce conditions more conducive to the norms' future repetition. In other words as humans act according to their habit, their interactions with the world will produce material effects in accordance with their habitual knowledge and shape their surroundings in such way that repetition of the habitual action is rendered more likely.²¹

Object-relations which were initially instituted as reactions towards objects which manifest a particular norm, through the effects of habit become natural and almost spontaneous ways of reacting to the world. Similarly, the theoretically endless possibilities of normative constructions of the world become deadened into ossified ways of representing the world. It would not be unfair to term these norms as habitual norms, norms which are so entrenched through habit that they become obvious and unquestioned representations of reality.

²⁰ See chapter 4.

²¹ Similar to how Bourdieu's notion of habitus strives to create the most friendly and suitable environment for itself, by surrounding itself with those objects and persons most conducive to its operation. Pierre Bourdieu, *Pascalian Meditations*. Cambridge: Polity Press, 2000, pg.146-150.

6.3 Norms, ideal or practical?

In the foregoing analysis I have reimagined norms in their materiality and argued how they are embodied and manifested through the ternary to constitute the material fabric of the embodied category. I also claimed that the reality which directly confronts us is a normative construction conditioned by our habitual norms of knowledge and action. Humans can only interact with a world which is normatively ordered and oriented towards their intentionality.²² When we make statements about our reality, we are actually making normative representations from the perspective of a particular normative stance. The apparent self-evidence of many of these representations is not due to their nature as empirical facts, but the effects of habit which renders knowledge and action automatic and compulsive, and obscures the moment of norm construction.

Advancing this material conception of norms, I have not only claimed they are empirical phenomena, but also that they occur in unison with the objects and actions which embody them. This raises a potential issue of determinative order, for if norms only exist through the action, there is no temporal or conceptual separation between them. This seems to preclude the possibility of norms acting as guides or determinants of action, and by extension how normative systems such as law whose explicit purpose and effect is to order human action can be explained.²³ Moreover the denial of norms' independence of material reality would preclude the possibility of normative judgements on the desirability or legitimacy of action.²⁴ I would deny the existence of ideals insofar as they are posited to be transcendental or elevated beyond influence from human action.²⁵ However I do not commit to a wholesale rejection of the possibility of norms functioning as guides to action. Norms are capable of guiding

²² I use the term intentionality here to denote an attitude which is less reflective or deliberative than purposive, but retains an active aspect of mental and physical engagement. Human actors engage in the world with intentionality, so not necessarily deliberative or reflective in pursuing their purposes, but nevertheless consciously controlling and coordinating their actions in order to produce certain material effects. See chapter 4.

²³ Norms take human action as the object of their operation; Kelsen n.6 chapter 22.

²⁴ The idea that law is not simply a matter of posited rules and their enforcement, but as a social institution must serve some aspirational role of striving towards a *nomos*, is clearly asserted by Cover. Similarly the idea that interpretation of law must be a moral exercise which justifies and legitimises the violence of law is asserted by Cover and Dworkin. Robert Cover, *Narrative, Violence, and the Law : The Essays of Robert Cover*. Law, Meaning, and Violence. Ann Arbor: University of Michigan Press, 1993. Ronald Dworkin, *Law's Empire*. Oxford: Hart, 1998. I understand the theme in common to be it is not sufficient for law to efficaciously command and enforce action, without also justifying its grounds for legitimacy in the same action.

²⁵ See chapter 1.

choices and paths of action, without having to do so from an ideal status.²⁶ They do so by being manifested in the alternative choices available to the human actor, presented as material possibilities rather than immaterial reasons or rules. This material foundation of norms enables human action to be undetermined by retaining the element of choice.²⁷

Norms as guides or rules of action are materially and actively constituted, which carries two implications. First, norms are constituted by the particular context in which they arise, so the content of norms is context-dependent, like all normative significations in the embodied category. Second, situations carrying normative import are far more ubiquitous than is recognised; since the world is structured normatively, it follows that all action undertaken are of normative import. The important issue is how contingent and imposed normative orders become persistently perpetuated despite their theoretical alterity. This is achieved through the functioning of habit cohering actions with context, so obscuring the normative construction of reality and making it familiar and natural. Certain meanings and relations between objects become so naturalised that they are taken to be phenomena beyond the influence of human relations, so beyond the remit of normative regulation.²⁸

Normative dilemmas are most often thrown up when there is a disjunction between habit and context which obstructs the smooth operation of habitual action and renders the element of choice explicit and unavoidable. For example, for a vegetarian a situation where meat is consumed is rife with ethical questions, as there is a disjunction between his habitual actions and what is occurring in actuality. These moments of conflict will often precipitate a need for practical deliberation to harmonise the disjunction and enable further action, and discourse is proliferated when this conflict between practical norms is detached from its concrete context and abstracted

²⁶ Dewey refers to this as 'ends in view', which he opposes to ultimate ends such as morality. John Dewey, *Human Nature and Conduct : An Introduction to Social Psychology*, New York: H. Holt, 1935, pg. 223-237.

²⁷ Choosing between the available material alternatives, as opposed to choosing the action itself, which is the common understanding of autonomy; see Christine Korsgaard, 'Origin of value and scope of obligation' in Korsgaard, & O'Neill, *The Sources of Normativity*. Cambridge ; New York: CUP, 1996. chapter 4; Christine Korsgaard, 'The Normative Constitution of Agency.' In *Rational and Social Agency*, Chapter 9. OUP, 2014.

²⁸ Dewey also refers to this dichotomy between the provinces of scientific and philosophical thought, which he rejects as an attempt by philosophy to hold on to immutable truths. Dewey n.6 chapter 3.

to become a conflict between ideals.²⁹ So in this example what is a situationally constituted instance of misalignment between habit and context which precipitates a need for choice, is valorised by discourse into a moral problem which is resolvable only by reconciling ideals or principles, such as sanctity of life, ethical treatment of animals, concerns for health and environment, pitted against the ideals of freedom of personal choice and sovereignty of humans over nature. Such discourse of ideal norms portrays material events as incidental fodder which must be ordered by ideals that transcend beyond the specific context. Moreover material normative resolutions can only approximate ideals, so are compromises to the limitations of material reality.³⁰ Against this I argue that all ideal norms are manifestations of a particular normative signification through material human action; they are embodied in the material context by the objects and object-relations which constitute both their existence and content. Norms are context-dependent in the strong sense of being constituted by the particular context, and limited by those objects, object-relations, and signifying chains forming that context.

I raise this issue in anticipation of my upcoming argument that choice is the lynchpin of normative action, by indicating that normative choices are ubiquitously embedded in contexts of all human interactions, and it is only by the effect of habit that potential normative dilemmas are glossed over. In reality human actors are constantly engaging in actions which manifest and reinforce a particular normative order, such as maintaining the market economy through their mundane actions of paying for goods and services, refraining from trespass or shoplifting. The moral and ethical import of these mundane actions go mostly unnoticed owing to their habitualness. It is only when there occurs a change in the human actor's experience which forces a conflict in his bodily habit that situations become normatively problematic. Changes in context and experience effectively change how the very norm is constituted, rather than just change the specific case to which ideal norms are applied.

Norms as generalised rules may be abstracted and synthesised from multiple contexts, however norms as rules of action cannot be totally divorced from the material space or situation which originally constituted them. They cannot have an existence independent of their immediate material context, of the objects, object-relations, and

²⁹ Action proceeds upon attainment of a new equilibrium between internal instinct, which form a potential new habit; this process is one of practical deliberation, not ideal reflection. Dewey n.26 pg.89-71 & pg. 107-111.

³⁰ Dewey n.6 Part III s.IX.

signifying chains which manifest the norms and construct the present reality. Norms influence action not by presenting ideal reasons, but by constructing the various feasible paths of action and possibilities of reality, constrained by the particular collection of objects presented in that moment.

6.4 Normative action

Having established the groundwork of how norms are embodied materially in the ternary, and how they may influence human action through habit, I will in this section proceed to analyse how the normative aspect pertains directly to action. This means shifting from the artificial hypostatisation of norms as embodied meanings, to looking at norms in their active state as normative action.³¹ The analysis will proceed from the practical perspective of the acting individual as the locus of normative action. This practical perspective entails the formulation of problems with regard to their pertinence to action. Knowledge is practical knowledge comprised of recollection, inference, and anticipation, and virtual constructions of the world are oriented around the central hypothesis of what must be done.³²

The foremost issue is how norms and action interrelate such that the result may be characterised as normative action. I argued in the previous section that all actions are normative, or carry normative import, since all meanings and significations found in the world are normatively constructed and imputed through human action, so it becomes a logical extension to define normative action as simply all action in the embodied category. I now elaborate in detail the relation between norm and action, focusing on the particular case of norm-guided action. I understand norm-guided action to denote action which consciously and deliberately takes some norm to determine the means or ends of action.³³ This implies an active cognitive element to the action, and a conscious choice of a particular course of action over others by virtue of the norm's

³¹ This is not a conceptual dichotomy; I perceive normative action to be the locus of normativity, the basic unit of normative ontology as it were.

³² I am not asserting that there is no purely theoretical knowledge, or knowledge for its own sake. For the purposes of my argument I am not directly concerned with such knowledge.

³³ Norm following, in Brennan, et al., *Explaining Norms*, OUP, 2013, chapter 9; norms must feature in some way in the agent's practical reasoning in order to count as norm-oriented action. Cf. Joseph Raz, *The Authority of Law : Essays on Law and Morality*. Oxford: Clarendon, 1979; on norms as reasons for action, and law as preemptive reasons. Even Hart whose notion of rule following is relatively normatively undemanding requires at the very least an 'internal point of view' on rules which suggests some form of recognition of them; Hart, n.1.

influence or determination. I believe norm-guided action best represents those cases of action commonly denoted as rule-following, moral action, or conforming to standards.³⁴ Although I conceive of all action to be same, I am happy for present purposes to maintain this artificial distinction between norm-guided action and other actions, and take the former to exemplify normative action.

I begin with the foremost issue of how action is capable of being guided by norms. Idealist theories often resolve this issue by asserting a conception of will which is the causative force behind action, and ideal Reason which is the causative force behind will. Reason dictates norms to the will, which must overcome other human faculties such as desire and passion in competing to determine action.³⁵ The mechanism used to integrate norms and action is a combination of Reason and will, both of which are posited as beyond empirical determination.³⁶ Human actors are endowed with the capacity to orient their action towards norms through an exercise of Reason and will, but need not necessarily do so, for it is also open and easier for them to orient action to desires and passions, in other words to act in their natural character.³⁷ To the extent that action is directed solely by will and Reason, it is normative.³⁸ To the extent that action is directed by desires and passions, it is on the same level as animals directed by their innate nature to act in certain ways.

Instead of the foregoing account, I advance a conception of normative action which is constituted through the ternary and susceptible to the mechanism of habit like any other action. Habit does not undermine normative action, rather it is the mechanism which both conditions and sustains normative action by driving its repetition and stabilising the normative orders of reality. Habit obscures the normative aspect of action by familiarising the action onto the human actor's body, thereby reducing the

³⁴ Cf. Brennan *ibid.*, chapter 10; norm conforming is not an example of norm following, as it takes the norm only as an instrumental reason for action.

³⁵ I have discussed the theories of Hobbes and Kant, which I take to be representative of ideal theories of will and reason in human action. Whilst for Hobbes both will and reason are defined in somewhat material terms, the former being the 'last appetite in deliberation' and the latter being a form of high intelligence, these concepts remain independent from changes in material circumstances, and as such can be described as ideal in the sense of transcending the material. By comparison Kant adopts much more explicitly ideal notions of will and reason, placing them in direct confrontation with passion which is grounded in the phenomenal sphere. The Kantian Reason is grounded in the noumenal sphere, therefore beyond the influence of the material world, and is made active to the extent it can direct the will according to its maxims. Further see chapter 1.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*

cognitive effort involved in the action and rendering it increasingly automatic.³⁹ In other words action which began as conscious efforts guided by norms becomes habitual action impressed onto the body and triggered by conducive external conditions.⁴⁰ Habit has not changed what began as norm-guided action into non-normative action, conversely the norm-guided action is facilitated and sustained by habit which compels repetition so reinforces the norm's endurance.

For example, the process of learning a new skill requires the human actor first to familiarise himself with the norms which constitute the proper performance of that skill. In learning how to play the violin, the student must be guided by the norms of proper violin playing, such as how to hold the instrument, handle the bow, how to apply pressure, and so on. Necessarily implicated in this period of explicit instruction is constant attention to these norms by deliberately conducting his bodily movements in accordance with them.⁴¹ Insofar as norm-guided action is defined as explicit rule-following, this deliberate and conscious effort of controlling bodily movement to conform to norms would appear to be the epitome of norm-guided action. However the student cannot continue to engage in such a manner of action if he wishes to progress in his skill, since the cognitive effort required in performing and reflexively adjusting his bodily movements must become effortless in order to free up attention for other considerations, such as nuances in the score and music. The mechanism which enables this bodily dexterity⁴² is habit; through practice which is repetition of bodily action, the student imprints on his body those actions necessary to playing the violin.⁴³ In other words the norms of proper performance are imprinted onto the body such that he is able to play without much cognitive attention to every detail of his movement. Habit has reduced the necessary cognitive effort by imprinting the actions onto the bodily level.⁴⁴

³⁹ Dewey n.6 Part I s.IV; Maurice Merleau-Ponty, *Phenomenology of Perception*. Routledge Classics. London: Routledge, 2002 Part I s.3

⁴⁰ Bourdieu n.21 pg.138-142.

⁴¹ Merleau-Ponty gives an example of the acquisition of skill in learning a sport, which results in the actor's body becoming areas of sensitivity magnetised towards his surroundings; Merleau-Ponty n.39 Part I s.3

⁴² Bourdieu, n.21 pg.142-146.

⁴³ Merleau-Ponty n.41; Cf. Bourdieu who claims that subjects take up institutions roles and 'make it their own'; n.21 pg.150-155.

⁴⁴ Bourdieu n.21 pg.138-142. Dewey n.6 pg.64-71. This does not mean the action becomes unconscious, for it is still conscious and deliberate, just less deliberative.

Although the element of conscious attention and deliberate effort has been significantly reduced, this does not change what began as an explicit case of norm-guided action into non-normative action. It is clear that the actions are still norm conforming, in the sense that the student plays the violin in conformity with the proper norms of method. The norm-guided aspect has been shifted from cognitive attention to bodily hexis through the operation of habit. Now it is the habit, specifically the habitual actions, rather than cognitive attention to the norm, which condition and sustain the normative action.⁴⁵ Habit conditions the normative action because it renders action increasingly aligned with the actor's body and away from the explicit norm, evidenced by the possibility of developing bad habits of playing, which denotes habitual movements not in conformity with the norms. Habit also sustains the normative action because it renders the action effortless and compulsive, so less subject to change and examination; this is why it is important to cultivate good habits in the acquisition of skills, in order to facilitate actions in conformity with the norms and avoid falling into bad habits which are difficult to change.⁴⁶

I have referred to normative action as norm-guided action and norm-conforming action in turn; both are the same in the sense of action manifesting a norm. Whether an action conforms to a norm as a result of direct or intentional orientation towards that norm, or simply by accident, does not change the signification of that action as a material manifestation of that norm.⁴⁷ Neither am I concerned with norms in relation to motivations for action. From the practical actor's perspective there can exist myriads of motivations, however the material effects of his actions will manifest and reinforce certain public norms independently of his mental state. Normative action is both norm-guided and norm-conforming insofar as the action outwardly conforms to the norm, and such actions will effectively be material manifestations of that norm, regardless of what motivation lay behind the action.

6.4.1 Habit of normative action

It may be argued that even if habituation in the norms of mechanics of action, as presented in the foregoing example of learning an instrument, does not change the

⁴⁵ Bourdieu n.21 pg.155-163.

⁴⁶ The norm through habit is grafted onto the actor, who takes the norm onto himself, and thereby changes the norm through his unique manifestation of it; Bourdieu *ibid.*

⁴⁷ Cf. Brennan et al., n.33.

normative import of the action since habituation is merely an accumulation of expertise, the same cannot be said for normative action understood in its moral aspect which takes norm to be both the cause and the goal of action. Whereas the habituation of a skill involves the use of norms as instrumental means for the attainment of the further end goal of greater expertise, the same cannot be said of truly norm-oriented action which takes the norm as the end goal. If an action is performed out of habit, and only incidentally in conformity with a norm, then it cannot be said to be properly normative.⁴⁸

Such arguments are variants of theories which espouse norms as metaphysical ideals placed in opposition to habit which is considered to be a part of the empirical world. The fundamental dualism of ideal norms and material habit means there can be no integration or harmonisation between them, since they are seen as antimonious.⁴⁹ It would be helpful first to clarify what is meant when terms such as moral, ethical, or principled are used specifically in opposition to terms such as instrumental or functional. Instrumental often refers to the means by which the desired end may be attained, and for normative action that end should be determined by norms rather than by desire.⁵⁰ By this formulation instrumental norms are at best rational in their ability to attain the end and can apply to any goal-oriented action, whereas properly normative action has the norm as one of or even the sole end goal. My arguments against such conceptions of norms as ideals I have already elaborated, and will not repeat here. Instead I would like to address directly this idea that only action determined by or aimed at norms constitute normative action, and argue that is not the only way action can exert normative import.

Norms are not separable from their material manifestation in human actions, so it follows that even mundane actions can and do carry significant normative import; they implicate human relationships by acting out the normative conditions of how humans relate to each other and to their material world.⁵¹ Every instance of action exerts a

⁴⁸ The epitome of this conception of moral action would be the Kantian theory of categorical imperatives. Kant n.2. Cf. Hart who rejects Austin's notion of the habit of obedience as an unsatisfactory account of rule-following behaviour, for its lack of recognition of the internal aspect of rules; Hart, n.1. The similarity of both critiques lies in that for habitual actions the rule itself does not feature as a determinant or reason for action.

⁴⁹ *Ibid.*

⁵⁰ Brennan et al., refers to these as 'externalised norms', n.33.

⁵¹ I refrain from asserting whether relations with other living organisms such as animals or the environment would also count. Such cases could be included since they affect the terms of the relationship between humans and their environment.

normative force which affects not only the individual actor, but other human beings, as he actively constructs a material reality structured by those norms embodied in his actions. These normative terms condition not only the actor's own relation to the world, but also cause material changes to the external environment which can have far reaching implications for how other human actors relate to him, to each other, and to the world in general. In other words, with every act a human actor is constructing a material world in accordance with his personal history and knowledge, and imposing these norms onto the world at large.

Objects mediate between human actors, who by severally interacting with objects in particular ways simultaneously institute the terms of their relationship vicariously through the objects which operate like stand-ins for other human beings.⁵² Human beings as objects cannot exist in isolation; they are immersed in a wider group from which it becomes possible to differentiate them as individuals in their various modalities.⁵³ This multiplicity means the individual always relates to others whenever he engages with objects, by manifesting the norms which condition their interrelationships. This mediation through material objects avoids disembodied accounts of subject interrelations without denying the subject related nature of reality building; a form of inter-object-subjectivity. Objects standing in for generic others who are more often than not materially absent from the context allow interrelations to occur without physical or psychological communion.⁵⁴ The disparate actions in which each individual routinely engages suffice to construct and maintain the normative order conditioning all human interrelationships.

For example, a human actor confronted with the object of a fence might react to that object by not crossing over it, provided he possesses the relevant habit, so effectively reenacting its modality as boundary marker. He has also effectively instituted the terms of his relationship with the potential owner of the fence and the property according to the norms of privacy and private property. There is no need for any intersubjective communication to establish this normative order, as the forceful presence of the object compelling the human actor to engage in his habituated response suffices to construct a particular normative context. Such habit conditioned

⁵² To clarify this 'standing in' is not one of direct representation or substitution, but more like an avatar.

⁵³ The individual is an abstraction of the group is a topic I have discussed in greater detail in chapters 1 & 2.

⁵⁴ I envision this avoids reliance on modes of intersubjective relations such as agreement, joint plans, recognition, cooperation, which are common forms of human relations used to build social action.

actions are not done or chosen because of any intersubjective regard or recognition, the actor simply acts out of his habit in that particular context. The resultant action is nonetheless one which reenacts in normative terms the relationship between the human actors.

6.4.2 Habit and choice

Assuming it is accepted that habit does not eliminate the normative element from action, and allowing the possibility that habit and norms may occur in concert, it could still be objected that such habitual actions are so mechanical in quality that their normative significance is negligible. Normative action must contain an element of choice by the actor in order to fulfil the standards of responsibility.⁵⁵ Machines which are programmed to perform some action cannot be said to be responsible for those actions, regardless of their normative effect, so machines are not capable of normative action in any meaningful sense of those terms. Similarly if humans are simply programmed through habit to engage in certain actions, this would liken them to machines and render them incapable of meaningful normative action.

Fully mechanistic action indeed cannot be sensibly described as normative. However habitual action is not fully mechanistic. One effect of habit is to diminish the conscious cognitive element in action and therefore to cause action to become increasingly unthinking and automatic, even compulsive. However this is merely a change in the quality of action as experienced by the human actor possessing the habit, and not a change in the action itself. I define mechanistic actions as those which are beyond conscious control of the human actor, such as muscular convulsions, or movements caused by external physical forces such as gravity.⁵⁶ These are examples of involuntary actions which cannot be controlled by the human actor through the use of his motor-capacities. All other human actions I define as intentional, in the minimal sense of being voluntary physical or cognitive actions which have intentionality.⁵⁷ The necessary cognitive element for action need not amount to conscious reflection, deliberation, or reasoning, in order to be intentional. The direction or movement of limbs in a certain way, or the intention to achieve some material effect through the use of the corporeal body is sufficient to establish intentional action.

⁵⁵ Korsgaard, *Normativity* n.27.

⁵⁶ See chapter 4

⁵⁷ Merleau-Ponty on intentionality as motility; n.39 pg.158.

Given that habitual action is not mechanistic as I have defined the term, the pertinent question is how habitual action can claim to be normatively imputable to the human actor. Intentional action is within the control of the human actor, so is a result of the actor's choice. It is the element of choice which enables the action to be imputed in normative relation to the human actor. Put simply, if I moved my body in certain motions of my own volition, such as striking at something, then that action would be imputable to my choice to strike at something. I may object that I only engaged in that action through habit or even unconscious reflex, such as if I struck at a bug on my shoulder out of a fear of bugs. That objection would not change my action from an intentional to a mechanistic action, since it is only required that I intentionally moved my body in a certain way rather than the more stringent intention of striking the bug off my shoulder.⁵⁸

Habitual actions retain this element of intentionality, so may be imputed to the human actor as a result of their choice, an event which is obscured by the effects of habit.⁵⁹ Habit makes action feel effortless and natural, and precipitates the action through bodily compulsion which likely preempts deliberative decision, resulting in the human actor acting in an absentminded fashion, allowing his body to operate while his attention wanders. If the habit is relatively compulsive, the human actor might find himself actively creating the necessary conditions for habit's fulfilment. Given these powerful effects of habit it is easy to perceive how the element of choice in action is obscured, as the body automatically and compulsively adopts its habituated stance towards the world, leaving scant opportunity for critical reflection. Regardless of how scant the window of opportunity is for deliberative choice, I argue it sufficient for action to be imputed normatively to the actor. Although habitual actions may appear to be natural and inevitable, awareness of their voluntary quality opens the moment of choice to exploitation. In other words by severing the shackles of necessity which bind thoughts and actions together into rigid habitual behaviours, the moment of choice is made more apparent and opens the possibility of alternative paths of action. By approaching reality as a contingent rather than inevitable possibility, the realm of potentiality becomes accessible.

⁵⁸ There will be ambiguous examples, such as moving during sleep, however the issue is not directly pertinent here.

⁵⁹ Imputed only in terms of arising from his intentionality as opposed to arising mechanistically. This is a development on my definition of intentional action, which must all have a choice element; I make no further claims regarding the responsibility or liability of the actor.

I am not advocating that material reality is capable of being changed simply through a change in thought or perspective.⁶⁰ In contrast I place great emphasis on the materiality of reality and its limitations on possible human action. Human actors are constrained in their knowledge and action by their material external environments. By highlighting the element of choice as the possibility of realising freedom I simply aim to release normative constructions of the world from the rigidity of necessity, render the meanings of reality contingent and envision different ways of interacting and being in the world.⁶¹

6.5 Habitual actions and subjectivities

Following from the foregoing discussion on choice as the normative pivot, I proceed to briefly address the possible challenge that habitual actions are akin to disciplined subjectivities, so susceptible to that same determinism I have rejected in Foucault's theory.⁶² I will compare the notions of subjectivity with habitual action, with the aim of resisting the claim that human action conditioned by habit is deterministic by demonstrating the possibility of radical contingencies between human action and their external conditions.

⁶⁰ I reject theories which propound that reality is essentially an extension of thought, and so capable of being transformed through thought alone, such as variants of Cartesian skepticism; Tim Button, *The Limits of Realism*, OUP, 2013, chapter 7. Changes in thought reflect changes in the meaning significations of reality, which may be fundamental and sudden such as in the case of epiphanies or revelations. However these significations remain constituted by the unchanged material reality, so limited to an extent, but they are nevertheless constitutive changes in that they change how the world is, or should be.

⁶¹ This attention to the moment of choice is also important in elevating blind habit into conscious practice, which is the deliberate repetition of action aimed at refinement rather than ease. The practitioner aims to refine his actions and thoughts through repetition, and instead of lapsing into unthinking habit perfects the practice through constant attention to his actions. Clare Carlisle, *On Habit*. Routledge. 2014. The emphasis placed on choice is common to the practice of mindfulness, which teaches a neutral approach to emotions and thoughts, with the aim of separating these from action by severing the cause and effect relationship which keeps action compulsive. See Lea, Cadman, & Philo, 'Changing the Habits of a Lifetime? Mindfulness Meditation and Habitual Geographies.' *Cultural Geographies* 22(1): 49-65. I would argue that this significance of choice is not ideal in character, so is unlike that ideal conception of freedom such as Kant's categorical imperative and will, but neither is it fully pragmatic such as economic rationality. This choice is very much material in that it involves a cognitive effort of awareness to one's own corporeal state, including feelings, thoughts, emotions, and the external situation, but also normative in its meta-cognitive approach to these internal and external states.

⁶² Chapter 2.

Firstly let me recapitulate the conception of subjectivity as simply as possible.⁶³ A subjectivity is a human being who is disciplined through social mechanisms to behave in a certain way.⁶⁴ The human 'subject' is formed and moulded through training and discipline into a particular 'subjectivity', and comes to act in accordance with the training and discipline he has undergone.⁶⁵ This creation of subjectivity is not one of restricting some innate and boundless freedom of the subject to some determined subjectivity. Rather the discipline is formative, as it endows the human with powers to act but only as far as his discipline allows.⁶⁶ In other words the human is programmed much like a machine, and through repetition of training is given his powers of prowess and action. But these powers are exercised only to reproduce the human in that subjectivity, that determined mode of acting. This is how subjectivities restrict the possibilities of action, and by implication render action deterministic.⁶⁷

Human actors who are constituted by habitual object-relations share many similar characteristics with humans as subjectivities. Habit is also formative of the human actor by enabling the consolidation of skills onto the body through repetition of bodily motions, which requires expenditure of time in order to construct a body with a physical history. Both subjectivity and habit seem to suggest the creation of a particular mode of human who conforms to his training, so is capable only of those actions predetermined by his training. A human subjectivity acts in accordance with his disciplining, and a human of habitual actions acts in accordance with his habits.

Whilst there are similarities in the process of forming subjectivities and habits, nevertheless habit as I conceive of it is more malleable and contingent compared with subjectivity. This is due to the greater influence of external conditions and their contingent relation to habits. Habitual action is not solely precipitated by the habit, but needs the corresponding external conditions to trigger and serve as the medium for

⁶³ Ibid.

⁶⁴ The conception of subjectivity I am concerned with is mostly provided by Foucault's theory of the disciplined subject. Although I would identify many similarities and overlaps with Marxian theories of human nature which in general propound an economically conditioned or determined human subject. I have discussed the problem of economic determinism in Marxian theory in chapter 1. I have also referred in passing to Bourdieu's theory of habitus, which I would perceive as falling into the broad tradition of Marxian theories, in chapter 5.

⁶⁵ The reference to discipline is explicitly Foucauldian, however training understood as repetitive action is a common factor in the creation of the subject for both Foucault and other theorists such as Bourdieu and Merleau-Ponty.

⁶⁶ That discipline and power are formative of the subject, rather than constraining, is a characteristically Foucauldian claim, see chapter 2.

⁶⁷ Ibid.

action. A habit without the necessary external conditions to trigger its fulfilment cannot manifest in action, whilst the external conditions cannot be apprehended by the human actor except through his habits. So habitual action is a two-way process of constructing the external conditions and reacting to them as conditioned by habit. It is a synchronic process of interpellation of the world and of the human actor.

6.5.1 Interpellation of world and actor

The material world as perceived by the human actor is actually an interpellation through accumulation and synthesis of his past experiences into a coherent whole. Through episodic exposure to the world as bounded instances of space and situation, a picture is gradually built up which forms his vision of the world, which may also be called his knowledge, as both are constituted by the entirety of his personal history, thereby making them unique to that actor. That is to say for every human actor their interpellation or understanding of the world is different and unique to themselves by virtue of their possessing unique personal histories. In actuality there are areas of significant coincidence between these disparate interpellations, since humans who necessarily share space and time, and communicate, will have accumulated many shared experiences, resulting in similar personal histories. Nevertheless this does not detract from the unique quality of human interpellations of the world, and the nuances of difference which are capable of being manifested as significant differences in action.

A human actor who is conditioned by his habitual object-relations will interpellate his present reality in terms of what is familiar to him by habit, and by engaging in these habits he is in turn interpellated into an object with a particular modality, or a 'subjectivity' who embodies the norms of his actions. However this is only a momentary process of interpellation and not a fixation. The interpellation of world and subjectivity are entirely dependent on the material objects placed in particular relations to each other to constitute the space and situation for action. For example, the material objects of chairs, desks, walls, books must be present in a particular order for the human actor to interpellate the context as a classroom, and for him to be compelled in his habitual actions which interpellate his subjectivity of student or teacher.

This dependence on material external objects to condition the possibilities of reality and action renders interpellation different from subjectivity in significant ways. Firstly, every context is a unique moment containing a collection of objects, persons, and places which are capable of infinite permutations of relations and significations. Theoretically any moment may be interpellated into radically different realities, by investing objects with radically different meanings, so allowing infinite possibilities of action. In contrast a theory of subjectivity would suggest that action is determined in the acting human who acts to reproduce his subjectivity. The actions appropriate to a subjectivity are sufficiently ingrained on the body, such that those actions become ways of being in the world which imply a constancy of action in the face of fluctuating external conditions. I concede that subjectivity also requires the necessary conditions to trigger the appropriate action, which implies a necessary degree of coordination between subjectivity and external factors.⁶⁸ Nevertheless the causative locus of action lies with the human as subjectivity; there is an implied fixity of subjectivity which endures almost independently from the mechanisms of discipline.⁶⁹

Secondly it is not only the context which is unique, but every human actor is also unique in his particular personal history. This implies that the interpellations of reality and the appropriate actions within that reality are unique and personal to that actor, and that there are as many interpellations of the world as there are unique human beings. This also means every action undertaken in the world is both non-replicable and non-substitutable in its quality and meaning. Because of the irrevocable differences of personal history, the meanings attached to objects and actions cannot be identical between human actors. In actuality there will be significant similarities, resulting in shared and communicable significations, however this is merely a coincidental rather than a necessary homogeneity. In contrast subjectivity would suggest that disciplinary processes operate to produce a population of humans

⁶⁸ At least in the early stages of training coordination between body and the inorganic is vital; Michel Foucault, *Discipline and Punish : The Birth of the Prison*. Harmondsworth: Penguin, 1979, chapter 5.

⁶⁹ Discipline is not a one-off event, but an ongoing and incessant process transmitted through relations of power, which I would assume requires a level of stability and homogeneity across both context and the mechanisms themselves. For example, Foucault's description of the disciplinary process of the school is couched in terms of homogeneous activity, although I would not venture that Foucault imagined such processes to be truly homogeneous across all schools. Nevertheless for a theory of disciplinary mechanisms to be viable, there must be considerable constancy and homogeneity throughout the disciplinary process, in order to ensure sufficient outputs of subjectivities across time. If a disciplinary mechanism varied day by day, there will be no adequate time for training and memorising the necessary bodily actions.

characterised by a degree of homogeneity in body and mind, action and thought.⁷⁰ Moreover this homogeneity is a necessary characteristic, since subjectivities are formed according to the fixed terms of the disciplinary mechanism. In other words there seems to be implied a fundamental core likeness amongst subjectivities which is a necessary part of the formative process.⁷¹

The combined effect of the uniqueness of context and action results in a state of fluctuation and contingency brought into coincidence by habit. Against the theoretically infinite possible combinations of reality and action there is established the actuality of enduring constructions of reality and group action bordering on collectivity. This is not a result of deliberate efforts to order divergent actions into coordinated ones, whether through rational cooperation or through disciplining the body. Each participating human actor is merely acting in response to the world he inhabits according to his bodily knowledge, without any regard to any social plan or goal. The significant commonality in actors' knowledge of the world are a result of coincidental similarities in personal histories which occur with a high degree of frequency owing to the necessity of humans living in communities to share space and time, so constitute their histories from shared experiences and situations. These shared experiences are ingrained in habit, and come to condition the knowledge and action of large proportions of human actors in a given community.

The interpellation of reality is unique to every human actor, so allows for radical divergence and constant flux between reality and action. To be sure, although theoretically any given moment is entirely unique both in its material and symbolic constitution, in actuality there is significant continuity between past and future, and limitations on the feasible possibilities of reality. The fundamentally contingent and fluctuating relation between action and context is tenuously stabilised by the mechanism of habit, and a change in either action or context could disrupt the

⁷⁰ I would refer to Foucault's theory of the subjectivity of petty criminal class as an extreme example of a class being conditioned through social processes in order to achieve a manipulated homogeneity. Foucault propounds that the petty criminal in society is in fact part of a strictly controlled population whose members are essentially trained in the ways of criminality, by being passed through the disciplinary institutions of police, courts, and prison. They are kept under constant surveillance. Foucault presents a theory of criminality which subverts more commonplace notions of criminality as aberrance or anomaly; instead Foucault asserts that criminality is an actively formed and disciplined class necessary to society. I would read this as Foucault arguing for the necessity of a relatively homogeneous and stable population of petty criminals whose actions are disciplined and managed through those mechanisms which produce this particular subjectivity. Foucault n.67 chapter 9.

⁷¹ There is absolutely room for variation and divergence, but I would argue that without a core of homogeneity the concept of subjectivity as an enduring way of being would be jeopardised.

precarious order. What results is a precarious state wherein each participating human actor through the force of his habitual object-relations acts in coincidental conformity with others, so contributes to the contingently maintained order of society.

6.5.2 Habit and normative choice

Refocusing the issue on the problem of determinism being antithetical to normative action, since habitual action does not impinge choice, normative change through habitual action is possible.⁷² Habitual action is not curtailed in its free choice element, but through the conservative and compulsive effects of habit comes to compel the human actor to react to his reality rather than actively choosing the terms of his construction and engagement with the world.⁷³ The possibility of normative choice is opened up by fundamental conflicts of habit.

A state of stability and coordination of action amongst collections of human actors which is not the result of some predetermined disciplinary process or preconceived social agreement is relatively more contingent and precarious. The mechanisms which condition this semblance of coordination are bound by contingent rather than necessary factors, so a change in those external factors is liable to cause a potentially significant and sudden change in action. This is because habitual actions are always changing and adapting with the synthesis of new experiences. Adaptation of habitual action and knowledge comes from the human actor and his ability to interact with his surroundings in an intentional fashion, to adapt his behaviour according to the demands of the present.⁷⁴ The process is one of interactive influence between external context and action, rather than a one-directional determination by agency. Adaptiveness of habit entails not only application of current skill and knowledge, but a reconstitution of the actor's entire habitual body, a process which reoccurs incessantly as long as his action persists.⁷⁵ So adaptation already implies normative change, and its organic nature means change may occur without deliberate manipulation.

⁷² My emphasis on choice has similar resonance with Kant's theory of the infinitely free will, however my conception of choice differs fundamentally in that I do not envision choice as a disembodied exercise of reason.

⁷³ Cf. Bourdieu whose theory of habitus is comparatively more deterministic; habitus is determined by the place it occupies in the economic structure. Bourdieu n.21 pg.184-186.

⁷⁴ Cf. Merleau-Ponty who conceives of habit as intelligence and skill, rather than rigid repetition; n.39 Part I s.3.

⁷⁵ Bourdieu, n.21 pg.138-142.

If the potential for change is an indication of the possibility of freedom, habitual action allows for many opportunities for change. This is because whilst habitual actions are considerably stable and predictable across time and context, they are also unique in the two-fold sense of being constituted by a particular human actor as a unique collection of habits, and acting within a particular context constructed by its unique objects. This means two human actors placed in the same context might ascribe very different meanings to the objects they confront, hence interpellate two very different realities. This difference is due to the unique personal histories of each actor consisting of diverging habitual object-relations in response to those objects, so resulting in different ways of acting given the same context. I would argue that this possibility of difference opens the space for change and choice, for when confronted with disagreement the necessity for choice and the chance to change habitual action arises. I submit that habitual action can allow for fundamental conflicts, and by implication give rise to situations calling for genuine normative choice and resolution.⁷⁶

As argued above, normative dilemmas and resolutions are not characterised by general ideals being applied to specific situations, but are constituted by the specific situations and their significations. Normative conflicts arise from conflicting interpellations of reality and their relevant appropriate actions, and since every interpellation is unique to an actor's personal history, this implies that conflicts are symptomatic of different normative realities. Such a conception of conflict precludes any solution which depends on achieving assent on the discursive content of norms, whether through discourse, rational argument, or Reason.⁷⁷ This is because the differences originate from the very interpellation of normative reality through unique personal histories; they lie at the basic foundations of how reality is constructed in normative terms.⁷⁸ This is a fundamentally constitutive level, both of the human actor and the material world they engage in, and change provoked by conflict entails a fundamental reconstruction of reality along the lines of those new norms, rather than simply a change of ideas in the mind.⁷⁹

⁷⁶ Fundamental in the sense of occurring at the level of constitution rather than representation.

⁷⁷ Cf. Robert Audi, 'Cognitive Disparities' in Christensen, Phiroze, and Lackey, *The Epistemology of Disagreement : New Essays*, OUP, 2013 on a cognitive approach to defending rationalism. Cf. Jonathan Kvanvig, 'Perspectivalism and Reflective Ascent', in *ibid.* on a different approach to rationalism.

⁷⁸ That there are multiple moral truths is a claim I share with moral relativism; Gilbert Harman, 'Moral relativism explained.' *Problems of Goodness, New Essays in Metaethics*, 2012.

⁷⁹ Bourdieu, n.21 pg.169-172.

Undeniably, there is also necessarily a change in the mind or ideas of the human actor, in the sense of discursively representing the world in a different way. For example, a human actor who has become a vegetarian might change his discursive representation of reality to include espousing the benefits of vegetarianism. However this change is both constituted and maintained at the more fundamental level of how the human actor constructs his normative reality, specifically how he invokes the modalities of animal products which precipitates changes in his reaction to them. His changed material actions manifest a different norm into the world, so constructs a material world upon these new norms. Whilst the human actor may espouse various reasons for his changed behaviours, they are of secondary importance compared to the direct and material changes to the external conditions caused by his changed actions.

Although the way in which normative conflicts are expressed is mostly through discursive rationalisation, namely by explicating the signifying chains which form the symbolic context for the contentious norms, and attempting to connect the signified objects and object-relations into a new normative order. In actuality normative conflicts reflect differences in interpellating reality, and by extension the different choices habitually committed to by each human actor, so are genuinely normative in the sense of being the results of choice, and genuinely in conflict in the sense of arising from a place of irreconcilable difference. I believe that this image of reality as constituted by multiplicities of normative standings maintains the individual humans in their uniqueness, and also characterises collective action as bounded multiplicity with the constant potential for irruption.

6.6 Norms and group habits

The above discussion has gradually shifted the focus of analysis from the relation between norms, normative action, and habit as perceived from the practical actor's perspective, to emphasise the potency and normative significance of the external conditions. The power of the external conditions in constituting both the interpellation of reality and the possible courses of action within that reality means human actors are compelled by the forceful presence of material objects in their surroundings to react in

particular ways and to construct a reality in accordance with the meanings most strongly presented by those objects.⁸⁰

The external conditions carry a magnetic normative force which compels human action in certain ways.⁸¹ So far, I have only spoken of reality as being either a normative construction or an interpellation, both terms suggesting a passivity of reality. Now I will emphasise how the external conditions actively condition and compel action according to particular terms. External conditions do not fully constitute human actions, for that would suggest determinism, however they do exert a magnetic and potent influence on action on a constitutive level. They do not only present physical obstacles for action, but form the conditions of possibility for action and their normative meaning.⁸² These conditions are not normatively neutral, but are structurally biased towards the hegemonic normative orders constituted by group habits.

I have defined group habits as habits which are widely common in constituting the personal histories of human actors in a community. In other words amongst a population of human beings those habitual object-relations which each possess in common with many others may be regarded as group habits of the population, ossified into prevalent social norms and customs. Group habits are no different from other habits in that they must be materially manifested through the objects and object-relations which constitute them, however they seem to exert a force in shaping the normative landscape of reality by virtue of their widespread habituation, so constitute a common and enduring interpellation of reality.⁸³

Whilst theoretically interpellations of reality are unique, in actuality disparate interpellations are sufficiently similar so that there appears effectively only one dominant interpellation of reality.⁸⁴ I use the term 'appear' since the overlaps and similarities between individuals' habits are not identical in the sense of being replicas or having the exact same ternary constitution. Rather the similarities are sufficiently close to engender an appearance of sameness, and this apparently same

⁸⁰ This compulsion is neither rational persuasion or physical coercion, but a force of habit which magnetises body and world interactions. See Merleau-Ponty, n.39.

⁸¹ Akin to Merleau-Ponty's assertion that the world consists of 'areas of sensitivity' which corresponds to a human actor's body; *ibid.* However my argument is that instead of the environment responding to the actor's bodily movements, conversely it is the external environment which shapes and moulds the actor's body into particular actions as conditioned by his habitual object-relations.

⁸² Both physical/mechanical and normative/meaningful possibilities.

⁸³ See chapter 5.

⁸⁴ Akin to Bourdieu's doxa (presupposed beliefs), and illusio (unreflective adherence); n.21 pg.98-102.

identification of reality operates as a presupposition shared by human actors.⁸⁵ In other words, human actors presuppose that they inhabit a reality constituted in identical terms, that the objects, object-relations, and signifying chains all have effectively the same meaning so as to enable mutual communication and understanding. This also implicates a presupposition of the normative terms constitutive of that reality, taken as the unquestioned natural order of reality.⁸⁶

This presupposed common identification of reality is not sustained solely through the force of each human actor's own habits, but is reinforced by the material objects in the external environment presenting particular modalities. More specifically the objects are presented most forcefully in their group habit modalities due to their constant reinforcement by sheer repetition of particular spatial relations of objects, and reenactment by situational relations of others' actions.⁸⁷ In other words as objects are placed in a material space according to the normative terms of group habits, such as beds being placed in bedrooms, the sheer frequency of encountering that space renders that particular set of modalities increasingly powerful. In conjunction the material effects of others' actions create a situation which reinforces the normative dominance of group habits. This implies that the presupposed symbolic context is structured along those signifieds pertinent to the group habits. The process of naturalisation is likely favourably to bias group habit modalities by strengthening their connection to objects and increase the power they exert over action. Concurrently the effect of habit renders group habit object-relations increasingly automatic and compulsive in reaction to those objects. Presupposition is not a theoretical or pre-material concept; it is grounded in the material body which adopts a habitual and compulsive interpellation of reality that appears natural and inevitable owing to the quality of habit, a process writ large across the community.⁸⁸

The dynamic between the interpellation of reality in accordance with group habits and the active production of a material external environment which embody those group habits is a cyclical and synchronic feedback loop. The process continues apace as the

⁸⁵ I do not mean a theoretical or conceptual presupposition, such as Kant's *a priori* categories or Kelsen's Grundnorm. This presupposition is material and mundane, and is evidenced variously in the unspoken assumptions made in ordinary speech, the use of gestures and expressions in communication, use of single word imperatives, etc. Cf. Bourdieu *ibid.*; also his 'structuring structures' which are socially constructed categories of understanding; n.21 pg.172-180.

⁸⁶ *Ibid.*

⁸⁷ Akin to Bourdieu's two-fold inscription of the social in things and bodies, which brings about correspondence between objectified fields and bodies; n.21 pg.150-155, pg.180-182.

⁸⁸ *Ibid.* pg.172.

effects of habit and material reinforcement together drive further entrenchment of group habits. The more the external environment is reproduced by human action to embody the norms of group habits, the surer is their continued interpellation of reality. For example, if through habitual knowledge and experience I anticipate that engaging in a certain action will produce a certain material effect, and find it vindicated at every turn, it becomes a self-evident cause and effect relation or even a natural law, and difficult to challenge or question the conditions of that action.⁸⁹

To take an extended example, the external space consisting of a road and a pavement is charged with the norms of traffic rules embodied in the material objects of road, pavement, curb, traffic lights. The situation consisting of cars driving on the road and pedestrians walking on the pavement is charged with the norms corresponding to that space, as human actors acting in the appropriate manner embody the rules of traffic. The scene may appear to be one of norm determined rule following behaviour by the human actors as participants in a shared project of coordinated action. That is because the drivers and pedestrians all act in conformity with the formal rules of traffic, their actions are taken as evidence that they are obeying the rules of traffic, so they must be determining their actions in accordance with the rules. In other words the formal rules are posited as bringing order and structure to the situation by dictating the appropriate norms of action, and causing those actions by exerting influence on the will or minds of the human actors.

It is not norms as rules, but material objects embodying norms which constitute the situation in a biased fashion such as to compel action conforming to those norms. The context is set up in such a way that the material objects present particular modalities forcefully, so compel human actors to react by engaging in the object-relations they have habituated. Both the modalities and the habitual object-relations likely embody the norms of group habits, so result in actions which conform to the norms outwardly, but are not caused by the norms in the sense of being norm determined action. The driving mechanism is habit, so implies that those habits which are most ingrained will exert a greater influence in conditioning knowledge and action. If the human actor has most often encountered the objects of road and pavement in their modalities as places for cars and pedestrians respectively, the force of habit will impress these modalities most strongly upon him. The habitual knowledge of the objects will lead to an almost

⁸⁹ Bourdieu n.21 pg.191-195; 'two-fold truth'.

automatic recognition of the space in those particular terms, and override alternative possible interpellations of that space. The situation would arguably be different if there were no cars on the road late at night, so a pedestrian might feel freely able to jay walk. This is not a case of flouting the rules in the sense of deliberately disobeying rules, but rather the absence of the objects of cars change the interpellation of the space and situation.

I would argue that the significance of this biased construction of external conditions demonstrates how group habits are maintained through apparently rule-following behaviour which are actually habitual behaviours coincidentally conforming to formal rules. Because group habits are so prevalent, they lend themselves to transmission through mimesis and instruction.⁹⁰ In turn these habits come to constitute part of that human actor's knowledge and ways of interaction, so bias his interpellations of reality towards those habits and the norms they embody.⁹¹

6.6.1 Group habits and normative action

The foregoing may suggest that group habits exert an almost homogenising force on action. Since group habits are able to affect the fundamental constitution of external conditions in ways favourable to their perpetuation, there would appear to be no room for any other habits or courses of action to intervene, as hegemonic group habits tend towards homogeneous self-reproduction and preclude the possibility of change. However this is only on the assumption that group habits are successful in maintaining action at the unthinking automatic level of repetitive habit, which requires a consistently smooth and effortless fulfilment of that habit. In other words both the action and the external conditions must be kept in sufficiently constant correlation so as to preclude any external obstacles which might impede the unthinking operation of habit.

In actuality this is unfeasible, since not only is every context unique in its composition of material objects and human participants, there are also multiple group habits vying for fulfilment. Moreover the greater the spread of a particular group habit across a population, the greater the number of interpellations exist for that habit, since

⁹⁰ Learning processes often described in theories of socialisation; see chapter 4.

⁹¹ Bourdieu n.21 pg.190-195.

interpellations are conditioned by the unique histories of disparate human actors. In other words as a group habit becomes more prevalent, it also encompasses a greater variety of personal histories. Unique histories entail differences which are nuanced yet irrevocable, so cause interpellations of the group habit to become less homogenous and stable in its possible meanings. As long as interpellations of reality remain unique this multiplicity exerts a destabilising effect upon group habits by increasing the chances of conflict between competing interpellations.

I would argue that the tendency of group habits towards homogeneity and totalisation is offset by the destabilising effects of multiplicity and proliferation of discourse. Multiplicity and discourse mutually imply the other, since discourse is another term for the discursive representation of interpellated reality, and multiplicity denotes the innumerable unique interpellations to be so represented. The pertinent issue is to demonstrate how these two forces operate to destabilise group habit and open the possible space for normative change.

I have said that as long as all the participant human actors are not impeded in their habitual actions, group habits will remain at the level of presupposition. The human actors will act upon the presupposition that they are in agreement in their interpellations of reality, so enabling the group habits which structure that reality to remain implicit and powerful. An irruption or change might occur through either a change in the external conditions, or the revelation of a conflict between individuals' habits.⁹² Both would cause a sudden disruption in the smooth functioning of habit in the form of an external obstacle.

Regardless of the source of irruption, the effect is to force the group habit into conscious deliberation, which is likely to entail a discursive explication of its constitutive signifying chains. The presupposition can no longer remain presupposed, but becomes an object for examination and deliberation.⁹³ This deliberation is not reasoning or debate between rational agents, but an invested process directed

⁹² Lindahl details the irruptive force of illegal behaviour which momentarily brings into explicit relief the joint action of legal ordering, so forces the interpretation of that joint action. Hans Lindahl, *Fault Lines of Globalization : Legal Order and the Politics of A-legality* Oxford Constitutional Theory. 2013, pg.26-30.

⁹³ Ibid.

towards the continuation of action.⁹⁴ Since the presupposition which once facilitated smooth habitual action is now rendered asunder, action becomes blocked, so the imminent question becomes what course of action to take. This necessity of choice reveals the moment of normative action, of opportunity to choose the next step and the necessity of being guided by norms in making that choice.⁹⁵

At the individual level such conflict is usually resolved by having regard to other habits furnished by experience. For example, if I find that my preferred drink is not available, I might imagine based on my past experience what the second best option is for satisfying my thirst in that particular moment, given the entirety of my present state. Or failing that, defer to instruction or advice from others; if I have no experience with choosing wine, I might defer to the recommendations of the sommelier, and through repeated experience build up a knowledge of wine and my own preferences. In both instances there is a reconfiguration of my body of habit upon synthesising the my experiences. The process at group level is similar, only instead of deliberation there is likely to be precipitated a proliferation of discourse, which is the expression of multiple interpellations of the situation. Multiple and competing constructions of the context may be advanced as the 'right' one, all of which are conditioned by the unique personal histories of the human actors involved. A straightforward example would be a situation where each person involved holds a different opinion on the significations and the desired outcome. Situations of normative conflict are the same in quality, despite the predominant use of prescriptive language in the giving of normative judgements. From the practical perspective, norms are no different from opinions in that both aim to influence proceeding action.

I believe this fundamentally material source of conflict between bodily habit and external conditions can explain why social movements are often instigated by human actors whose bodies are the sites of conflict. Bodies of the female, raced, transgendered human actors who find their bodily habits impeded by the external conditions, unable to fulfil their habitual personal histories, so often at the juncture of

⁹⁴ This would largely preclude a solution of conciliation, which is where belief in a proposition is suspended when faced with indeterminate epistemic claims; David Christensen, 'Epistemic Modesty Defended 1', in *The Epistemology of Disagreement* n.76. This is because action cannot be suspended in entirety, and whenever an actor engages in action there is manifested some normatively important effect, which necessarily implicates a committed belief, in spite of the actor reporting skepticism or otherwise.

⁹⁵ Norms are materially constituted as feasible action possibilities.

impeded action and choice.⁹⁶ The explicit expressions of these conflicts as moral or political is not a case of discovering a defective application of ideal norms, such as equal treatment or human rights. The conflict comes to light owing to disjunctions between habit and their external conditions which can no longer sustain the presupposition of the issue as unproblematic, so forces the necessity of choice of action and opens up the space for the proliferation of discourse.⁹⁷ The habit which is interrupted no longer obscures the active normative construction of that particular context so allows competing interpellations to vie for dominance.

6.6.2 Materiality of norm conformity

Throughout I have emphasised the primacy of the materiality of reality over its discursive aspect. The foregoing discussion on the destabilising effects of discourse does not alter the assertion that human actions are foremost conditioned by the material realities they find themselves situated in. Hitherto I have approached action from the constructive aspect, focusing on the human activity of manifesting the norms which structure material reality. There is a danger that focusing solely on the human as active being gives the impression that humans through volitional action are capable of changing the normative structure of reality. Whilst in theory I would argue this is true, in actuality human actions are constrained by the external conditions which are perceived more as externally imposed conditions of necessity as opposed to positively constructed conditions of possibility.⁹⁸

External conditions both enable and constrain action; they enable those actions which correspond to the normative structure of reality, and constrain those which are not in conformity with the normative structures. Rather it would be more accurate to say that the field of possible action itself is constrained by the normative structures of the world, and actions which lay outside that field are perceived as implausible, unthinkable, fantastical.⁹⁹ These external conditions are constituted by habitual actions of all human actors in a community, and mutually reinforce their reproduction.¹⁰⁰

⁹⁶ Frantz Fanon, *Black Skin, White Masks*. Pluto Classics. London: Pluto, 1986; Mitchell J. Wood, 'The Gay Male Gaze.' *Journal of Gay & Lesbian Social Services* 17(2): 43-62.

⁹⁷ Embodied conflict which is tenuously covered over by discourse; see chapter 3.

⁹⁸ Akin to Bourdieu's 'fields'; n.21 pg.98-102.

⁹⁹ This claim is parallel to Lindahl's notion of systems of order designating that which is unorderable, therefore outside the field of actions possible to the order; n.91 pg.175-6.

¹⁰⁰ Bourdieu, n.21 pg.150-155.

This grounding in habit and materiality is why discourse is relatively impotent in determining action. By implication norm conforming actions are also not the results of discursive reasoning and will, but are reactions towards the objects in the environment, compelled by their forceful presence and constrained by external conditions to a narrow field of possibility. Human beings do not act in conformity with the prevailing norms and rules of society because they accept or endorse them, and consciously orient their actions in line with those norms. Rather the norms and rules constitute the terms of possible material action, and by being embodied in objects they are part and parcel of the external conditions.

For the practical human actor, living means actively engaging with the world in an intentional fashion to bring about material effects which are conducive to the prolonging of action. When faced with norms embodied in the external conditions, these are perceived as external obstacles which human actors take into account in deliberating their actions. These norms are simply taken as given, as irrevocable constraints on action, and deliberation is shifted towards how to act given these constraints.¹⁰¹ For example, if I wish to drink a soft drink, my actions will be preoccupied with going to a store and purchasing one. Or if I cannot afford to purchase the item, my actions will be preoccupied with deliberating between methods of acquisition such as stealing and the chances of detection or punishment. My choices are externally constrained by the normative institutions of law, property, and money which I reenact and embody in my actions of either purchasing the item, or surreptitiously taking it. The possibility of simply taking the item boldly and walking out without paying, but also without the fear or risk of punishment or any incentive of running away is not presented as a plausible course of action.¹⁰²

¹⁰¹ Ibid. pg.98.

¹⁰² Such courses of action are mostly undertaken as explicit demonstrations of protest which seek to subvert directly the norms of action. Examples include occupying public spaces, sit-ins, rallies, etc. However I would take note that demonstrations are usually events which are characterised by both symbolic and material isolation, and crowd participation. Protests are isolated and cut off from everyday material and symbolic living, and constrained to its own limited space, both symbolically by labelling it as protest and using jargon to convey its messages. But also materially by cordoning off the protest from other public spaces, using uniformed police and other partitioning objects to contain the protest in a physical manner. Similarly the relative ease for a crowd to engage in protest compared to the difficulty and rarity of lone protestors would attest to my assertion that the external conditions are very important in conditioning the possibilities of action. It is easier to break free of habitual conformity when crowd action no longer reinforces the habitual group habits of conformity. Cf. Lindahl's category of the a-legal action, of action which calls into question the very boundaries of the legal order; n.91 pg.36-38.

When anticipating out the possible courses of action, those norms of the situation are perceived to be necessary and irrevocable, rather than contingent and particular. I have to pay for the drink, or I have to steal it without being caught, is an accurate description of the situation. It is highly unlikely that in such a situation the norms of property and money will be critically examined and their validity reflected upon. Indeed I might consciously rebel against the unfairness of capitalism and deny the legitimacy of the money institution, however as long as my possible courses of action are anticipated to be limited by the constraints of those institutions, my resulting actions will necessarily conform to those norms. The force and solidity of these constraints are sustained by the force of habit my habitual reactions towards the objects in my immediate surroundings.

This is how norm conforming behaviour is maintained in the world: by prevalent group habits structuring the external conditions in a biased way so as to limit the field of possible action. Moreover norm conforming behaviour is not dependent upon the reinforcement of psychological belief or acceptance of those norms, but by presenting the material external conditions as the necessary and irrevocable environment which the human actor must navigate as best he can in order to achieve his aim. Where discourse exerts a potentially destabilising effect is to reveal the apparently necessary normative structures in their contingency and offer up alternative possibilities for action. So rather than being preoccupied with what must be done, action is oriented towards what can be done differently.¹⁰³ There is potential for discourse to change the normative terms of the external conditions, but only if discourse is effectively materialised by action.

I have stated that choice is not a matter of thinking or reflecting, but being conscious and active in choice at the moment of action. Similarly society cannot achieve a desired state by only proliferating discourse on the relative merits or validity of social norms and institutions in hopes of hitting upon the correct answer. There must be effective change in the material external conditions in order to enable different possibilities of action, outside of those currently constrained to conform with prevalent social norms.¹⁰⁴ As long as human actors continue to engage in action which

¹⁰³ Bourdieu n.21 pg.106-111.

¹⁰⁴ This may be likened to Lindahl's notion of reordering or redrawing the boundaries of a system of order. However I would emphasise that the difference with my claim lies in the primacy of the material, which necessitates not only a discursive change in the meanings or significations of the order, but must be preceded by a change in the material conditions themselves, such as a different placement of objects.

conforms to extant institutions they will continue to anticipate their possible actions to be constrained by the institutions as a necessary and irrevocable fact to be navigated.

6.7 Conclusion

I have presented my theory of normative action by combining the ternary framework with the mechanism of habit to produce a material and action based account of norms, by presenting the relationship between norms and action as spontaneous manifestation, rather than cause and effect. To the objection that habit is antithetical to normative action, I have argued that the element of choice between material possibilities allows habitual actions to be normatively imputed to the actor, without resorting to ideal conceptions of agency and autonomy. The possibility of radical alternatives to the constructions of reality and fields of action maintains the contingency which prevents normative action from sinking into fixed and determined repetitions. The stabilising effects of habit maintains the precarious coordination between action and context, and explains the considerable hegemony of certain normative orders.

The vital claim is that norms are manifested by intentional action, and are effectively manifested regardless of the cause of action. This allows me to equate the normative significance of actions explicitly determined by norms with actions which are purely coincidentally norm conforming. This normative equivalence is important in anticipation of the proceeding chapter which will focus on legal normativity, for I will be arguing that coincidentally law-conforming actions form the bulk of legal normative action.

Legal Normativity

I have developed in preceding chapters an account of embodied normative action which treads a middle path between theories which depend on ideal Reason, and those determined by social and economic forces. Norm and action occur in unison, in a moment of action which manifests particular norms into materiality. Action is conditioned by normatively structured external conditions which are biased towards the most habitually prevalent norms in society. Every instance of action is unique and affords infinite possibilities for world building; likewise every context is unique in its composition and possibilities for action. Their fundamentally contingent and unstable relationship is brought into coincidence by the force of habit, which drives particular patterns of behaviour and constrains the possible interpellations of reality. These repetitive areas of coincidence ossify to become group habits, or prevalent social norms and institutions, which cement their hegemony by constructing external conditions conducive for their reproduction. This cyclically reinforcing process is primarily driven by habit operating to stabilise and compel activity, all in a non-teleological and undetermined fashion.

In this chapter I will return to my original aim of constructing a theory of embodied legal normativity by exploring how my account of normative action is played out in the specific domain of law. I will argue that legal normativity is manifested through law-conforming action which is primarily driven by habit rather than determined by legal norms. The prevalence of law-conforming action makes law a group habit, so implies the presence of strong and ubiquitous forces in the external environment which support and condition legal behaviour. This conception of legal normativity as legal action is thoroughly grounded in materiality, in the corporeal legal actor and the external conditions which embody legal norms.

Pursuant to my *in media res* approach, I will proceed upon the assumption that law is readily present in society as identifiable norms and institutions. I will constrain my enquiry to examining the mechanics of legal action along with the conditions of its

possibility and reproduction. Furthermore I take law to be a social phenomenon which has its foundations in the empirical world, and reject any conception of law as an ideal *a priori* category of norms or principles. I will take the form of law most familiar to generic modern liberal societies, epitomised by State law, as my working material. I begin by firstly recasting law using the language of objects, object-relations, and signifying chains, so representing law as a haphazard collection of material objects and actions as opposed to a system of norms. I then focus on the element of legal action and its two enabling factors of habit and external conditions. The legal actor is advanced as the locus of normativity, and legal action as the materialisation of normativity. Lastly I offer some observations on how the counterintuitive features of law might be explained by my account of legal normativity.

7.1 The materiality of law

Re-imagining the materiality of legal normativity necessitates a re-characterisation of law as constituted by material legal action as opposed to a system of rules. This entails examining the everyday actions of individual actors which serve as manifestations of law as the most basic form of legal action, which in their aggregation constitute the entirety of law.¹ This organic approach eschews conceptions of law as a coherent system of discourse, a collective social practice, or any other suggestion that law is somehow an autonomous and self-enclosed phenomenon. Instead I envision law to be a haphazard collection of disparate and coinciding actions which are contingently related to a common signifier.

The first step is to re-present law in terms of the ternary, and detail how law is embodied in objects, manifested in object-relations, and organised through signifying chains into a symbolic context for legal action. This enables the relationship between legal norms and legal action to be reconfigured in accordance with the account advanced in the preceding chapter; legal action is that which manifests legal norms but not necessarily determined by them, driven by habit and compelled by external conditions favourable to their repetition. The normative force of law is maintained through already habitual actions of individuals which coincide to form the group habit

¹ My aim is to explore the conditions of legal normativity, however for brevity I will use the terms law and legal to refer to the same notion of law being manifested into materiality; I do not conceive of law as separate from legal normativity, but simply another aspect of the same phenomenon.

of law, then organised under the signifier of law to become legal discourse. Discourse does not form the condition for law's normative force, and actions which conform to and manifest law are not testaments to law's discursive claims.

7.1.1 Law as objects

Objects embody various modalities which lie dormant until they are manifested through action. Which particular modality is presented most strongly depends on the presence of and relation to other objects in the spatial vicinity which conjures up the modality appropriate to that space. These modalities are how norms become embodied in material objects, so when an object presents a particular modality it embodies a particular norm and contributes towards a normative construction of the world congruent with that modality. As a particular modality may be congruent with many normative orders, an object is capable of embodying multiple norms simultaneously. This also implies conflation and a degree of mutual conformity and reinforcement between potentially competing normative orders.²

Law is embodied in material objects which present a meaning, function, or value which is either designated by law, or is in conformity³ with the relevant legal designation. I call these legal modalities simply to denote their law-embodying character.⁴ Formal designation occurs when an object is invested with a modality peculiar to law, such as being named by the law explicitly in legislation.⁵ This may entail the object is treated

² I use the term normative orders to refer to networks of signifying chains which form sophisticated and coherent discourses, such as law, religion, etc. However these are not orders in the strict sense of being autonomous or distinct from each other, as I perceive them to all be instances of group habits designated under varying signifiers.

³ I define conformity as non-conflict rather than compliance. Non-conflict need not be fundamental or conceptual in the sense of no possibility for conflict; there only needs to be lack of conflict in specific actual situations.

⁴ Throughout I will use the term legal in this loose sense to denote being relevant to law in some manner, such as being formally or informally designated, forming part of another normative order which supports and reinforces law, enabling legal activity, or simply not posing direct challenges to law's operation. As such I may refer to certain objects and actions which have no apparent connection to law, but I perceive to contribute in some way to law's sustained manifestation in the world. This is a necessary part of my project to break down the familiar structures of law as statutes, rules, institutions, practices, etc. into the most basic unit of human action, and reforming these into a new conception of law.

⁵ This may be likened to Lindahl's formulation of a collectivity disclosing something as something, which is similar to my conception of investing an object with a modality, so treating it as something. This is particularly so from the perspective of the legal discourse, or Lindahl's legal collectivity, however the difference lies in my conception of modalities is context dependent rather than discourse dependent. The modality exhibited by an object, so the modality it embodies into materiality, is conditioned by the presence of other objects and their spatial relations which constitutes the material context, and invokes a particular symbolic context. Hans Lindahl, *Fault Lines of Globalization; Legal order and the politics of a-legality*, OUP, 2013, chapter 4.

or used in a different way, such as banknotes being used as legal tender, a function which is made possible solely by formal legal criteria being met.⁶ More often the object will continue to be used in already established ways, but simply formally integrated into law, such as foodstuffs continuing to be treated by law as consumables when legislating on food safety regulations. Most of these ready established legal modalities are designated informally, by being implicated in a presupposed fashion;⁷ law for the most part takes as given the common and mundane modalities of objects found in the world, and occasionally would designate them with a modality peculiar to law. Thus law is embodied in objects presenting a modality which is either formally designated as peculiar to law, or more often informally and implicitly reiterated by law in a mode it already possesses.

Since law is a group phenomenon, it follows that law must designate certain group objects which it controls for its members. To take the example of the archetypal State law, a legal State entity cannot arguably be maintained without the bodies of its members designated as citizens under criteria peculiar to that State.⁸ By implication it also needs a territory whose boundaries and access are formally designated.⁹ Not strictly necessary but often present would be formal designations of objects located inside the territory, the most ubiquitous modality being private property.¹⁰ Significantly this designating of group objects also creates obligations amongst group members; as the most ubiquitous legal modality is private property, it follows that the most common and basic obligation between human actors as members of the group is mutual respect for others' property in the form of material commodities and bodily integrity.¹¹

⁶ Foreign and counterfeit banknotes not meeting criteria peculiar to a legal system demonstrates how a familiar object may lack a familiar modality.

⁷ The most ubiquitous modality is objects as property; this is the default setting for law, in conformity with other normative orders such as economy and general society.

⁸ Rules of citizenship, passports and identifications, etc.

⁹ Whether this must be physical territory is now a disputed issue in legal theory. I would argue that some form of material embodiment is necessary, such as a domain name for virtual territory; the issue is more about actual control than physical borders.

¹⁰ With the spread of capitalism physical boundaries no longer present much obstacle to the movement and subsumption by capital of bodies and spaces; see Hardt & Negri, *Empire*. Cambridge, Mass. ; London: Harvard University Press, 2001, Part 3.6.

¹¹ I clarify that the legal group envisioned here is not any robustly or explicitly delineated collectivity, such as Lindahl's notion of the legal collectivity. Rather it is a more haphazard community which is maintained mostly by the necessity of sharing space and resources.

7.1.2 Law as object-relations

Whilst objects are capable of embodying the law by presenting their law-conforming modalities, it is the human action reacting to the object in a manner relevant to law which manifests it into material reality. Those object-relations which are capable of manifesting law constitute legal action, and the totality of such object-relations together constitute the entire body of human activities of creating and maintaining law. Legal action is therefore not an effect of a causative deliberation determined by legal norms, nor is it evidence of the efficacy or validity of law's normative force, but is the very manifestation of law through material action.

Object-relations are capable of manifesting law when they are instituted by law so that their enactment constitutes a legal norm, or they are instituted through other means and their enactment conforms to, and does not conflict with actions prescribed by law. Any action which conforms to legal norms either by direction and compliance, or by coincidence and non-conflict, counts as legal action. Legal action is not restricted to those explicitly determined by legal norms, but includes actions which are simply law-conforming in that the norms they reenact do not pose direct challenges to law. I believe that whilst object-relations formally instituted as legal norms may appear to be the archetype, the maintenance of legal normativity through continued reproduction and reenactment of law depends mostly on informally instituted and coincidentally conforming actions.

A legal norm can be seen as an object-relation that is formally instituted by law as peculiar to it. The object-relation denotes action which is appropriate to law as legality, and simultaneously denotes its negative as illegality. In this way both legality and illegality are manifestations of the same legal norm, as they are simply the same object-relation expressed in positive and negative terms.¹² This means actions which transgress the law are equally instances of legal action; they do not undermine law, but reinforce a material reality which preserves the integrity of law.¹³

¹² Cf. Lindahl n.5 pg.138-140.

¹³ Here I differ in my conception of illegal behaviour by positing them as instances of positive manifestation of law, from Lindahl who sees illegality as a moment of irruption which is smoothed over by subsequent reaffirmation of the legal order through legal action, such as arrest; Lindahl, *ibid.* There is no sharp distinction between actions which undermine or reinforce law, since actions are unique and defy neat normative categorisation. I am only highlighting illegality as another mode of law's manifestation.

Legal actions which are not instituted by legal norms occur through human actors engaging in their habitual and familiar actions which coincidentally conform to law; these actions manifest law in conjunction with any other norms they are compatible with. The most common example would be interacting with objects in their modality of property, such as not appropriating or destroying objects, monopolising objects, and engaging in exchange. These various object-relations are all in conformity with the law in relation to property ownership, contract, and theft, in conjunction with other prevalent norms of the market economy, money institution, and private property. Actions manifest multiple norms simultaneously, so human actors can actively manifest law through their actions without necessarily having any knowledge of their doing so.¹⁴

By engaging in legal action, the group entity of law is materialised and maintained. For State law this entity would primarily consist of the group legally designated through its legal activities, such as producing and enforcing domestic legislation, entering international treaties as a sovereign State, not submitting or recognising foreign laws in its territory.¹⁵ More specifically formal legal institutions such as court systems, and legal practices such as contracts, which may be viewed as unit entities of law, are similarly manifested by the legal activities of individual actors.¹⁶

7.1.3 Law as signifying chains

Finally, these legal objects and object-relations are connected together through signifying chains to form the discursive order of law as a coherent collection of formal rules and institutions, of statutes, courts, legislatures and such organised into an autonomous and enclosed system. An archetype of a formal legal signifying chain would be a written statute, which designates the relevant legal objects, institutes the appropriate legal object-relations, and connects them in a coherent and discrete piece of symbolic legislation. Going a step beyond, areas of law are compartmentalised into distinct specialisms such as contract and employment, and are all constituted by their

¹⁴ This is similar to Lindahl's argument that the legal collectivity is maintained through the actions of its individual participants acting in line with the collective legal ordering, irrespective of their consciousness or awareness of their doing so; n.5 pg.86-88.

¹⁵ Actions all undertaken by members of the group; group entities are maintained by members behaving 'as if' the group exists; see chapter 4.

¹⁶ Mundane actions such as appearing in court and standing in the dock; paying money in exchange for goods; being arrested and incarcerated. The wilful voluntariness or motivation of these actions are irrelevant, what matters is their material and public effects; see chapter 6.

respective networks of signifying chains which group together objects under their peculiar significations. The proliferation of these signifying chains continues and expands into discourses which attempt to encompass all of law, in other words legal theory.

Signifying chains transmit meaning, but they cannot sustain those networks of meaning without the necessary material support of objects and object-relations. This means that whilst a statute might be the formal representation of a legal signifying chain, it is more accurately viewed as an object of written document, created by the object-relations of enactment by legislature, and maintained in its materiality by being actually enforced or kept in the statute books.¹⁷ This also applies to legal practices and institutions, which may not have their norms enshrined on paper, but are manifested through conventional and customary actions.¹⁸ Furthermore these material embodiments of law are not driven or determined by legal discourse, but are merely given discursive coherence *ex post facto* under a common legal signifier.

I believe that this fundamental materiality of law highlights the inadequacy of understanding law as a coherent system or discourse. The networks of signifying chains which constitute legal discourse give apparent coherence to a collection of disparate activities by designating them under the common referent of law, hence giving the impression that these activities are object-relations instituted from a centralised source of authority. In actuality law is a haphazard collection of objects and object-relations, some of which are peculiar to law, most of which are already established as commonplace actions not in conflict with or implicitly integrated into law by being reiterated under a legal signification. The constitutive material elements of law are mutually non-coherent; law is fundamentally a haphazard collection of objects and actions.

7.1.4 Legal contexts

Having re-characterised law in terms of the ternary of legal objects, object-relations, and signifying chains, these may now be combined to form a dynamic picture of how

¹⁷ I realise I am presupposing normative constructs such as enactment which contains its own discourse; the point is that all such legal phenomena is constituted by the same fundamental actions of law building.

¹⁸ The relationship between normativity and efficacy is they are different aspects of the same legal action, where efficacy denotes the material effects of the action, and normativity denotes the normative relations manifested and reinforced by the action.

law is manifested through the interaction between action and its context. Although it is the action which manifests law, the possibility and potentiality of that action must be embedded in the material context. Moreover legal action must be strongly and consistently compelled by the context in order to maintain the hegemony of law.¹⁹ This means that the objects which constitute the physical surroundings present their legal modalities most strongly to compel the enactment of their legal object-relations, thereby manifesting the norms of law into being.

I call these legal contexts, comprised of spaces and situations constructed along objects' legal modalities. Legal contexts are not exclusively constructed along legal modalities, but may simultaneously present other modalities not in conflict with law.²⁰ The important characteristic of legal contexts is not that a space or situation can be represented by legal discourse, but that the norms of action which are compelled by the forceful presence of objects are biased towards manifesting law, either because they are peculiarly legal norms, or they are norms which conform to law.²¹

Legal space is formed by material objects placed in particular spatial relations to invoke most forcefully their legal modalities, thereby create a space which compels legal action. For example, a shop is a legal space with the objects on display presenting their modality as goods for purchase, the shop walls and doors as the boundaries of private property, and the counter as the proper area to engage in the contract for sale.²² This is not a matter of simply representing the material space in legal terms, conversely it is the relative spatial positions of the objects which first

¹⁹ Used in Gramsci's definition of dominant ideology, which I argue law currently holds.

²⁰ Lindahl terms this coexistence of norms 'compossibility', a notion which is similar to my notions of conformity and non-conflict, in that the coexisting norms must not be mutually exclusive; n.5 chapter 5.

²¹ There is rich literature on the topic of how spaces condition actions and experiences, and how law intersects to shape both. Mario Berti, 'Handcuffed Access: Homelessness and the Justice System.' *Urban Geography* 31(6): 825-41 for a study of the relationship between public places, legal regulation, and the homeless. Moore, Freeman, & Krawczyk, 'Spatio-therapeutics: Drug treatment courts and urban space', *Social and Legal Studies* 20: 157-172. D. Moran, 'Carceral geographies and the spatialities of prison visiting: Visitation, recidivism and hyperincarceration', *Environment and Planning D* 31: 174-190. M. Benson, 'Mining sacred space: Law's enactment of competing ontologies in the American West', *Environment and Planning A* 44: 1443-1458. J. Gillespie, 'A Legal Geography of Property, Tenure, Exclusion, and Rights in Cambodia: Exposing an Incongruous Property Narrative for Non-Western Settings', *Geographical Research*, 54: 256-266.

²² Lindahl gives a similar example of the space of a shop, and how one proceeds by the proper means to purchase goods in an unquestioned matter of fact fashion. Lindahl n.5 pg.134-5. It is important that the legality in both Lindahl's and my own examples is maintained through the unquestioning action of the individual participants who need not be explicitly aware they are engaging in legal behaviour. However whilst Lindahl emphasises the collective 'we' element in participation, I differ in that I do not envisage the human actors to be participating in a collective, but rather merely acting from their own habitual experience.

conjure up a reality which is amenable to legal construction. It is the orderly placement of objects on shelves with labels indicating a price which invokes those objects' relevant legal modalities, and these in turn compels their relevant legal object-relations. In contrast, if those same objects were strewn on the ground, or the windows of the shop were smashed, they would likely not invoke their legal modalities, and a legal space would not be constructed.²³ The norms of law are imbued into the surroundings without fully determining the significations of that space, as it is not a space which is discursively delineated in legal terms, but in the process of constituting space law is invoked organically by the material objects embodying legal norms.

Similarly the legal situation is constructed by human actors engaging in legal object-relations. A shop situation is constructed by other actors behaving as customers, such as choosing goods and paying for them, and refraining from shoplifting or disruptive behaviour. The placement and movement of these objects and bodies enable the human actor to read the situation, so respond and react in a manner appropriate to that situation; in this case acting in conformity with law.²⁴ Again this acting in conformity with law is not a matter of consciously complying with legal norms, but engaging in those object-relations most strongly compelled by the situation, which are also coincidentally legal.

Context as legal space and situation gives law a materiality which influences action in a direct bodily manner. Legal space directs our physical movements by constructing particular pathways which strongly compel us to place ourselves in certain spatial positions. Similarly legal situation constructs a particular relational dynamic which compels us to move our bodies in particular ways of relation to others', as informed by our bodily knowledge. These material prompts are presented by objects strongly invoked in their legal modalities, and encountering these objects we are compelled to respond in the appropriate legal action.

²³ A reference to the 'broken window theory', now largely disproved, but remains an influential theoretical idea; see Johansen, Neal, and Gasteyer. 'The View from a Broken Window: How Residents Make Sense of Neighbourhood Disorder in Flint.' *Urban Studies* 52(16): 3054-069. Cf. J. Fulda, 'The 'Broken Windows' Theory and the New York Experience Reconsidered', *Economic Affairs* 30(1): 101-02.

²⁴ Kotabe, Kardan, & Berman, 'The Order of Disorder: Deconstructing Visual Disorder and Its Effect on Rule-Breaking.' *Journal of Experimental Psychology: General*, 2016.

7.1.5 Legal action

I have already defined legal action to be any action which conforms to law; I now discuss how legal norms and action interrelate in further detail. Conscious knowledge of law is not a necessary condition of legal action; whilst any context can be recast in terms of its legal signification, the human actors interpellating and creating that context need not have any knowledge of formal legal norms to reproduce a reality which manifests those norms.²⁵

The materiality of law means legal norms compel action at the bodily level, and it is the bodily action itself which manifests the legal norm by reenacting it into material existence. This unity of norm and action means action need not be determined or guided by norm; action need only pose no direct challenge or conflict to norm, in the sense of manifesting another norm which is not compatible with law. A human actor who refrains from causing bodily harm to others may be determined by any number of factors, such as timidity or physical frailty, however this does not detract from the material effects of his actions, among which is the manifestation of law. In refraining from causing bodily harm, the human actor is actively constructing a material reality wherein humans do not physically harm each other, and reinforcing others' actions of doing the same. Collectively these human actors will have constructed a reality which appears to be determined by law through their contingent yet mutually conforming actions. Hence the significance of action lies in its outward material effects, and not in its ultimate cause, and action which conforms to legal norms is capable of manifesting those norms without being ultimately determined by them.

As the human actor engages in legal action, he is interpellated into a legal subject,²⁶ and becomes the locus of legal normativity as he manifests law through his actions. This process of interpellation is converse to the theories of subjectivity which suggest the creation of a subject through the mechanisms of legal discipline. The legal subject

²⁵ Contemporary jurisprudence generally operates with a concept of legal action as action guided by legal norms, whether as reason for action or constraint upon action. See chapter 1.

²⁶ My conception of legal subject is not active legal agency or subjection to law, but rather the embodiment of law in the actor. It may be more accurate to view the actor as an object of law, a material unit which constitutes law's existence, however I refrain from using the term object in order to maintain a distinction between the human actor and true legal objects which are those objects possessing legal modalities. Whilst the human actor can be said to also embody law, the element of action is the crucial medium through which modalities and norms are materialised, and the human actor as the locus of action is therefore not an object in the strict sense.

is simply a member of the legal entity, and a member's fundamental function is to reproduce the group entity, including his own self as member. A coincidentally law-conforming action is sufficient to interpellate the actor into a legal subject irrespective of his conscious knowledge of law; he becomes a vehicle or conduit for law without necessarily becoming subjected to law in the sense of either being persuaded of its validity or disciplined to its standards. It is not a matter of creating a subjectivity whose thoughts and actions are conditioned by particular mechanisms, but rather the outward conformity of action and norm which is important for manifesting legal norms into materiality.

7.2 Maintaining the law

I now examine how law is maintained in its guise as hegemonic social practices and institutions, by detailing how legal actions are persistently reproduced on a widespread scale. I believe this is made possible by the dual operations of habit upon legal actions, and structuring the external conditions to facilitate their fulfilment, thereby increasing the likelihood of their repetition. Both habit and external conditions are likely integral to other normative orders which conform to or actively reinforce law, so are legal but not determined by law. The result is a group of individual human actors each possessing habits which are coincidentally legal, together manifest an apparently homogenous order of law. What draws these contingent actors and actions together is the external environment structured in terms conducive to the reproduction of legal action.

7.2.1 Habitual legal action

Legal action need only conform to law without being determined by it, so habitual legal action is habitual action which conforms in some manner to legal norms without being determined by them. I do not pose the more stringent requirement that action conforms fully to that determined by legal norms, since conformity with law is coincidental and contingent, therefore highly unlikely to replicate action which is explicitly norm determined. This means habits which are not necessarily cultivated through instruction by legal norms are still capable of manifesting the materiality of law.

An habitual action is characterised by its ease and reduced cognitive effort which is a result of repetition grafting the action onto the bodily hexis.²⁷ Habitual action is precipitated when the necessary external conditions and triggers for action are in place to facilitate its fulfilment.²⁸ In order for an action to become habitual, there must be some time invested to allow repetition to graft the action onto the body, and for experiences of the various contexts which calls forth the action to accumulate into knowledge. The two processes occur concurrently to construct a human actor with a habitual action which is both robust in its repetition, but also capable of adapting to changing contexts.

Given that the formal norms of law are largely peculiar to its legal system, are often centrally instituted, and are largely internally coherent, it might be concluded that that only explicit instruction and training as informed by the proper legal norms may result in habits which are properly legal.²⁹ However I would argue that for most of the population habituation in legal behaviour is mostly achieved through general socialisation, without much explicit input from formal legal norms. Most human actors in their everyday actions engage in legal behaviour as a result of their habits cultivated through processes such as education and upbringing.³⁰ This contingency between habit and legal action is stabilised by the external environment which typically comprises of legal contexts conducive to the fulfilment of habitual legal action. The haphazard actions of individuals are entrenched through habit, and brought into coincidence by the environment to maintain a precarious legal order.

A human actor's cultivation of habits begins from the very moment of first action, and through accumulation and synthesis of experience forms a body of habit and knowledge.³¹ One of the first experience a human actor becomes familiar with is the

²⁷ Pierre Bourdieu, *Pascalian Meditations*, Cambridge, Polity Press, 2000, pg.138-140.

²⁸ Ibid. pg.168-9.

²⁹ For example, gaining the necessary skills of being Roman Catholic would require being instructed and disciplined by the proper doctrines.

³⁰ I use the term socialisation loosely to denote the process of growth and development undergone by a human being in a social or communal context. I do not subscribe to any particular methodological or theoretical school in social psychology, and the intricacies of the comparative influences of environment and genetics are not pertinent to my thesis. However I must acknowledge that environmental factors play a significant role in the establishment of a human being's personal history, since my aim is to construct a materialist theory of normative action and to reject ideal conceptions of action. I do not anticipate that not committing to the further claim that environmental factors are the sole determinants of personality or psychology, so allowing for some influence from genetic or other factors poses a great challenge to my central thesis. For more detailed discussion on various approaches in psychology, see Hart & Smith, *Blackwell Handbook of Childhood Social Development* Part II, Oxford ; Malden, MA : Blackwell 2002.

³¹ For a concise overview of the concept of socialisation see Frances Waksler, *Studying The Social Worlds Of Children*, Routledge, 2003, chapters 1 & 2.

difference between their own body and the bodies of others, and by extension the appropriate ways of interacting through their bodies.³² Habits of physical interaction with others are deeply complex and highly nuanced, however it might be safe to assume that restraint from using force, keeping a certain distance, refraining from excessive contact are habitual responses to other's bodies which are relatively common. When human actors habitually approach each other's bodies in ways which generally exclude the use of excessive force, inappropriate contact, and repelled interaction, I would argue that these actions conform broadly to legal norms relating to harm to persons, such as the criminal laws of assault, rape, and bodily harm. These actors are effectively engaging in legal behaviour, likely without input from relevant formal legal norms. Moreover these habits are likely already to have been formed in the contexts of family and school, before the human actor becomes aware of any notion of law or legality.³³

Habits of interaction with material objects follow a similar course, and culminate in the common habitual response toward material objects as property. This comprises of habits of monopolisation, manifested in actions such as writing names on possessions, and habits of acquisition, such as borrowing and exchanging things. Through repeatedly interacting with objects as property the human actor forms a complex and nuanced set of habits which broadly conform to the legal norms such as theft, private property, and contract.³⁴ His previously cultivated habits present fertile conditions for increasingly sophisticated legal actions such as deliberating economic choices, buying and purchasing assets, selecting the objects to surround himself.³⁵

I raise these instances as examples because I believe that for the largest part of the population their initial and ongoing contact with law comprises mostly of these actions relating to persons and property. This also implies that these behaviours form a large

³² Jacques Lacan, and Alan Sheridan, *Écrits : A Selection*. London: Tavistock Publications, 1977, chapter 1; on the mirror stage.

³³ For a concise overview of the role of parenting in the development of prosocial behaviours in children, see Laura Padilla-Walker, 'Parental Socialization of Prosocial Behaviour' in Padilla-Walker and Carlo (eds) *Prosocial Development: a multidimensional approach*, OUP, 2014.

³⁴ Research in children's understanding of property indicate that concepts of ownership begin to form as early as age 2, often exhibiting a bias towards first person possessor in establishing ownership. See variously Blake & Harris, 'Children's understanding of ownership transfers' *Cognitive Development*, 24 (2) 133–145; L.E. Fasig, 'Toddlers' understanding of ownership: Implications for self-concept development' *Social Development*, 9(3): 370–382; Neary, Friedman, & Burnstein, 'Preschoolers infer ownership from "control of permission"' *Developmental Psychology*, 45(3) :873–876; Rossano, Rakoczy & Tomasello. 'Young Children's Understanding of Violations of Property Rights.' *Cognition* 121(2) :219-27.

³⁵ Bourdieu, n.25 pg.172-180.

proportion of all legal action, hence are the foundations for maintaining law's normative force. Whenever we refrain from using others' bodies with excessive force, or pay for goods, or refrain from entering gated areas, we are manifesting normative orders, including law, into materiality.³⁶ It is likely that law is not the uppermost concern in our minds when engaging in these actions.³⁷ Their habitual nature would suggest that we engage in these actions without much cognitive deliberation at all, however collectively these semi-automatic habitual actions constitute the foundation of a legal society. This is not to say there are no instances of law breaking such as theft, bodily harm, or trespass, or that human actors who engage in such actions are somehow less habituated or more cognitively deliberate in their actions.³⁸ Nevertheless it is fair to say most behaviours relating to the habitual treatment of others' bodies and material objects conform to the relevant legal norms, and serious deviations from these norms are rare.

7.2.2 Assimilating legal norms

I have argued that the large proportion of what constitutes legal behaviour is habituated through other non-legal norms, cultivated through the general process of socialisation. This means that a human actor builds up bodily knowledge which enables him to adequately participate in a legal community even before his first explicit encounter with formal law.³⁹ Whilst theoretically it is possible to progress through life without encountering or engaging with law, the ubiquity of law permeating and determining fields of action renders this highly improbable. Since the human actor is likely to possess an already established body of habits before his initial encounter with law, what occurs is an assimilation of law into existing habits, possible changes in existing habits which are in conflict with legal norms, and possible introduction of new habits determined by legal norms. The assimilation of law onto a human actor's body renders quite a significant change in his discursive significations of action and context, so how he discursively represents the world and his actions within it.

³⁶ This is similar to Lindahl's notion of disclosing something as something anew, which I understand as a reinforcing of a certain ordering of oughts; n.5 chapter 4.4.

³⁷ Ibid.

³⁸ Law breaking behaviour may be equally habitual, and still reenact the law by being performed in a surreptitious or guilty way.

³⁹ Bourdieu, n.25 pg.184-186.

To assimilate the law into habit means to become aware of the peculiarly legal modalities of already familiar objects, appreciating the legal significations of already established habitual object-relations, and connecting these into new networks of significations peculiar to law. For example, the existing habit of exchanging banknotes for goods might take on the additional layer of legal signification by introducing the formal legal modalities of objects as merchandise, and the act of paying as purchasing or contracting.⁴⁰ This additional facet of formal law, or legality to objects and object-relations is not limited to a new interpretation of past actions, but constitutes a fundamental change in habit which affects the virtual construction of possible future actions. It is as if the human actor has attained law as a concept through which to analyse and reintegrate his actions and environment into a new network of significations.⁴¹ Although this may entail a broadening into new possible fields of action, it also implies a narrowing of action along the fault lines determined by law.⁴²

The practical human actor encounters the world through activity, and knowledge is in the service of action rather than passive reflection. For example, a human actor is able to navigate the context of a shop using his habitual bodily knowledge of selecting and purchasing items; he might organise these practical options under moral signifiers such as right and wrong, notions which are likely instructed and habituated through upbringing and socialisation.⁴³ Assimilating law into this context entails the introduction of legal signifiers, most pertinently the notions of criminality and legal punishment. The knowledge that it is wrong to steal now gains an additional meaning of criminality; that stealing is not only wrong in a generic sense, but also wrong in its criminal or illegal aspect. Similarly the threat of punishment which was likely limited to admonitions from parental or teacher authorities now encompasses the policeman as

⁴⁰ There are suggestions that understandings of law and legal concepts are not developed until age 10, and most knowledge acquired in early stages are derived from second hand sources, such as television and parents. *Blackwell Handbook* n.28 chapter 24.

⁴¹ Like a change in the 'structuring structures', Bourdieu n.25 pg.172-180. This is not an ideal type concept which is prior to legal action or experience, but simply another meaning or aspect added to existing knowledge, or perceiving action in an additional way.

⁴² In the sense that what could have been possible ways of interacting with objects is now closed off. This is akin to what Lindahl describes as relegating to the unorderable; n.5 pg.175-6.

⁴³ Kohlberg has argued that the categories through which humans understand morality is separable into distinct stages which begin from obedience to authority and fear of punishment, progressing to appreciation of universality and morality. Lawrence Kohlberg, *The Philosophy of Moral Development : Moral Stages and the Idea of Justice*. 1st ed. San Francisco: Harper & Row, 1981. It is interesting to show that changes in the terms used by humans to describe a situation, which I would liken to changes in the signifying chains used to construct a context, is a fundamentally qualitative change in ways of thinking. However I do not agree that changes in understanding occur in a determined hierarchy of stages.

a figure of coercive authority capable of meting out punishment in the form of arrest and incarceration.⁴⁴

These newly assimilated legal significations of objects and object-relations may initially be confused and vague, however it is likely that a working knowledge of law is quickly albeit haphazardly accumulated through repeated exposures to law. The relative ease with which law insinuates and latches onto established habits is owing to the high degree of conformity between law and those already established common social behaviours. The human actor is essentially primed for legal action, and increasing habituation to these new legal significations refines the discriminations between future actions and their discursive meanings. For example the habit of not unilaterally monopolising objects is refined by the additional legal significations of private property, criminality, and punishment, which increasingly entrench the objects as private property axiom, and foreclose other possible ways of interacting with objects.

7.2.3 Cultivating peculiarly legal habits

The above discussed the assimilation of law onto established habits and how the addition of legal significations precipitates an almost wholesale reintegration of a human actor's body of knowledge. I now address those habits which are more likely to be cultivated primarily in their legal signification and are peculiar to law. Norms peculiar to law are not somehow distinct or separate from other norms of social interaction with which they may overlap, they simply have the addition of being instituted by law. The foremost examples of mundane legal norms would be traffic laws, and matters of bureaucracy, such as paying taxes, maintaining personal identification, and registrations. It is not necessary that the human actor undergoing habituation in these actions is explicitly aware of their formal legal status or accept their normative validity, as long as he takes them as guides to action⁴⁵ and cultivates habits accordingly.

⁴⁴ Ibid. I emphasise the police instead of the State as authority due to the former's more material presence and visibility, as opposed to the more disembodied and abstract character of the latter. Material presence exerts greater influence on reinforcing habitual actions and structuring the external environment. Furthermore involvements with police plays a significant role in legal socialisation; Fagan & Tyler, 'Legal Socialization of Children and Adolescents.' *Social Justice Research* 18(3): 217-242.

⁴⁵ In the practical sense of presenting material possibilities for action; see chapter 6.

For the majority of the population, their peculiarly legal habits and knowledge are likely to be limited to those which enable and facilitate their everyday living, such as complying with traffic laws, purchasing goods, and paying taxes. For those whose professions necessitate the assimilation of formal legal knowledge, the participants likely embody this knowledge into their workplace habits. Or those human actors who have regular contact with police may develop habitual behaviours deeply interconnected with the legal system, such as extensive experience of the criminal justice system through repeated experiences of being stopped and searched, arrested, indicted, and so on.⁴⁶

I would argue that recidivism offers a strong challenge to a common assumption in jurisprudence that knowledge of law should form a condition of its normative force. Repeat offenders are arguably not ignorant of the law, and are likely more familiar with legal rules and proceedings compared to individuals who have not been exposed to the same experiences.⁴⁷ This indicates the significance of legal contexts in compelling legal behaviour, and the corresponding ease of criminality in situations lacking the necessary material possibilities for legality.⁴⁸ For most of the population, their contact with formal law is limited to that which sufficiently enables them to continue their everyday living. These legal activities inordinately comprise of non-violent physical interaction with others, and refraining from misappropriating property, two activities which have their habitual foundations in non-legal normative socialisation.

⁴⁶ Foucault has defined such cases as forming a criminal class with which the police is intimately involved in actively managing their criminal activity, by cycling the population through the various mechanisms of surveillance and incarceration. Michel Foucault, *Discipline and Punish : The Birth of the Prison*, Harmondsworth, Penguin, 1979. Research in legal socialisation also indicate that for youth offenders, negative involvements with police and courts are predictors of reduction of perceived legitimacy of law and legal authority, which is negatively correlated with compliance; Fagan & Tyler n.44. Furthermore the use of police stop and search powers are exercised with disproportionate frequency against certain demographics, notably black people; Bowling & Phillips, 'Disproportionate and discriminatory: Reviewing the evidence on police stop and search', *The Modern Law Review* 70(6): 936–961. I would argue that the combination of these factors suggest greater involvement with agents of the law both increases knowledge and experience of legal norms, but also likely decreases acceptance of their normative validity.

⁴⁷ There is rich research into recidivism and the factors which cause criminal behaviour, which is not directly relevant here. For a sample, see Chan, Lo, & Zhong, 'Identifying the Self-Anticipated Reoffending Risk Factors of Incarcerated Male Repeat Offenders in Hong Kong.' *The Prison Journal* 96(5): 731-51.

⁴⁸ Ibid.

7.3 Lawful environment

It might be opposed that my claim of legal action as habit is undermined by the presence of illegal behaviour, and the fact that human actors do take the law into account when deliberating their decisions. To the first objection I have remarked that illegal behaviour is equally capable of manifesting the norms of law, so do not pose a problem by their actual presence. The second I understand as an objection that rigid habitual action approximates determinism, for it leaves action with no freewill and effaces the element of meaningful normativity. To this I would answer that every action is preceded by a moment of choice which preserves its normative aspect and enables action to be imputed to the human actor. This moment of choice is obscured by the dulling effect of habit, but is not eliminated and comes into sharp relief when habit is impeded, triggering a moment of crisis.⁴⁹

The choice of whether to follow legal or other norms I would characterise as a moment of crisis when competing habits vie for expression. Human actors simultaneously embody multiple norms in their various habits, which operate in a state of equilibrium to facilitate everyday activity. When habit runs smoothly, legal norms are integrated harmoniously with other norms of action, all manifested simultaneously through the same habitual action. When an impediment is encountered, the equilibrium is upset as habit can no longer conflate the various norms embodied in that action, with the result that legal norms may come into direct conflict with other norms. This forces deliberation and choice against the backdrop of habits competing to be fulfilled, some of which embody law, some may not, and a choice between them would lead to law being manifested or not. This is not a choice represented and determined solely through norms, but through habits embodying compounds of norms.⁵⁰ That is not to say that discursive norms are completely impotent in guiding action, rather it is precisely in the moment of crisis and deliberation that the human actor might consciously have regard to norms when deciding his future action. Nevertheless the relative likelihood of a norm being manifested over another still depends largely on the strength of their respective habits and the eternal conditions as the guides for action.

⁴⁹ John Dewey, *Human nature and conduct : an introduction to social psychology*, New York : Holt 1922
For detailed discussion see chapter 5.

⁵⁰ Ibid.

The hegemonic status of law cannot depend solely on the force of individuals' habits, since habits exhibit plasticity and are liable to change. This is especially pertinent to legal action as the majority are not cultivated strictly through determination by legal norms, so from the outset are liable to diverge depending on the individuals' personal experiences.⁵¹ Habitual legal action requires an external environment which stably and strongly reproduces conditions conducive to legal behaviour, and draws together the disparate individual habits into a collective legal action. This environment is charged with the forceful presence of legal objects compelling habitual legal responses, in short a lawful environment.

A lawful environment fundamentally consists of common and recurring legal contexts. These are not discursively constructed as formal legal contexts, but are likely to be familiar contexts interpellated through the actor's extant body of knowledge which coincidentally conforms to law. The explicitly legal significations are gradually and haphazardly assimilated into familiar contexts, and their introduction will in most cases not disrupt familiar habits, but refine and reinforce pre-established norms of action. In other words socialisation already has furnished human actors with common interpellations of reality which conform to law, and the addition of legal significations enables more conscious and refined distinctions between familiar contexts. The magnetic force of these external conditions are due to entrenched habits rather than the force of discursive law which for the most part piggybacks on these other habitual norms.

This construction of context is highly dependent on the presence of objects placed particular spatial relations to invoke most strongly their legal modalities. There must be cars and traffic lights on the roads, persons on the sidewalks, shop windows must remain intact, shop doors guarded with security, and people must peacefully share space. In this lawful environment material objects are presented as property, bodies of others are seen as inviolable, and the power of the State and the risk of punishment are embodied in objects such as uniformed police, surveillance cameras, and security staff. These objects pose not just physical obstacles to action, but act with a material

⁵¹ So even though disparate human actors all behave outwardly in conformity with the law, the habitual actions and histories are unique to the individual human actors, which raises the possibility that a change in the external conditions would precipitate different responses from different actors.

force upon human bodies by compelling action through the effects of habit.⁵² The norms of action confront human actors as possible courses of action within their material environment, and insofar as objects present their legal modalities, the legal norms of action are embodied into material reality.

7.3.1 *Precarious law*

Whilst the foregoing may suggest that legal action is strongly bolstered by the concurrent operations of habit and environment, in actuality law is much more precarious. Law shares a contingent relationship to those entrenched habitual norms it is parasitic upon, so the conflation between external conditions which embody law and other normative orders is coincidental and susceptible to rupture, resulting in conflict. This also implies that for those legal contexts which are largely or exclusively peculiar to law, the objects possess legal modalities which do not overlap or conform with their other modalities, so raises the possibility that the environment may be constructed along norms hostile to the enactment of legal action.⁵³

A change in the external environment can quickly change the norms conditioning action, and descend into a situation of unlawfulness. This may happen during events such as rallies, strikes, riots, mob action, where the former lawful context is usurped. In such cases it is not that there is a sudden suspension or breakdown of law, rather the objects' most strongly presented modalities have changed, so causing the construction of context to come into conflict with law. When participating in a rally, the object of the police and other signs of authority suddenly change their modalities, becoming objects of threat and oppression as opposed to unassailable figures of power. During a riot or mob action, the bodies of others are no longer presented as encased in an inviolable shell, but become visceral flesh which collide in physical opposition to each other. Such dramatic shifts in the external environment is relatively rare, so provide few opportunities for such experiences to occur. However once

⁵² This is similar to Searle's notion of status indicators: John Searle, *The Construction of Social Reality* London: Penguin, 1996. However I would argue that the effect of objects is not limited to presenting or reinforcing a symbolic meaning, but precipitates material change by compelling the actions of humans which in turn reinforces their meaning and power.

⁵³ This is most likely to occur when law institutes novel modalities and object-relations, such as by introducing legal regulations radically different from contemporaneous social behaviour.

experienced, a human actor's bodily habits may undergo a fundamental change, which in turn changes the way he views and interacts with the world.⁵⁴

Because such fundamental shifts in the external environment are rare, the precariousness of law is more likely exhibited in other, more frequently occurring manners of nonconformity. Law is sustained largely through habitual actions which are contingently law-conforming, so conflicts or disruptions between the two are the likely source of illegal behaviour.

Usually legal and nonlegal group habits coincide and reinforce each other to construct an hegemonic picture of reality. For example, a prevalent social custom is to show favouritism towards family members, a fundamental norm of capitalism is possessive accumulation, and a ubiquitous legal norm is to designate objects as private property; these norms when habituated in a harmony results in a world wherein inheritance is both possible and treated as a natural practice. These habits which may have been combined haphazardly dovetail to construct an enduring vision of the world at their interstices.

However there are certain points of departure between these group habits which might disrupt their conflation and precipitate a moment of conflict necessitating choice. One example might be economic relations between family members; capitalist habits dictate that maximisation of value is the primary goal, whilst family habits induce altruistic and compassionate behaviour, resulting in situations rife with conundrums.⁵⁵ Another example might be a conflict between the habits of family life and law's prescription against violence. Habituation to family dynamics and privacy might lead to tolerance for greater levels of violence, such as disciplining children, abusive or controlling spouses, displays of physical domination, actions which would otherwise not be tolerated outside the family setting. So the habits pertaining to being a member

⁵⁴ I would venture that this seismic change in a human actor's fundamental orientation to the world has been variously described as a process of politicisation, awakening the political consciousness, becoming aware of biopower, etc. Donatella D. Porta. 'Eventful Democratization: When Protest Changes Relations.' in *Mobilizing for Democracy : Comparing 1989 and 2011*, First ed. OUP, 2014, chapter 2. Cf. Gi-Wook Shin, 'The Historical Making of Collective Action: The Korean Peasant Uprisings of 1946.' *American Journal of Sociology* 99(6): 1596-624. Cf. Anderson & Mendes. 'Learning to Lose: Election Outcomes, Democratic Experience and Political Protest Potential.' *British Journal of Political Science* 36(1): 91-111.

⁵⁵ I have elaborated on this example; see chapter 5.

of family come into conflict with the habits of being a citizen, and the physical bodies of others are not as strongly expressed in their legal modalities.⁵⁶

Group habits are forever vying to increase their influence upon action by determining the modalities of objects to compel those object-relations which manifest their particular norms. When group habits come into conflict, a rift is created in the external conditions, which disrupts the operation of smooth habitual action, so prompts the human actor to find a new equilibrium for action.⁵⁷ The precariousness of law is most strongly displayed in these moments of rift, especially if the conflicting habit is more deeply ingrained or better integrated into a human actor's personal history. If the human actor chooses to engage in habit which embodies law, then the normative force of law is manifested over other norms. However the factors influencing choice are innumerable, and most definitely not restricted to endorsing the law's validity. If the law's claims are given greater weight in deliberation,⁵⁸ I would venture this is due to other habits such as fear of punishment, fear of shame and disappointment from peers and family, as opposed to any idealistic regard for law.

7.4 Counterintuitive features revisited

I have previously claimed that law presents counterintuitive features, outlined through two broad themes of responsibility and emotion, and argued that these are symptomatic of discursive attempts to ground legal normativity in ideal Reason and efface the legal subject's embodied aspect. I posed the idea that the counterintuitive character of law as lived experience might be better accounted for by a material approach to legal normativity such as I have developed. I now reexamine those counterintuitive features and asses how they may be understood through the lens of my account of embodied legal normativity.

⁵⁶ Foucault asserts that the disciplinary mechanism of school is also used to monitor family life by disseminating information between parents and teachers in the process of disciplining children. I would argue that this may be similar to changing the habitual knowledge of children and their expectations of how they are to be treated by adults. Foucault n.46 pg.211-2.

⁵⁷ Dewey, n.48

⁵⁸ Ibid.

7.4.1 *Embodied interrelations*

The first counterintuitive feature I identified centred around how human interrelations enabled and sustained mutual regard and obligation, explored through the concept of responsibility. Discourse based on Reason presented a model of rational contracting to exemplify legal mutuality, and displaced the material other with immaterial notions of rights and duties. My primary dissatisfaction is the artificiality of valorising one limited case of organic human interaction as the archetype of legal relations. This is compounded by the seeming omnipresence of law in all areas of life, which means law does indeed mediate and establish obligation in human relations, but in a fashion which exceeds the limited model propounded by Reason. My aim is to explicate that area of excess which is inadequately theorised.

Objects mediate human interrelations, so objects in their legal modalities constitute a case of legally mediated interrelations. The most ubiquitously presented legal modalities are objects as property and human bodies as inviolable, and acting in response to these modalities would institute a relationship with others constituted by respect for private property and for bodily integrity. This mutuality is not established through intersubjective agreement, but by the individual's habitual response to the objects of things and human bodies. This habitual bodily action manifests the norms of law and materialises a reality constructed accordingly, and owing to the widespread commonality of such legal habits throughout society, these disparate individual actions coincide to construct the seemingly omnipresent entity of law. Mutual regard and responsibility are incorporated into bodily habits which coincidentally embody legal norms; these are manifested simultaneously in action, which may give the appearance of law determining responsibility, but are actually facets of unified action.

The ubiquitous terms of legal interrelations of private property and bodily integrity pertain mostly between strangers, who by severally acting according to their basic legal habits institute these relationships with generic others. This stranger to stranger relationship becomes increasingly displaced as the actors become more familiar, so more likely to mediate their relationship by instituting their own particular object-relations and significations to objects which they share. For example, objects which began as a vague piece of property come to be designated as shared property. By engaging with objects in these new and different modalities, the actors change the

terms of their relationship and open it to other possibilities of action. As they institute their own object-relations, they displace the law's presence from their relationship and create their own particular external conditions and habits from the objects they surround themselves with. A situation of cohabitation might result in this construction of a new familiarity, where cohabitants create their own rules of sharing space and resources.⁵⁹ The foremost example of cohabitation displacing law is the family, where physical proximity is a significant factor in building the family entity whose relational dynamic presents a strong foil to legal relationships.⁶⁰

Law is most present where there is an absence of familiarity. We manifest law by simply interacting with the objects and bodies we encounter as private and inviolable property, a response which is for the most part habitual and effortless. So by individually engaging in mundane and effortless habitual action, the ostensibly great task of keeping law and order is achieved. Whereas the situations where mutuality is perceived most keenly, such as personal relationships where actions take on innumerable messy significations, the law is absent.

7.4.2 Emotional foundations

Another counterintuitive feature of law is its contrary character as both a repository for emotion, and its rhetorical denial of emotion and valorisation of impartiality. Integral to Reason's disavowal of embodiment is its rejection of subjective and irrational emotions as unsuitable grounds for an objective and rational system of rules. My critique of this discourse focused on cases where action prescribed or endorsed by law is derived and justified by irrational fear and hatred, despite the contrary claims of discourse. Law is rife with emotions it cannot fully subsume under a totalising discourse, however it is able to contain their disruptive force by ordering them into manageable legal categories. I believe this is achieved by aligning law with other normative orders and closely associating their respective habits.⁶¹

⁵⁹ These tend to mirror ways of interaction the cohabitants are already familiar with, such as emphasis on fair distribution of tasks, individuation of resources, reliance on rules rather than favour to structure coordination. This may be explained by the operation of habit's compulsive aspect which seeks to create the conditions most favourable to its fulfilment. Bourdieu argues that the habitus will actively seek to create an external condition most favourable to its expression by surrounding itself with familiar things and places; Bourdieu n.25 pg.150-155.

⁶⁰ One factor amongst many; see chapter 3.

⁶¹ Law mirrors social norms, sometimes deliberately, often by coincidence. The pertinent issue is the incorporation of these norms in the same habit such that the content of emotion is mirrored in each normative order.

Habit combines and structures the various factors which constitute action into harmonious equilibrium; it amalgamates our desires, impulses, and aversions into enduring preferences and ways of being.⁶² Habitual actions are effortless but purposeful endeavours based on our accumulated experiences of how to achieve our aim, whether that be happiness or the acquisition of money. Habit may be seen as a conglomerate of various norms combined in ways unique to the individual, so a habit conforming to law has already combined the legal action with the actor's internal states into a stable equilibrium. In other words acting in accordance with the legal norm will not disrupt the steady flow of emotions because habit has already stabilised their interaction. This steady state is reinforced by the presence of a stable external environment which induces legal habits and reinforces their particular combination of action and emotion. Sustained coordination between habit and environment induces a presupposition of harmony, in this case between the legal normative order and the actor's unique interpellation of reality.

As long as this harmony persists there is no cause for the presupposition to be questioned. A conflict may result in the actor finding his habits obstructed by his external environment, precipitating a moment of crisis necessitating change and choice in order to establish a new equilibrium for action.⁶³ In many cases this might be accompanied by emotional upheaval, ranging from mild inconvenience to a fundamental doubt about one's identity.⁶⁴ Legal action which is rendered from its smooth integration with emotion becomes mired in the actor's deliberations between his conflicting habits. It may also be the catalyst of emotional turmoil if the obstruction to action is presented by a hostile legal environment, such as suffering arrest or police brutality. The apparent schism between law and emotion is actually a disruption of habit and a disjunction between the actor's interpellation of reality, or how the world should be, and the formal norms of law. Legal normativity is constitutively emotional at its core, but that element is simply obscured by the effects of habit.

⁶² Dewey n.48 Part.II s.1; chapter 5.

⁶³ Dewey n.48 Part.II s.1.

⁶⁴ Ibid. Cultural displacement is a significant disruptor between habit and environment; see Jessica Walton, 'Feeling It: Understanding Korean Adoptees' Experiences of Embodied Identity.' *Journal of Intercultural Studies* 36(4): 395-412. Amputation as a disruptor of motility and the habits of movement; Senra, et al., 'Beyond the Body Image: A Qualitative Study on How Adults Experience Lower Limb Amputation.' *Clinical Rehabilitation* 26(2): 180-91.

7.5 Contingent legal normativity

Legal normativity is conditional upon two contingent relationships, between law and other normative orders, and between legal action and environment. These are brought into stable coincidence by the mechanism of habit. Habit adheres legal norms with other norms, simultaneously manifests them in the same action, and entrenches their repetition through its conservative and compulsive effects. Concurrently habitual constructions of external conditions conducive to law compel engagement in legal action and the reproduction of material legal environments. I am not claiming that law cannot actively influence action, only that its normativity is not sustained through the force of its own rhetoric. Law is not manifested through action by acting as a reason or determinant of action, but by insinuating itself into actions and behaviours which are already established and reinforced in other ways. In doing so law becomes a habit which contributes to the mutually supportive maintenance of a particular construction of reality, one that is favourable to its perpetuation. Thus legal normativity may be fundamentally contingent, it is nevertheless bolstered by these dual operations of habit.

Conclusion

This thesis has argued that legal normativity is better understood as a manifestation of norms through material action which contingently embodies norms of law without necessarily being determined by them. The primary problem with philosophical approaches which centre upon Reason as the locus of normativity is their inadequate regard for the acting subject's corporeality, and posit mind/norm and body/action as distinct and related by cause and effect as opposed to belonging in a unified moment of acting. Opposing theories of materialism endeavour to reincorporate the body as a site of norm construction, but arguably fall into the same dualism only to reverse the cause and effect relationship to result in determinism, and the dismissal of normativity as ideology. I have argued for an alternative conceptualisation of the relationship between norm and action as one of mutual constitution, so rejects any distinction or separation between them as separate events or ontologies. Norms are embodied in action, which manifests them into materiality; likewise action must embody and manifest norms as part of their intentional structure. Unified normative action is driven by the mechanism of habit, so maintains action through bodily impetus and obviates the need for Reason or rationality as cause of action. Legal normativity is a specific albeit prevalent case of embodied action in society; law's ubiquity and perpetuation is driven largely by habituation in legal behaviours and other mutually conforming normative actions, as opposed to the validity or legitimacy of law's institutions and rhetoric.

Throughout my efforts to construct a material account of embodied normativity, I have strived to reimagine the material aspect of norms and how they might exist as recognisable physical matter. This led to the claim that physical objects are normative and exert a power to compel action, a power enabled by habit. More importantly this led to a notion of a normatively charged external environment which is similarly interpellated through habit, but exhibits a power normatively to structure and order human action which rivals physical impediment. The idea that the external environment is normatively saturated and somehow connected to human beings' internal structural states, which operate in sync to produce certain actions is commonly

reiterated in social theories.¹ My interest is in the object and the human relation to it, which I have termed the object-relation and used as the basis for my theory of embodied action. Whereas I appreciate other theories have addressed how the external environment and internal human states interrelate, the focus is mostly upon the general context or situation, with specific objects taking centre stage only for illustrative purposes. I believe my notion of object-relations provides an opportunity to explore further the philosophical structure of human relations to objects.

I am specifically interested in the case of objects as property, as things to be owned, monopolised, desired, protected from others and so on. Property features prominently in my account as the ubiquitous modality which maintains the *status quo* of hegemonic orders such as capitalism and law. Objects invariably feature as property in the most influential western philosophical traditions and constitute an integral part of being human, but often proceed no further than claims that humans need or use objects as property in order to achieve some other aim.² A fundamental tenet of property law is that it is a right possessed by legal subjects with regard to things, so displaces the material interaction as the locus of the property relationship.³ I believe that how humans relate directly with objects in such fashion as to reproduce the material conditions for property as a normative construct is under-theorised. In other words rather than beginning from the property as the norm, property should be analysed in its material elements of object and action, and the conditions supporting those structures.

The potent power of the external environment over possibilities of human action has been widely asserted by social theories, and I have relied on the same in presenting how hegemonic norms ensure their repetition by warping the social fabric in their favour. If the relationship between humans and objects is better understood, it may open up different possibilities to our current situation by changing the mundane ways we relate to objects. This may lead to renewing the notions of public and private through the objects and actions which constitute them, such as built environments and

¹ Pierre Bourdieu, *Pascalian Meditations* Cambridge: Polity Press, 2000; 'structuring structures'. John Searle, *The Construction of Social Reality* London: Allen Lane, 1995; 'Background'. Edmund Husserl, *The Crisis of European Sciences and Transcendental Phenomenology : An Introduction to Phenomenological Philosophy*. Evanston: Northwestern University Press, 1970; 'Lifeworld'.

² John Locke, *The Second Treatise of Government : (an Essay concerning the True Original, Extent and End of Civil Government), And, a Letter concerning Toleration*. 3rd ed. 1966; possessive individualism. Immanuel Kant, *The Metaphysics of Morals*. Cambridge Texts in the History of Philosophy. New York: CUP, 1996; expression of natural freedom. Georg W.F. Hegel, *Phenomenology of Spirit*. Oxford: Clarendon Press, 1977; objectification of self.

³ M.G. Bridge, *Personal Property Law*. 3rd ed. Clarendon Law Series. Oxford: OUP, 2002. The same may be said of most Western liberal legal systems.

common resources. It also poses interesting questions on how new technological objects change the structure of human interrelations and present possibilities for restructuring physical and virtual spaces. Gaining these insights would enable a legal society to more effectively regulate and change the actions of its members in pursuit of its material conditions of *nomos*.

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