# Constituting the co-operative: law and the political in the history of the English co-operative movement

# Constituting the Co-operative: Law and the Political in the History of the English Co-operative Movement

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I hereby declare that the work presented in this thesis is my own, except where explicit reference is made to the work of others.

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# Abstract

Co-operatives are often regarded as alternatives to capitalist forms of business organisation. This thesis argues that this alterity has been circumscribed by the legal recognition and constitution of co-operatives as bodies corporate within a broader system of political economy in the mid-nineteenth century, in which co-operatives came to be regarded primarily as commercial entities. Drawing on the work of Michel Foucault, this thesis pursues a genealogy of the co-operative in order to expose the conditions of its constitution, beginning with a critique of dominant historiographical approaches to the co-operative movement that regard legal recognition as 'enabling' for a co-operative form that already existed outside the law. Following an alternative historical account that locates the beginnings of the co-operative movement in the late eighteenth century, in what E.P. Thompson referred to as the 'moral economy of the English crowd', this thesis situates legal recognition within shifting forms of power and governmentality in the creation of the modern state, while also emphasising the historicity of the legal form of the body corporate. The body corporate imports a transcendent form of unity from the medieval church that becomes normalised in the nineteenth century as part of the emergence of liberal and biopolitical governmentality, serving as a form of metaphysical enclosure that facilitates market discipline. While co-operatives do offer a meaningful alternative by virtue of an ethos of mutuality derived from the moral economy, this thesis argues that legal recognition was depoliticising for the co-operative, not in the narrow terms of political economy, but through what Philippe Lacoue-Labarthe and Jean-Luc Nancy refer to as 'the closure of the political'.

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My friends and colleagues at Birkbeck College School of Law have offered invaluable support, solidarity and camaraderie over the course of this thesis. In particular, I must thank Lisa Wintersteiger, Hannah Franzki, Laura Lammasniemi, Anastasia Tataryn, Dan Matthews, Kanika Sharma, Mayur Suresh, Kojo Koram, Hayley Gibson, Paddy McDaid, Ceylan Yildiz Begum, Ozan Kamiloglu, Roberto Yamato, Tshepo Madlingozi, and Thanos Zartaloudis.

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## Introduction

Co-operatives are often regarded as an alternative to capitalist forms of business organisation, and they form a key part of attempts to build an alternative economy in the United Kingdom and around the world.[1] While co-operative structures vary from place to place, they generally share a set of principles and values that serve to differentiate them from businesses that exist primarily for profit.[2] The main difference is that co-operatives are owned and democratically-controlled by their members, not by shareholders, and exist primarily for the purposes of their mutual benefit, not profit.[3] However, while co-operatives offer an alternative to capitalist forms of organisation, they have also developed and operate within a predominantly capitalist system, and they have been shaped by this inclusion.

Drawing primarily on the work of Michel Foucault, this thesis takes a genealogical approach to the history of the co-operative movement in England, focusing particularly on the legal recognition of co-operatives in the mid-nineteenth century. Legal recognition, as I will argue, rather than simply enabling or legitimizing co-operatives, has functioned constitutively, determining to a considerable extent what we think a co-operative *is* in the first place. While early co-operative societies developed as a form of mutual aid in response to the depredations of an emerging market economy, their legal recognition as bodies corporate in the mid-nineteenth century served not only to subordinate co-operatives to the

[1] See for instance the essays collected in *Rob Harrison*, ed., *People Over Capital: The Co-operative Alternative to Capitalism* (Oxford: New Internationalist Publications, Ltd., 2013).

[2] The current list of co-operative principles, as provided by the International Co-operative Alliance comprises: voluntary and open membership; democratic member control; member economic participation; autonomy and independence; education, training and information; co-operation among co-operatives; and concern for community. See "Cooperative identity, values and principles," International Cooperative Alliance, accessed September 26, 2018, https://www.ica.coop/en/whats-co-op/co-operative-identity-values-principles.

[3] In the United Kingdom, in order to be registered under the Co-operative and Community Benefit Societies Act 2014, a society must satisfy the registering authority (the Financial Conduct Authority or FCA) that it is either a 'bona fide' co-operative or a community benefit society. For the former, the FCA has explicit regard to the principles as defined by the International Co-operative Alliance Statement of Co-operative Identity. See Financial Conduct Authority, *Guidance on the FCA's registration function under the Co-operative and Community Benefit Society Act 2014,* Finalised guidance 15/12. November 2015.. However, it is not necessary to register under this Act in order to be a co-operative and in practice those wishing to form a co-operative can choose from a range of available legal forms.

state, but also to constitute co-operatives as economic entities within the narrow discursive framework of nineteenth century political economy. Co-operatives, as a consequence, were both depoliticised and subjected to the discipline of the market. The legal idea of the co-operative thus presumes its inclusion within the market and its subordination to the state. This does not mean that co-operatives are not actually 'alternatives' capitalist businesses, but that in order to understand and encourage them to develop as alternatives, it is necessary to understand how the idea of alterity itself has been shaped and limited by legal recognition. In this introductory chapter, I will first provide a contextualized account of some of the problems and tensions in the idea of the co-operative and make the case for exploring the genealogy or "constitutive historicity" of the co-operative.[4] The chapter then turns to the question of alterity and draws on the work of Jean-Luc Nancy on ontology and community conceptualise the possibility of alterity that co-operatives present.

This project began several years ago, when I became involved with The People's Supermarket, a consumer co-operative in central London. It was an attempt to create an alternative to the dominant model of supermarket through community ownership. Much more than just a supermarket, it provided a home for a wide array of hopes and desires for change, as well as a means of realising those visions in the present. In addition to purchasing a nominal one-pound share and participating in the democratic management of the co-operative, member-owners were required to work a four-hour shift each month as way of contributing to the day-to-day running of the store and keeping overhead costs low.[5] Mundane tasks like stocking shelves and working the till became exercises in community-building. While far from perfect, it created real opportunities for people to relate to one another differently and to exercise a much greater degree of control, beyond that of mere consumers, over something central to their lives.

[4] The phrase "constitutive historicity" comes from Judith Butler, "Critically Queer," GLQ: A Journal of Gay and Lesbian Studies 1, no. 1 (November 1993): 19.
[5] In this respect it had been modelled after the well-known Park Slope Food Coop in Brooklyn, New York.

For better or worse, The People's Supermarket also received a considerable amount of media attention in its early days, reflecting in part the growing popularity of discourses around 'social enterprise'. The project attracted the attention of no less than the conservative Prime Minister David Cameron, who had been busy promoting the Big Society; a short-lived and ill-fated programme to encourage the expansion of the voluntary or 'third' sector whilst simultaneously pursuing, and many would say attempting to mask, dramatic cuts in government spending.[6] He praised our project as a perfect example of the Big Society and dropped by for the requisite photo opportunity. Two days later, at a meeting of the membership of The People's Supermarket, members voiced serious concerns about being associated with the programme. One who spoke said, "what we are doing is not political, we are simply trying to get good food at affordable prices into our community," and another replied, "for that reason, we are very political."

That our co-operative could be so readily seen as part of the Big Society, a programme apparently antithetical to its aims, speaks to a pervasive indeterminacy around the idea of co-operation more generally. Aspirations from across the political spectrum can and have been mapped onto ideas of co-operation and indeed subsist within them. They are often conceived of as part of a 'third way': a space understood broadly as lying between states and markets.[7] The malleability of these 'alternative' projects, which include co-operatives but also a range of other kinds of organisation, seem to stem from the very idea

[6] Robert Osley, "Prime Minister David Cameron bids to bolster his Big Society idea with visit to People's Supermarket," *West End Extra,* February 17, 2011, http://www.westendextra.com/news/2011/feb/prime-minister-david-cameron-bids-bolster-his-big-society-idea-visit-people%E2%80%99s-supermar (accessed November 7, 2016).

[7] Nikolas Rose, "Inventiveness in Politics," *Economy and Society* 28, no. 3 (1999): 481. The phrase 'third way' is currently most closely associated with social democracy and specifically Tony Blair's New Labour. According to Anthony Giddens, the phrase "third way" was in use as early as the late nineteenth century. Anthony Giddens, *The Third Way: The Renewal of Social Democracy* (London: Polity Press, 1998), 25. J.K. Gibson-Graham laments the loss of the original meaning of the third way: "[i]n the war of words that makes up political debate, reference to what we might consider the original 'third way' has been lost or blurred. Deploying terms like 'trust,' 'mutual obligation' and 'reciprocity' that hail from the cooperative support systems of the early 19th century, contemporary third way politics offers a language that softens the impact of a neo-liberal economic agenda obscuring, even rendering desirable, the withdrawal of state benefits." J.K Gibson-Graham, "Enabling Ethical Economies: Cooperativism and Class," *Critical Sociology* 29, no. 2 (2003): 129.

of 'the third way' itself. For J.K. Gibson-Graham, the third way is a space for leftist economic imaginaries and experimentation with emancipatory economic projects.[8] In conservative discourse, by contrast, the third way is a space in which "[e]conomic health is to be governed indirectly, not through direct intervention upon the workplace or upon ownership and control, but through fostering an ethos of human enterprise and moral responsibility."[9]

This tension and indeterminacy in the political meaning and purpose of co-operation was also accompanied by what seemed to be a structural constraint. While The People's Supermarket was attempting to build an alternative to the mainstream, corporate supermarket which almost completely dominates the market for groceries, it nonetheless had to compete with those same supermarkets for custom. This inevitably produced significant compromises—some more obvious than others—to the original vision. As Johnston Birchall writes of the co-operative movement more generally: "[i]t seems that we cannot have both efficiency and small-scale democracy in the modern trading world; either we stick to principle and go out of business, or become just like big business and have no principles left to stick to. Either way we lose."[10] Despite being situated 'between' state and market, co-operatives are very much subject to the vicissitudes of the market and must, at a minimum, be commercially viable.

Initially these two sites of tension seemed unrelated: the political malleability and vulnerability of co-operative projects was separate from the inherent difficulties of making such projects commercially successful while also maintaining a commitment to co-operative values. Subjection to the market seemed to be a necessary, if unfortunate, condition of existence, while politics was a matter of how we conceived of our project. Yet, as I will demonstrate in this thesis, the 'middle' between state and market that co-operatives are said

[8] Gibson-Graham, "Ethical Economies," 124.
[9] Rose, "Inventiveness," 484.
[10] Johnston Birchall, *Save Our Shop: The Rise and Fall of the Small Cooperative Store* (Manchester: Holyoake Books, 1987), xii.

to occupy is not a middle at all. The concept of a middle or a 'between' would imply that the state and the market are distinct and separate domains; that the state is a self-sufficient and sovereign entity and that the market in turn is a purely immanent and natural sphere, regulated only by the pursuit of self-interest. However, the market as we have come to understand it was largely constituted through the direct intervention of the state in the eighteenth and nineteenth centuries, and requires continual intervention and regulation.[11] The state, meanwhile, is not a sovereign or coherent entity, but, as Timothy Mitchell argues, "the metaphysical effect of practices that make such structures appear to exist."[12] Consequently, as this thesis will argue, co-operatives cannot be located in between state and market, but instead have been constituted by the state, as part of shifting forms of governmentality and dominant modalities of power, in order to compete in and be disciplined by, the market.

In this sense, co-operatives form part of an order that has been created through state regulation, and being a constituent part of it, they also do not necessarily challenge that order. However, despite being thus constituted, they also gesture toward and manifest the possibility of alterity: co-operatives offer a means of self-organizing and relating to others differently, in ways that undermine and expose the limitations of the state sovereignty and the immanence of the market. The politically-vexed position of co-operatives arises from the fact they simultaneously affirm and exceed the established order.[13] This dynamic, and

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[11] Karl Polanyi, *The Great Transformation: The Political and Economic Origins of our Time* (Boston: Beacon Press, 2001), 71-89.

[12] Timothy Mitchell, "Society, Economy, and State Effect," in *The Anthropology of the State: A Reader*, ed. Aradhana Sharma and Akhil Gupta (Malden: Blackwell Publishing Ltd., 2006), 174.

[13] One obvious name for this 'established order' would be capitalism. However, in this thesis, and in keeping with its Foucauldian orientation, I will largely avoid ascribing a monolithic identity to this order. While capitalism is certainly a significant logic of the dominant modalities of ordering, they are not reducible to capitalism. The many legal forms which we associate with capitalism, and particularly the body corporate which I will focus on here, have histories that long predate the development of capitalism and their integration into governmental practice cannot be construed as a response to capitalism. Thus while there will be many resonances here with Marxist critiques of legal form, I have not adopted a specifically Marxist approach. For a good example of this approach, see Isaac D. Balbus, "Commodity Form and Legal Form: An Essay on the 'Relative Autonomy' of the Law," *Law and Society Review* 11, no. 3 (1976-1977): 571-587. The relationship between the co-operative movement and Marxism will be discussed in more detail in chapter 1.

particularly law's role in creating it, has often been overlooked. There is a tendency to emphasize the vision of alterity and ethos of mutuality and solidarity that often animates co-operative projects at the expense of reckoning with the ways in which co-operatives may be limited or shaped by the forms they take, as well as their own history. The historian Stephen Yeo, for instance, suggests that co-operatives are inappropriately seen as functioning within a system which it is "their project to replace."[14] However, while it may sometimes be their project to replace that system, they also *do* operate within it, and they have been shaped by this inclusion.

Legal recognition has been one of the main mechanisms of this inclusion. Co-operatives were given legal recognition in the United Kingdom in 1852 through the passage of the first Industrial and Provident Societies Act. In the history of the co-operative movement, this is often seen as a watershed moment, which finally allowed the movement to grow and expand.[15] The movement, particularly the consumer co-operative movement, did grow significantly after a legal form was created for co-operatives.[16] While co-operative societies existed in varying levels of abundance in the first half of the nineteenth century (up to 500 societies existed at the height of the movement in the 1830s), it was in the latter part of the nineteenth century that they came to control increasingly significant amounts of capital. In 1852 there were 192 co-operative retail societies on record, with an estimated 20,000 members and £250,000 in annual trade. By 1901, there were 1229 co-operative retail societies in operation, with a membership of 1.5 million and annual sales exceeding £48.9 million.[17] Today, co-operatives are more prevalent than many would guess. At the

[14] Stephen Yeo, ed., *New Views of Co-operation* (London: Routledge, 1988), 27.
[15] See for instance David Lambourne, *Slaney's Act and the Christian Socialists: A Study of How the Industrial and Provident Societies Act, 1852 Was Passed* (Boston: David Lambourne, 2009). This attitude is reflected more generally in G.D.H. Cole, *A Century of Co-operation* (Manchester: Co-operative Union, Ltd., 1944), 114-126.
[16] The fact that it is primarily the consumer co-operative movement that grew, rather than worker co-operatives, is indicative of some of the structural difficulties in developing and sustaining co-operative projects. This will be discussed in more detail in chapter 1.
[17] These figures are drawn from Martin Purvis, "The Development of Co-operative Retailing in England and Wales, 1851-1901, a Geographical Study," *Journal of Historical Geography* 16, no. 3 (1990): 315-316.

most recent counting, there were at least 7,226 independent co-operatives which contributed £36.1 billion to the United Kingdom's economy in 2017-2018. 13.1 million people in the United Kingdom are active members of co-operatives, and they employ close to 235,000 people.[18] Meanwhile, the International Co-operative Alliance is the largest non-governmental organisation in the world, with more than 1 billion members.[19]

This model of success as expansion takes for granted that co-operatives will compete in a market and function predominantly as commercial entities. The success described here is largely put in economic terms, while its political import is assumed as a function of the co-operative form itself. However, while legal recognition no doubt enabled the co-operative movement to grow, it did so in a way that was constrained by the biopolitical and disciplinary logic that structured recognition. Legal recognition not only served to subordinate working class, co-operative, forms of association to the state but also to constitute them as bodies corporate, thereby subjecting them to the disciplinary effects of the market. Thus, legal recognition functions *constitutively*, determining at a very basic level what we think a co-operative is, such that the very idea of co-operative is already a legal one. The constitutive process is so effective that the co-operative's subjection to the market goes unnoticed or is perceived of as a natural condition of its existence. It also has significant practical consequences for co-operatives. This history of legal recognition necessarily shapes how we think about and practice co-operation (how we form co-operatives, what we expect them to do, and ultimately also our vision of alterity) in the present, and how we perceive its limits and possibilities. Yet the nineteenth century process of legal recognition was not, and could not, ever be completely determinative of co-operation. There is always an uncontainable excess which allows co-operation to retain an openness and an

[18] Co-operatives UK, *The Co-operative Economy 2018*, http://reports.uk.coop/economy2018/ (accessed on September 25, 2018).
[19] The International Co-operative Alliance, "The Alliance," last modified 2015, http://ica.coop/en/international-co-operative-alliance (accessed November 8, 2016).

indeterminacy. This excess can be engaged by groups seeking to actualize the vision of alterity and alternative values that can come with co-operation. Nevertheless, when the legal and historical constitution of co-operatives is taken for granted, the very idea and possibility of alterity suffers.

### *The "Constitutive Historicity" of the Co-operative* [20]

Co-operation is a concept which can be taken so generally as to seem without history, meaning simply to work [*operari*] together for some shared end. This end need not be 'good' by any measure;[21] yet many of the strongest advocates of co-operation as a form of organisation over the past two centuries have figured it as part of a fundamental human nature; a biological necessity and predisposition, which is paradoxically at once both necessary (for survival) and laudable.[22] As the story goes, the idea of mutual co-operation found its clearest and most enduring expression in the founding of the Rochdale Society of Equitable Pioneers in 1844 by twenty eight impoverished weavers, influenced by nothing but the hardship of their own circumstances. The Rochdale society is often regarded as the first modern co-operative. They both created the business model that would see the widespread growth of the co-operative movement and articulated a set of principles that would define and guide co-operatives internationally until the present day.

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[20] Butler, "Critically Queer," 19.

[21] As when Karl Marx discusses the centrality co-operation in the development of capitalist industry, by which he refers to the concentration of labour that forms the basis of capitalist exploitation, in Chapter 13 of the first volume of *Capital*. Karl Marx, *Capital, Vol. 1* (London: Penguin, 1990), 439-454.

[22] This kind of view has been articulated by wide range of authors. Peter Kropotkin, for instance, describes mutual aid as "a feeling infinitely wider than love or personal sympathy—an instinct that has been slowly developed among animals and men in the course of an extremely long evolution, and which has taught animals and men alike the force they can borrow from the practice of mutual aid and support, and the joys they can find in social life." Peter Kropotkin, *Mutual Aid: A Factor of Evolution* (Mineola: Dover Publications, 2012), xvi. Much more recently, Richard Sennett has provided a similar reading of co-operation. While suggesting that co-operation is something desirable, he also provides the following definition: "[c]ooperation can be defined, drily, as an exchange in which the participants benefit from the encounter. This behaviour is instantly recognisable in chimpanzees grooming one other, children building a sandcastle, or men and women laying sandbags against an impending flood. Instantly recognisable, because mutual support is built into the genes of all social animals; they cooperate to accomplish what they can't do alone." Richard Sennett , *Together: The Rituals, Pleasures and Politics of Cooperation* (Yale: Yale University Press, 2012), 5.

While the Rochdale society certainly existed and has been very influential in the domestic as well as the international co-operative movement, much of the story around it is a myth. It was not opened by starving weavers devoid of outside influence, nor was it the first successful co-operative.[23] Although ostensibly a story about origins, the myth of the Rochdale Pioneers serves to remove co-operation from its history. In this narrative, a set of immutable values are married to an exceptional historical event. The story, from that point, is largely told as one of success which serves to reinforce the integrity of the founding, and the fidelity of the movement to its values and principles, which themselves exist somewhere outside of history, in our very biology. This kind of history does precisely what Foucault suggests that we often want history to do for us: "confirm our belief that that the present rests upon profound intentions and immutable necessities."[24] So long as our present understanding of co-operation is tied to a mythic past there is no need to question the idea of the co-operative itself, even when co-operatives encounter difficulties. Though there is undoubtedly some truth to the dominant narrative, it also avoids difficult questions around the political malleability of co-operation and the subjection of co-operatives to the market presented in this chapter's opening. To understand how this impermeable object of the co-operative came about, it is necessary to look beyond any single story, and explore the "constitutive historicity" of co-operation, or how our contemporary idea of the co-operative emerged historically.[25]

"Constitutive historicity" is the idea that rather than being fixed, discourse is shaped by a history that gives it meaning.[26] It draws on the work of Foucault and his genealogical approach to history.[27] Genealogy has been described by Foucault and his many

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[23] Brett Fairbairn, "The Meaning of Rochdale: The Rochdale Pioneers and the Co-operative Principles," Occasional Paper, Center for the Study of Cooperatives, University of Saskatchewan (1994), 1.
[24] Michel Foucault, "Nietzsche, Genealogy, History," in *Essential Works of Foucault, Volume 2: Aesthetics, Method and Epistemology*, ed. J.D. Faubion (London: Penguin, 1994), 381.
[25] Butler, "Critically Queer," 19.
[26] Ibid.
[27] Ibid., 19, 4, 5.

interlocutors as a "history of the present."[28] It is intended to be the opposite of any search for origins. Although a search for the origin or essence of ideas motivates much historical research, it endows the present with a stability that it does not possess. As Foucault suggests, the search for an origin is an attempt to capture an "essence of things" or a "pure identity" which is then assumed to have been adulterated though the passage of time.[29] The search for origins "assumes the existence of immobile forms that precede the external world of accident and succession."[30] Genealogy, by contrast, resists "the metahistorical deployment of ideal significations and indefinite teleologies."[31] It is the very things we assume to be without history, taken to be transcendent and immutable values, rooted in a fundamental nature or principle, that are the products of often "arcane and ignoble" histories.[32] Genealogy designates a different positionality in relation to history, one in which, as Nietzsche would have it, "a new demand becomes audible," a demand to question "the value of...values themselves" which requires "a knowledge of the conditions and circumstances in which they grew, under which they evolved and changed...."[33]

The first step in a genealogical inquiry then is to recognize how discourse functions constitutively to create objects about which truth claims can be made, rather than reflecting a purely given reality. Genealogy, as Foucault says in an early treatment of it,

> applies...where discourse is effectively formed: it tries to grasp it in its power of affirmation, by which I mean not so much a power which would be opposed to that of denying, but rather the power to constitute domains of objects, in respect of which one can affirm or deny true or false propositions.[34]

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[28] Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage Books, 1995), 31. See also Wendy Brown, *Politics Out of History* (Princeton: Princeton University Press, 2001), 121-137. .

[29] Foucault, "Nietzsche," 371.

[30] Ibid.

[31] Ibid., 370.

[32] Todd May, *Between Genealogy and Epistemology: Psychology, Politics and Knowledge in the Philosophy of Michel Foucault* (University Park: University of Pennsylvania Press, 1993), 56. Emphasis in original.

[33] Friedrich Nietzsche, *On the Genealogy of Morals*, ed. Walter Kaufmann (New York: Random House, 1989), 20.

[34] Michel Foucault, "The Order of Discourse," in *Untying the Text: A Post-Structuralist Reader*, ed. Robert Young (Boston: Routledge and Kegal Paul Ltd, 1981), 73.

Discourse creates objects which mediate the relationship between language and the world: objects of discourse, in turn, do not correspond directly and completely to things in the world. In his work on sexuality as an object of discourse, for instance, Foucault asserts that "it is precisely this idea of sex *in itself*...that we cannot accept without examination."[35] Although 'sex' would often be equated with biology, and situated as part of an objective material reality, he insists that we must avoid this assumption and recognize that "sexuality is a very real historical formation; it is what gave rise to the notion of sex, as a speculative element necessary to its operation."[36] In this formulation, the word 'sex' does not designate an isolated object in the world, it is rather "the most speculative, most ideal, and most internal element in a deployment of sexuality organized by power in its grip on bodies and their materiality."[37]

By analogy, in this thesis, it is the very idea of the co-operative that needs to be questioned. The historical narrative and normative reading of co-operation presented in the Rochdale origin story takes the specific history of the modern co-operative organisational form to be the manifestation of a transcendent and immutable set of co-operative values. We need to invert this relation and see the history of the organisational form as that which *produc*es co-operative values subsequently taken to be without history. Rather than existing outside of history and manifesting in the Rochdale Pioneers, the idea of co-operation was formed and constituted by the historical experience leading up to the founding of that society, and indeed well beyond it. As will be discussed in chapter 1, many of the practices associated with co-operation long precede the application of the term and can be found in the riots and rebellions of the lower classes in the late eighteenth century. Early co-operative societies formed on the back of protests and riots, as part of what E.P.

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[35] Michel Foucault, *The History of Sexuality, Volume 1: An Introduction*, trans. Robert Hurley (New York: Vintage Books, 1990), 152. Emphasis in original.
[36] Ibid., 157.
[37] Ibid., 155.

Thompson calls "the moral economy of the crowd," giving them a more enduring organisational form and presence.[38] As a distinct set of ideas, co-operation began to coalesce in the mid-nineteenth century around the writings and projects of Robert Owen (regarded as the father of English socialism) and only came to designate a specific type of organisation—'a co-operative'—a few decades later.[39] In this historical sense, co-operation emerges as a distinct idea in the context of the upheavals of industrialisation, as the opposite of competition, and as something which offers, at a minimum, the possibility of the amelioration of social ills, particularly in the absence of state welfare provision. For many it also offered the vision of a wholly other society which would supersede the current one. In the English context, co-operation is the original form of socialism and for a time was understood interchangeably with it. By the mid-nineteenth century, co-operatives were increasingly regarded as a legitimate and praiseworthy form of organisation for the working classes, and one that would expose the working classes to the laws of political economy. This is the context in which co-operatives gained legal recognition through the Industrial and Provident Societies Act 1852.

Creating a coherent narrative for the co-operative movement which centres on innate values and the founding moment of the Rochdale Pioneers has required disavowing certain elements of this history; particularly, the violence of the riots and the politics of early socialism, as well as the constitutive effects of legal recognition. Legal recognition, as noted earlier, is usually seen as key to the success of the co-operative movement, giving it a basis of legitimacy on which to grow and expand. This view can be traced back to J.M. Ludlow

[38] E.P. Thompson, "The Moral Economy of the English Crowd in the Eighteenth Century," *Past and Present*, no. 50 (1971): 76–136.

[39] It is not clear exactly how or when the term came into this usage, though it appears to derive directly from Robert Owen's idea of Villages of Co-operation. The historian Jennifer Tann, writing of the range of organisations formed as part of the response to the Corn Laws in the late eighteenth century, which will be discussed in chapter 1, suggests that it did not come into general usage until the 1820s, and was not used in conjunction with similar types of organisation in the eighteenth century. Jennifer Tann, "Co-operative Corn Milling: Self-Help during the Grain Crises of the Napoleonic Wars," *The Agricultural History Review* 28, no. 1 (1980): 47, 23.

and Lloyd Jones; two prominent nineteenth century Christian Socialists who were largely responsible for the legal recognition of co-operatives as a distinct form of organisation. They observed that legislation created for building societies and co-operatives (the Regulation of Benefit Building Societies' Act of 1836 and Industrial and Provident Societies' Act of 1852, respectively), were "anticipated by the spontaneous efforts of the working class."[40] These forms of organisation were "not the creature of Parliament, but the working man's own creation."[41]

In one sense, it is true that the co-operative was not created by Parliament, but rather by associations (both working and middle class) operating without any explicit sanction from the state. However, this reading of legal recognition takes for granted not only the stability of the co-operative as a form of organisation existing outside the law, but also the law as neutral conduit for recognition. In this narrative, the co-operative form of organisation finds its expression in law and passes through the process of legal recognition without any discernible effect except to be legitimized and enabled. At the very least, processes of legal recognition run the risk of "misrecognition," in which the identity of whatever is to be recognized is distorted from its original or self-determined form.[42] For example, in the initial Industrial and Provident Societies Act of 1852, co-operatives were denied fundamental capacities such as the ability to hold land and devote funds to education. Later amendments to the Act rectified these inadequacies, granting co-operative organisations more power and discretion over the use of their resources. However, these deficiencies and eventual improvements to the law do not necessarily detract from the more fundamental problem of recognition itself or the aptly named "bringing within" that it effects.[43]

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[40] J.M. Ludlow and Lloyd Jones, *Progress of the Working Class 1832-1867* (London: Alexander Strahan, 1867), 96.

[41] Ibid.

[42] Charles Taylor, "Politics of Recognition" in *Multiculturalism: Examining the Politics of Recognition,* ed. Amy Gutmann (Princeton: Princeton University Press, 1994), 25.

[43] For a critique of the idea of misrecognition and the political theory of recognition as elaborated by Charles Taylor, see Patchen Markell, *Bound by Recognition* (Princeton: Princeton University Press, 2003), 39-58.

Instead of simply recognizing a pre-existing co-operative form, law served, at least in part, to *constitute* it. The legal idea of the co-operative is not a pure reflection of the working-class co-operative society (assuming there even was or could be such a pure form existing outside the law) but also reflects the historicity of legal forms and their shifting relation to life in relation to liberal and biopolitical forms of governmentality.[44] This thesis will focus specifically on the body corporate as legal form. This form, which was given to co-operatives by an amendment to the Industrial and Provident Societies Act in 1862, was most certainly not "the working man's own creation."[45] The body corporate and the legal personality attributed to it have a long history, extending back to the medieval church. In the early modern period, incorporation was a narrow privilege, available only by Royal Charter or Act of Parliament, and it served as a means by which the state could extend its authority over diverse areas of life. In this capacity it operated as part of what Foucault regards as a primarily sovereign or juridical form of power.[46] This dynamic shifted in the nineteenth century, when incorporation was made available to joint stock companies through a relatively simple process of registration.[47] As a consequence, as part of what Foucault regards as a normalisation of law, accompanying the emergence of disciplinary power and liberal or biopolitical governmentality, incorporation came to be seen as a private right, and a form of commercial freedom granted to pre-existing entities.[48] The

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In effect, misrecognition presumes the possibility of recognition—that a group or individual would have their own distinctive identity--and in so doing, reproduces and reinforces a model of sovereignty.

[44] This could come from a range of potential sources, but one of the most direct discussions of law in relation to shifting modes of governmentality comes from Michel Foucault, "Truth and Juridical Forms," in *Essential Works of Foucault, Volume 3: Power*, ed. J.D. Faubion (London: Penguin, 2002), 1-89. There is a longstanding debate over Foucault's thinking on law, with the dominant stance being that he 'expelled' law from his theories of disciplinary and biopolitical forms of power. See for instance, Alan Hunt and Gary Wickham, *Foucault and Law* (London: Pluto Press, 1994). In spite of this, they suggest it is possible to read a constitutive theory of law in Foucault's work, even if he would not have endorsed such a theory himself. More recently Ben Golder and Peter Fitzpatrick have offered a different reading of Foucault which highlights the integral role of law in Foucault's theories disciplinary power. Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Abingdon: Routledge, 2009). This debate will be discussed in chapter 3.

[45] Ludlow and Jones, *Progress*, 96.

[46] Michel Foucault, "Two Lectures," in *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*, ed. Colin Gordon, trans., Colin Gordon *et al* (New York: Pantheon Books, 1980), 88.

[47] Joint Stock Companies Act 1844.

[48] Foucault, *History of Sexuality*, 144.

normalisation of law is crucial here. It ensured that legal forms, like the body corporate, could appear to have an identity with life, in spite of their enduring connection to sovereignty.[49] It naturalised and concealed the dimensions of legal recognition that enabled co-operatives' subordination to the market, while at the same time allowing legal recognition to be seen as enabling.

The normalisation of law and the presumption of incorporation as a right and a freedom, obscures the constitutive effect of incorporation, allowing the corporate form and legal recognition more generally to function in a way that both disciplines and depoliticises the co-operative. In particular, incorporation, occurring specifically in the context of biopolitical governmentality, constituted the co-operative as economic or commercial entity, instantiating the divide between the political and the economic that characterises nineteenth century political economy.[50] This legally constituted idea of the co-operative shapes how we understand the limits and possibilities of co-operation as an alternative form of organisation and association today. Co-operatives' legal constitution as bodies corporate, poised for competition in the market, is taken for granted when they are viewed as situated 'between' state and market.

### *The Limits of Alterity*

However, the process of legal recognition and the constitutive history briefly traced do not completely determine what the co-operative 'is', nor could they. As suggested at the opening of this chapter, co-operatives both affirm *and* exceed the established order. They can be easily appropriated for the purposes of the prevailing politics of austerity, but they can also present a real opportunity to practice different forms of relation and to create new forms community. Co-operation retains an openness and an indeterminacy which can be

[49] See chapter 3.
[50] See also Michel Foucault, *The Birth of Biopolitics: Lectures at the College de France 1978-1979*, ed. Michael Sellenart, trans. Graham Burchell (Basingstoke: Palgrave Macmillan, 2008), 13-17; and Polanyi, *Great Transformation*, 120.

engaged by those seeking to actualise a vision of alterity. Particularly in recent years, there has been a resurgence of co-operativism at a grassroots level; part of what has been called "the new co-operativism."[51] These new cooperatives are distinguished by their lack of connection to older cooperative movements, their engagement with 'everyday' politics of meeting the needs of communities, more horizontal organizing practices and a stronger connection with local or immediate communities.[52] These projects have, to some extent, breathed new life into the idea of co-operation, manifesting the "leftist imaginaries" that Gibson-Graham wants to read into the third way.[53] As Gibson-Graham warns, an overemphasis on the ways in which these projects may be determined by various structural constraints can have a stifling effect and blind us to the ways in which they are alternative.[54]

The genealogical study of the creation of objects of discourse or regulation presumes, even requires, that these objects do not completely determine the world: there is a necessary separation between words and things without which genealogy would not be possible. If words had a complete identity with the world, there would be no need to question their history, nor would there be any scope for changing meaning, as the entirety of possible meaning would already be present in the word itself. The legally-constituted idea of a 'co-operative' would already include all its possible manifestations. As Foucault notes "[i]f language was as rich as being it would be the useless and mute double of things; it would not exist."[55] This might be described as the constitutive insufficiency of discourse.[56] It is echoed by Jean-Luc Nancy who suggests that "[i]f there is an illusion from which one

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[51] Marcelo Vieta, "Editorial: The New Cooperativism," *Affinities: A Journal of Radical Theory, Culture, and Action* 4, no. 1 (2010): 2.

[52] John Curl, "The Cooperative Movement in Century 21," *Affinities: A Journal of Radical Theory, Culture, and Action* 4, no. 1 (2010), 13.

[53] Gibson-Graham, "Ethical Economies,"124.

[54] J.K. Gibson-Graham, *The End of Capitalism (As We Knew It): A Feminist Critique of Political Economy* (Cambridge: Blackwell, 1996), 3.

[55] Michel Foucault, *Raymond Roussel* (Paris: Gallimard, 1963), 207-208. Quoted in Beatrice Han, *Foucault's Critical Project: Between the Transcendental and the Historical*, trans. Edward Pile (Stanford: Stanford University Press, 2002), 53.

[56] The phrase "constitutive insufficiency" is borrowed from Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Abingdon: Routledge, 2009), 65. They use it in relation to Foucault's idea of disciplinary power, rather than discourse.

must protect oneself today more than ever, it is the illusion that consists in getting hung up on words (history, philosophy, politics, art...) as if they were immediately to be equated with things."[57] While this project is primarily concerned with tracing the constitutive historicity of co-operation, appreciating the significance of this constitution requires maintaining a sense of this excess and indeterminacy; the possibility of alterity that co-operatives gesture toward and manifest. This is particularly necessary for understanding what is at stake in the process of legal recognition and constitution, both what may have been closed or restricted, and that which may continue on.

This thesis approaches this sense and possibility of alterity within the co-operative movement from a historical perspective; not the mythologised history of the Rochdale Pioneers, but the eighteenth century "moral economy of the crowd."[58] In contrast to dominant historical narratives of the co-operative movement, chapter 1 will argue that the moral economy of the crowd, which Thompson locates in the eighteenth century, can be seen as the genealogical "beginning" of the co-operative.[59] The co-operative derives some important features from these beginnings—in particular, what Thompson refers to as an "ethos of mutual aid," will be read as both a form of resistance to the depredations of an emerging market economy and the manifestation of an alternative way meeting basic needs denied by the market.[60] The moral economy has often been read as a paradigmatic example of 'custom' or 'tradition', perpetuating a romanticisation of its social forms. In contrast, I will argue, drawing primarily on Nancy's ontological reading of the political, that this ethos of mutuality should be understood as a political gesture.

Foucault's genealogy and Nancy's ontology may at first seem like unlikely bedfellows.[61] The very idea that there could be an essential content to being, that would be

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[57] Jean-Luc Nancy, *Sense of the World* (Minneapolis: University of Minnesota Press, 1997), 6.
[58] Thompson, "Moral Economy," 76.
[59] Foucault, "Nietzsche" 371
[60] E.P. Thompson, *The Making of the English Working Class* (New York: Vintage Books, 1963), 423.
[61] The connections between Foucault and Nancy no doubt run more deeply than can be explored here, particularly given the importance of Martin Heidegger for both thinkers. Even if Foucault, perhaps

the object of an ontology, is undermined by genealogy's commitment to the rejection of such ideal and ahistorical notions. However, Nancy offers an ontology which, like genealogy, resists transcendent and essentialized categories of meaning.[62] Being, for Nancy, is always "being with," bound up in an inoperative (*dèsoeuvrement)* "originary or ontological 'sociality'."[63] We are always-already in common with one another, prior to and co-extensive with all of other forms of sociality. Community, for Nancy, "is not a project to be realised, it does not occur as a series of social practices, and it is not a value or an idea– rather, it *is* only as shared finite existence."[64] More broadly, inoperativity evokes a sense that the world is always in excess of the categories which we create to conceptualize it, the categories by which we render things operative and designate them "as such."[65] The very possibility of alterity resides in this inoperative sociality which prevents closure and totalisation.

Modern deployments of community, often tied to a longing for a lost community, in need of retrieval, or attempting to realise a fully unified community in the present, obscure the inoperativity of sociality. The figure of the absolute individual, and correspondingly, the fully realised community, function as though the relationality that makes them possible in the first place did not exist. Community is regarded as an essence and given an ideal content—a brotherhood or fraternity, a society or a state. As Nancy writes,

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inadvertently, precludes a Heideggerian solution to the questions he poses, the amenability of a Heideggerian ontology to Foucault's project remains (see Beatrice Han, *Foucault's Critical Project*, 54-60). Making no pretension to philosophical mastery, I have brought these two strands of thought together for the sake of their practical confluences. As far as I am aware, there has been very little work drawing together the thought of Foucault and Nancy.

[62] See Ian James, "The Ground of Being Social" in *Being Social: Ontology, Law, Politics*, eds. Tara Mulqueen and Daniel Matthews (Oxford: Counterpress, 2015), 17-32.

[63] Jean-Luc Nancy, *Inoperative Community* (Minneapolis: University of Minnesota Press, 1991), 28.

[64] Ian James, *The Fragmentary Demand: An Introduction to the Philosophy of Jean-Luc Nancy* (Palo Alto: Stanford University Press, 2005), 186.

[65] Nancy, *Sense of the World*, 13. The distinction Nancy draws between "being as being" and "being as such" parallels the distinction he makes between sense and truth. "Being as such" posits being with a particular truth, whereas "being as being" is sense, or being-toward. "[T]ruth operates, whether it wants to or not, an untenable separation between being as *such* which it presents and being as *being*" (ibid., 12). Importantly, being as being and being as such are "inseparable from one another," yet "truth proceeds to operate the separation" (ibid.). Being as such appears as essence, in some particular fashion, with particular characteristics. Being as being would be inoperative with "being as the action of the verb 'to be', that is, being that 'makes' (things) come to presence (and that, consequently cannot itself be presented)" (ibid., 13).

"...economic ties, technological operations, and political fusion (into a *body* or under a *leader*) represent or rather present, expose, and realize this essence necessarily in themselves."[66] While complete immanence is impossible—or, more precisely, it is possible, but only in death or in ceasing to be— and consistently unworked by the inoperativity of sociality, modern forms of community nonetheless attempt to realise it, whether through claims to sovereignty, or simply the presumption of presence. Nancy refers to these attempts as forms of "totalitarianism" or "immanentism."[67] These terms are not restricted to "certain types of societies or regimes" but instead refer to the "general horizon of our time, encompassing both democracies and their fragile juridical parapets."[68]

In his early work with Philippe Lacoue-Labarthe, Nancy figures immanentism as the "closure of the political," precisely because it obscures sociality and possibility of alterity.[69] The political (*le politique*), Nancy argues, "is the place where community as such is brought into play."[70] The political—before any particular program or project—is concerned with the very possibility of alterity and the unworking of the limits of any established order. The political (*le politique*), in this sense, is not any form of instituted politics (*la politique*), but rather the question of relation itself. In Chapter 1, I will argue that the ethos of mutuality that derives from the moral economy of the crowd can be read as political in this Nancian sense, outside the terms afforded by political economy, in which the political would be predominantly associated with the state, in opposition to the economic. The ethos of mutual aid exemplifies a form of politics that does not "stem from the will to realize an essence."[71]

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[66] Nancy, *Inoperative*, 3.
[67] Nancy, *Inoperative*, 3.
[68] Nancy, *Inoperative* 3).
[69] Phillipe Lacoue-Labarth and Jean-Luc Nancy, "Foreward to The Centre for Philosophical Research on the Political," in ed. Simon Sparks, *Retreating the Political* (London: Routledge, 1997), 112.
[70] Nancy, *Inoperative*, xxxvii.
[71] Ibid., xl.

While this ethos of mutuality continues to animate co-operatives, I will argue that incorporation functions as a form of metaphysical enclosure that both disciplines and depoliticises the co-operative. The sense of a lost community, for Nancy, derives fundamentally from Christianity. As he writes, "[b]ut the true consciousness of the loss of community is Christian...the community desired or pined for...is understood as communion, and communion takes place, in its principle as in its ends, at the heart of the mystical body of Christ."[72] Modern attempts to achieve communion are a reflection of a process of secularization, and an attempt "to respond to the harsh reality of modern experience: namely that divinity was withdrawing infinitely from immanence."[73] The legal form of the body corporate derives specifically from this idea of the *corpus mysticum*, importing a transcendent conception of unity from the medieval church. This thesis will trace the historicity and political theology of the body corporate form, and its integration into English law, as a way of elaborating its metaphysical dimension.[74]

Legal recognition thus served as a means of "managing alterity," and also containing it.[75] This is not to suggest, however, that legal forms are themselves devoid of alterity. The possibility of alterity subsists within law itself, as law's responsiveness. As Ben Golder and Peter Fitzpatrick explain,

> [w]hilst law must assume a definite content—and this content is given to law in standard jurisprudential perceptions by such entities as a sovereign, a class, a society, and so forth—the law cannot remain tied to any given content and must incorporatively engage with what is other to it, with resistances and transgressions which challenge its position.[76]

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[72] Ibid., 10.
[73] Ibid.
[74] There are, as Alberto Toscano has pointed out, potentially significant tensions between the concept of genealogy and political theology as it is generally understood, particularly by Giorgio Agamben. For the purposes of this thesis, a political theology of the body corporate arises as a consequence of genealogy because theology, while not the only aspect, is a key element of its historicity. The influence of theology arises not only as a general paradigm, but as the more or less direct influence of the medieval church on English law. This theological influence is not taken to be pernicious. Instead, it is a matter of historicising the concept which in turn, as an important aspect of any genealogy, helps to denaturalise it in the present. See Alberto Toscano, "Divine Management," *Angelaki: Journal of the Theoretical Humanities* 16, no. 3 (2011): 125-136.
[75] Judith Butler and Athena Athanasiou, *Dispossession: The Performative in the Political* (Cambridge: Polity Press, 2013), 75.
[76] Golder and Fitzpatrick, *Foucault's Law*, 77.

The experience of the co-operative movement in England readily demonstrates this responsiveness in the very fact that the law changed in order to accommodate a new mode of organisation and recognise the rights of working-class people to organise themselves for the purposes of their own mutual aid. Law has "a fluid nature" that gives social movements the ability to influence their circumstance. Thus, although "[l]aw reflects the state's power" it can also, and often must, be used as tool of resistance.[77] However, while law is responsive, it is not infinitely so. This is not to devalue the responsiveness of law, but to suggest that understanding the limits of these forms, and the often subtle ways they shape and circumscribe visions of alterity is also important. Law constructs meaning and constitutes identities, as well as "our imagination about what is politically possible."[78] Moreover, "it is the state that gets to decide whether constituents are worthy of legal rights and what kind of rights they can have and when those rights may be invoked."[79] While there is much that co-operatives can do within the confines of this form, there are also persistent difficulties presented by the subjection to the market entailed by the form and its history.

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[77] S. Barclay, L. Jones, and A.M. Marshall, "Two Spinning Wheels: Studying Law and Social Movements," *Studies in Law, Politics and Society* 54 (2011): 3. This, of course, is the well-worn territory of critical race theory. See for instance Kimberlé Williams Crenshaw, "Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law," *Harvard Law Review* 101, no. 7 (1988), 1331-1387. See also Brenna Bhandar and Jonathan Goldberg-Hiller, "Law, Sovereignty, and Recognition," in eds. Brenna Bhandar and Jonathan Goldberg-Hiller, *Plastic Materialities: Politics, Legality, and Metamorphosis in the Work of Catharine Malabou* (Durham: Duke University Press, 2015), 209-232. Acknowledging the alterity and relative indeterminacy of co-operative forms of relation shares similarities with Bhandar and Goldberg-Hiller's argument that within forms of recognition, there can and indeed must be movement. In the settler colonial context, for instance, aboriginal communities have turned to the law "out of necessity" (ibid., 213). And more broadly, it is not possible to simply step outside of frameworks of recognition. They draw on Catharine Malabou's conceptualization of plasticity, and particularly the function of temporality, to show "how subjects confined to particular *historicities* survive, psychically speaking, by thinking, acting and living according to a temporality that exceeds and perhaps even contradicts the confines of sovereign orders" (ibid., 220). A similar dynamic could perhaps be read into the working class co-operative movement, insofar as the co-operative is a utopian project, the full realization of which is always projected at least partly into the future. In addition, working class people could hardly have persisted with co-operative projects without some form of legal recognition, particularly given the difficulties in collectively holding property without some form of legal personality. This will be discussed in more detail in Chapter 4. For further reflection on the relationship between property and legal form, see Brenna Bhandar, "Disassembling the Legal Form: Ownership and the Racial Body," in eds. Matthew Stone, Illan rua Wall and Costas Douzinas, *New Critical Legal Thinking: Law and the Political* (London: Routledge, 2012), 112-127.

[78] Sandra R. Levitsky, "Law and Social Movements: Old Debates and New Directions," in *The Handbook of Law and Society*, eds., Austin Sarat and Patricia Ewick (Chichester: John Wiley & Sons, Inc., 2015), 385.

[79] Ibid.

*Chapter Overview*

The thesis begins from the question of alterity and its relationship to the political in the history of the co-operative movement in England. The first chapter offers a critique of the dominant historiographical approaches to the co-operative movement which have, paradoxically, tended to remove the co-operative from its history. Drawing on the critical resources of Foucault's concept of genealogy, I argue that the history of the co-operative movement has been told within a discourse of political economy, which is predicated on a well-defined separation between 'the political' and 'the economic'. The 'origin' of the co-operative movement with the Rochdale Pioneers instantiates the divisions created by that discourse, by providing a moment that stands outside of history. In so doing, these histories efface the conditions of constitution for the co-operative, and particularly the role of law in this constitution. This chapter then offers an alternative approach to this history, which sees the co-operative as historically linked to what E.P. Thompson called "the moral economy of the crowd" in the eighteenth century.[80] Instead of reading the history of the co-operative movement as derived from a mythic origin in the Rochdale Pioneers, this alternative approach leads to the question of how the disparate practices associated with the moral economy were transformed into the discrete organisational form of the co-operative. I argue that the history of the co-operative movement is one of depoliticisation, not in the narrow terms of political economy, but through the "closure of the political" as described by Lacoue-Labarthe and Nancy.[81]

The second chapter argues that both the moral economy of the crowd and the co-operative should be seen as emerging from particular forms of relation with the state. There has been a tendency, particularly within legal pluralism, to regard both the moral economy

[80] E.P. Thompson, "The Moral Economy of the English Crowd in the Eighteenth Century," *Past and Present*, no. 50 (1971): 76–136.
[81] Philippe Lacoue-Labarthe and Jean-Luc Nancy, "The Retreat of the Political," in ed. Simon Sparks, *Retreating the Political* (London: Routledge, 1997), 122-134.

and co-operatives as having their own autonomous forms of law and normativity. The moral economy, for instance, is thought to manifest a form of traditional or customary law, a framing and terminology which implies a relationship of autonomy from, but also inferiority to, the state.[82] Co-operatives, in turn, have been regarded as a means of maintaining these traditional forms of relation and legality within state law. Yet this framing takes for granted the ways in which both the moral economy and co-operative may already be the product of a relationship with the state.[83] Drawing on the work of Peter Fitzpatrick, this chapter argues that it is actually law which makes the state possible, inviting an interpretation of law from poststructuralist thought and viewing the state not as an ipseity, but as the outcome of a process of negation and differentiation from other associations.[84] The means by which the state constitutes itself through the recognition of associations is explored through a close reading of Hobbes' *Leviathan*. However, this chapter approaches Hobbes not as the author of a totalising sovereignty but, following James Martel, as one "who helps us to understand how sovereignty is not so much an actual font of authority, but a rhetorical production."[85] The *Leviathan* demonstrates both how the state constitutes itself through processes of legal recognition, and how the state uses silence and tacit consent to strategically negotiate its own impossibility. The historical shift from moral economy to co-operative is not a matter of "bringing within" from "outside," as the Christian Socialists suggested,[86] but a more complex constitutive dynamic that reflects shifting modalities of governance and power in relation to associations as the modern state comes into being.

The third chapter turns to the specific legal form of the body corporate exploring

[82] See for instance Harry Arthurs, "Review: *Customs in Common: Studies in Traditional Popular Culture*," *University of Toronto Law Journal* 43 (1993): 289.
[83] See Stuart Henry, *Private Justice: Towards Integrated Theorising in the Sociology of Law* (London: Routledge & Kegan Paul plc, 1983), 92-96.
[84] Peter Fitzpatrick, "Being Social in Law and Society," in Tara Mulqueen and Daniel Matthews, eds., *Being Social: Ontology, Law, Politics* (London: Counterpress, 2015), 36.
[85] James R. Martel, *Subverting the Leviathan: Reading Thomas Hobbes as a Radical Democrat* (New York: Columbia University Press, 2007), 239. .
[86] Ludlow and Jones, *Progress*, 96.

both its history and the particular historical context in which it came to be used in the nineteenth century. In contrast to theoretical debates on the nature of corporate personality that have cast it as a reflection of the 'real personality' of groups, a mere pragmatic device, or simply a right, this chapter argues that incorporation, as a mode of legal recognition, functions constitutively, particularly as a consequence of what Foucault calls the normalisation of law.[87] This chapter traces the history of the body corporate from its roots in Roman law through its 'metaphysicalisation' in the medieval church, and its eventual integration into English law. The chapter then turns to the use of incorporation in the early modern period, reading this in connection with new forms of governmentality. In the early modern period, incorporation served as a means of extending the authority and reach of the state, and was intimately connected with the operation of sovereignty and what Foucault refers to as police. This dynamic shifts in the mid-nineteenth century with the introduction of incorporation by registration and the emergence of biopolitical governmentality. This chapter argues that the introduction of incorporation by registration had the effect of *normalising* the corporate form, obscuring its connection to sovereignty and making it appear to be a private right and a form of commercial freedom. This normalisation also had the consequence of immanentising the transcendent metaphysical reference acquired in the medieval church, making the form "immanentist" or "totalitarian" in Nancy's terms. This is ultimately necessary background for understanding the effects of incorporation on the co-operative, when it is given this status in the mid-nineteenth century.

The final chapter returns to the specific context of the legal recognition of the co-operative movement in the mid-nineteenth century, focusing particularly on the Christian Socialists and their efforts to secure a legal form for co-operatives. The legal recognition of co-operatives is situated in a wider debate about limited liability, and the movement from a predominantly evangelical view of the market as a retributory force, to one that demands

[87] Foucault, *History of Sexuality*, 144.

and fosters integrity. The chapter explores how it was thought that the legal recognition of co-operatives would expose the working classes to the discipline of the market, as a means of disabusing them of their immediate desire for political rights, and also teaching them the laws of political economy. The chapter then turns to the specific form of the body corporate, arguing that it serves as a form of metaphysical enclosure that facilitates the discipline of the market. Through incorporation, the co-operative was constituted as an economic or commercial entity within the narrow terms of political economy. However, as I will argue, it was also depoliticised in a more fundamental way through the imposition of the corporate form, which imposes and immanentizes a transcendent form of unity from the medieval church, effecting a closure of the political.

The chapters in this thesis take what may at first appear to be a meandering route to its conclusion that the constitution of co-operatives as bodies corporate served as a form of enclosure that disciplined and depoliticised the co-operative. However, the theoretical movements and enquires pursued in this thesis are led by its genealogical orientation, which entails not only a different approach to history and periodisation (chapter 1), but also a critique of the modes of thought on which dominant approaches to co-operatives and law have been based. The theoretical orientation of most legal and political academic work that has been done on the English co-operative movement has been pluralist, starting from the German jurist Otto von Gierke, whose theorisation and historiography of German associational life influenced many subsequent thinkers, including the most prominent historian of the English co-operative movement, G.D.H. Cole. Within socio-legal literature, a legal pluralist approach to co-operatives has also been dominant, even if they have only been a marginal concern within the discipline as a whole. The affinity between co-operatives and these pluralist approaches stems from an underlying concern with group and associational life, including the state, and the corporate nature of such groups.

However, as I argue in chapters 2 and 3, these perspectives have implicitly reproduced a conception of legal recognition, one ultimately shared with more liberal theories (such as that of H.L.A. Hart, engaged in detail in chapter 3), which takes for granted the ways in which law may have had a constitutive effect on the co-operative, regarding such groups as existing prior to and persisting unscathed through their recognition by the state. In order to undertake a more thorough genealogy of the co-operative, the chapters in this thesis explore the conditions of possibility not only for the legal recognition of co-operatives, but the particular way in which this recognition has come to be regarded as purely enabling. This requires, in turn, exploring legal recognition first and foremost as a historical question that sees legal recognition and the forms that it takes as reflecting shifting modalities of power in the constitution of the modern state, as well as the historicity of particular legal forms themselves. This thesis contends that a significant part of the reason why co-operatives look and function as they do now is a consequence of how the state absorbed and attempted to rationalise associational life in the mid-nineteenth century, and the subsequent normalisation of law that allowed the state's coercive power to effectively disappear and become 'facilitative'. In addition, as chapter 3 argues, the specific use of the body corporate in the nineteenth century can only be understood with reference to its history as a means of collectivisation in the medieval church. The notion of enclosure introduced in the final chapter provides a way of describing legal recognition that appreciates, but also depends on, both of these prior theoretical insights.

*A Finite History of the Present*

The constitutive historicity of the co-operative as a legal entity presented here is only one possible narrative. It is not inherently more truthful or accurate than any other, nor is my intention to propose that this account is definitive. Foucault once claimed that all of his work is fiction: "[a]s to the problem of fiction, it seems to me to be a very important one; I

am well aware that I have never written anything but fictions."[88] Fiction, for Foucault, is not devoid of truth, but rather

> ...the possibility exists for fiction to function in truth, for a fictional discourse to induce effects of truth, and for bringing it about that a true discourse engenders or 'manufactures' something that does not as yet exist, that is, 'fictions' it. One 'fictions' history on the basis of a political reality that makes it true, one 'fictions' a politics not yet in existence on the basis of a historical truth.[89]

Discourse, in this sense, serves in a creative capacity, as the means by which we make and unmake the world. The goal of this project is not necessarily to pursue a more truthful discourse of the co-operative, but rather to challenge the very idea of the possibility of such a truth; to recognize that truth is a decision. "The historicity of the truth," as Nancy notes, "lies in the fact that it offers itself to our decision and is never given."[90] A particular decision about the meaning of co-operation was made with legal recognition. This project traces the history of that decision in an effort to understand how it affects how we understand co-operatives in the present. By constituting the co-operative as a body corporate poised to compete in a market, legal recognition has contributed to the framing of co-operatives as businesses. This framing takes for granted that the market is a free or natural space, rather than one constructed through regulation and state intervention. Recognizing that this understanding of the co-operative is a decision opens up spaces for new ways of doing the politics of co-operation; ways that must be fictioned. Genealogy, as Foucault summarizes, "is at one and the same time the historical analysis of the limits that are imposed on us and an experiment with the possibility of going beyond them."[91]

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[88] Michel Foucault, "The History of Sexuality," in *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*, ed. Colin Gordon (New York, Pantheon Books, 1977), 193.

[89] Ibid.

[90] Jean-Luc Nancy, "Finite History," in *The Birth to Presence*, trans. Brian Holmes et al. (Palo Alto: Stanford University Press, 1994), 165.

[91] Foucault, "What is Enlightenment?," in eds. Sylvere Lotringer and Lysa Hochroth, *The Politics of Truth*, (Los Angeles: Semiotext(e), 1997), 127.

# Chapter 1: Co-operation and the Possibility of the Political

"It is because law *matters* that we have bothered with this story at all."[1]

The history of the co-operative movement in England is often told as one of depoliticisation. As the story goes, the founding of Rochdale Society of Equitable Pioneers in 1844 inaugurated a new and more pragmatic model of co-operation. It left behind prior forms of co-operation that were more closely associated with the lofty ideals of Robert Owen and utopian socialism, as well as more violent forms of action that were part of the moral economy in the late eighteenth century. Whether Rochdale is interpreted as the beginning of the movement's success, or, in a more critical reading, lamented as part of a broader "drift to reformism," the modern co-operative was formed though a disavowal or loss of the political.[2] Law does not figure prominently in these accounts: legal recognition merely served, for better or for worse, to enable and legitimate the model of co-operation started by the Rochdale Pioneers. This chapter offers a critique of these dominant approaches to the history of the co-operative movement. It suggests that this way of telling the history allows it to be taken for granted in the present that co-operatives will function predominantly as businesses. Following the critique, this chapter proposes an alternative approach to this history; one that enables an appreciation of how law may have mattered in the history of the co-operative movement.

The chapter begins by presenting an outline of the dominant historical narratives of the co-operative movement. I argue that the periodisation of this history reflects less a real progression of events than an essentialised idea of the political that simultaneously

[1] E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (London: Penguin Books, 1990), 268. Emphasis in original.
[2] Eric Hobsbawm, *Labouring Men: Studies in the History of Labour* (London: Redwood Press, 1964), 341. See also Neville Kirk, *The Growth of Working Class Reformism in Mid-Victorian England* (Urbana: University of Illinois Press, 1985), 1-31.

creates, and is validated by, the divisions between periods. Periodisation, as Kathleen Davis notes, is "not simply the drawing of an arbitrary line through time, but a complex process of conceptualizing categories, which are posited as homogeneous and retroactively validated by the designation of a period divide."[3] In the mid-nineteenth century, it was not so much that the practices associated with co-operation had dramatically changed, but that co-operation came to be articulated within the prevailing discourse of political economy, which was itself predicated on a clear separation between politics and the economy. The market was thought to be determined by natural laws independently of intervention. Politics, meanwhile, was designated as a realm of activities associated with the state.[4] For middle class philanthropists who sought to appropriate co-operation as a means of ameliorating tensions between capital and labour, co-operation had to be figured as unpolitical, and separated from early socialism.[5] The Marxist critique of political economy reinforced this way of articulating co-operation: co-operation was an incoherent political strategy, vulnerable to the domination of economic forces precisely because it was not focused on the state.[6]

The founding of the Rochdale Society of Equitable Pioneers in 1844 has subsequently served as a point of origin for the modern co-operative movement. It stands outside of history; not temporally inaccessible, but rendered ideal and "almost magical," such that the terms attributed to it far exceed mundane historical details.[7] From this

[3] Kathleen Davis, *Periodization and Sovereignty: How Ideas of Feudalism and Secularization Govern the Politics of Time* (Philadelphia: University of Pennsylvania Press, 2012), 3.
[4] See Karl Polanyi, *The Great Transformation* (Boston: Beacon Press, 2001), 116-135. See also Michel Foucault, *The Birth of Biopolitics: Lectures at the College de France 1978-1979*, ed. Michael Sellenart, trans. Graham Burchell (Basingstoke: Palgrave Macmillan, 2008), 13-17.
[5] See Donna Loftus, "Capital and Community: Limited Liability and Attempts to Democratize the Market in Mid-Nineteenth-Century England," *Victorian Studies* 45, no. 1 (2002): 93-120.
[6] Karl Marx, "The First International," Inaugural Address of the International Working Men's Association, *Marx and Engels Internet Archive,* October 21-27, 1864, http://www.marxists.org/archive/marx/works/1864/10/27.htm (accessed 13 January 2017).
[7] Brett Fairbairn, "The Meaning of Rochdale: The Rochdale Pioneers and the Co-operative Principles," Occasional Paper, Centre for the Study of Cooperatives, University of Saskatchewan (1994), 1.

vantage, it projects forward in time, giving the contemporary co-operative movement, and the form of the co-operative itself, a sense of historical necessity. It also reaches backward, defining that which came before in relation to its own eventuality. In the present, we have an idea of co-operation founded on a disavowal or loss of the political, that takes as given that it must compete on a market. Left behind is a 'political' form of co-operation associated with Owenism; and before that, only the incoherent and sometimes violent efforts of the late eighteenth century.

This way of telling the co-operative movement's history locates depoliticisation within co-operation itself, retrospectively giving it an historical identity that in actuality only developed in the mid-nineteenth century and thereafter. The projection of this identity from an idealised, mythic account of the Rochdale Pioneers effaces both the conditions of its own constitution as such, and the mechanisms by which this constitution was effected. In particular, this way of telling the history obscures the role of law in this constitutive process. Law, as noted above, does not figure prominently in these accounts of the history of the co-operative movement. In relation to the discourse of political economy, and to its critique, law functions in a largely instrumental capacity; whether by enabling the market or by being completely subordinate to it. Law, as I will come to argue, was not simply secondary to the market and the economy. It was actively involved in constructing them, such that what is often depicted as a 'free market' is a realm of activity constituted in part by the state, through law.[8] In this context, legal recognition served to constitute the co-operative as an entity that would function on the market.

However, in order to appreciate the significance of law and the ways in which the co-operative was 'constituted' in the mid-nineteenth century, it is necessary to have an understanding of the history of the co-operative movement that is not already determined

[8] See Polanyi, *Great Transformation*, 71-80.

by the discourse of political economy. Following the critique of the dominant historiographical approaches to the co-operative movement, this chapter offers an alternative approach, drawing on the critical resources of genealogy as articulated by Michel Foucault.[9] Genealogy proceeds on the basis that discourse does not have a determinate relationship with the world. It thereby makes possible alternative histories, as well as a more specific analysis of how particular objects of discourse are formed or constituted. Genealogy also offers an immediate critique of the discourse of political economy and the forms of politics that flow from it, as Foucault suggests that the discourse of political economy obscures what he observes as the fundamentally constitutive function of power.

The chapter concludes with a sketch of an alternative approach to the history of the co-operative movement. I suggest that it is the earliest societies, formed in the late eighteenth century, rather than the Rochdale Pioneers, that should be regarded as the "beginnings" of the co-operative movement.[10] These societies are situated amongst a range of practices that E.P. Thompson attributes to the "moral economy of the English crowd."[11] In these early societies, Thompson observes a form of co-operative direct action that persists through to the modern form of co-operation.[12] Where dominant histories would emphasize rupture between three discrete periods in the history of the co-operative movement, this alternative approach establishes a thread of continuity. It problematizes the self-contained coherence of these three periods by showing how the ideologies of early socialism and liberalism interacted with older, more dispersed practices and normative frameworks. Drawing on the work of Jean-Luc Nancy and Philippe Lacoue-Labarthe, I

[9] See Michel Foucault, "Nietzsche, Genealogy, History," in *Essential Works of Foucault, Volume 2: Aesthetics, Method and Epistemology*, ed. J.D. Faubion, trans. Robert Hurley and others (London: Penguin, 1994), 369-392.
[10] Wendy Brown, *Politics Out of History* (Princeton: Princeton University Press, 2001), 101.
[11] E.P. Thompson, "The Moral Economy of the English Crowd in the Eighteenth Century," *Past and Present*, no. 50 (1971): 76–136.
[12] E.P. Thompson, *The Making of the English Working Class* (New York: Vintage Books, 1963), 203.

suggest that it is possible to see co-operative direct action as political.[13] The essence of the political, for Lacoue-Labarthe and Nancy—before any particular programme or project—is concerned with the very possibility of alterity and the unworking of the limits of any established order. The narrow circumscription of the political within the discourse of political economy presupposes the existence of the very system that would be put into question by the political.[14]

When conceptualised as political, an emphasis on co-operative direct action reveals that the arc of the history of the co-operative movement is not simply one of depoliticisation, at least not in the terms dictated by political economy, as a foregone conclusion and an inevitability. As I will suggest, the political gesture described as co-operative direct action persists in forms of co-operation in the present, as the means by which they attempt, often successfully, to manifest the possibility of alterity. However, this gesture has been limited and circumscribed over time, and particularly by the constitution of the co-operative as part of the system it is meant to replace. This analysis invites a consideration of the ways in which the very constitution of the co-operative as an object depoliticised it, but never completely. This chapter sets the stage for the next three chapters which will focus on the significance of legal recognition in constituting the co-operative. Where dominant approaches to this history obscure or downplay the role of law, this chapter presents a critique and an alternative narrative that raise the possibility that law may have played a role that was more than just instrumental.

[13] Philippe Lacoue-Labarthe and Jean-Luc Nancy, "The Retreat of the Political," in ed. Simon Sparks, *Retreating the Political* (London: Routledge, 1997), 122-134.
[14] Claude Lefort, "The Permanence of the Theologico-Political?" in *Democracy and Political Theory*, trans. David Macey (Cambridge: Polity Press, 1988), 217.

*The Political Historiography of Co-operation*

In general, and in contrast to the vast literature on trade unions, very little has been written on the history of the co-operative movement in England.[15] Aside from a relatively recent renewed interest in this history, a majority of the work produced on the movement has come from within, and has been commissioned on, an institutional level.[16] For the co-operative movement,

> ...'history' was intimately bound up with the success and promulgation of co-operative forms during this early phase and was construed, not merely as the product of passive reflection possible only after the struggle subsided, but as an active ingredient in a developing movement culture.[17]

George Holyoake's *Self-Help by the People*, perhaps the first in this genre, told the story of the Rochdale Pioneers just thirteen years after the founding of the society.[18] The work not only contributed to galvanizing the co-operative movement, in England and elsewhere, but "served as a practical handbook for working-class activists and was concerned as much with the future as with the past."[19] These 'internal' histories thus served to promote co-operation by explaining, in practical terms, how it could be done. These histories tend to present more or less celebratory and valorising accounts of the co-operative movement, written on the occasion of jubilees and anniversaries of particular societies.[20] The co-operative movement is also sometimes addressed in broader labour histories of working

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[15] Nicole Robertson, *The Co-operative Movement and Communities in Britain, 1914-1960: Minding Their Own Business* (Surrey: Ashgate, 2010), 4. For a comprehensive overview of historiographical approaches to the co-operative movement in England, see Peter Gurney, "Heads, Hands and the Co-operative Utopia: An Essay in Historiography," *North West Labour History* 19 (1994): 3-23.
[16] Ibid. See also Peter Gurney, *Co-operative Culture and the Politics of Consumption in England: 1870-1930* (Manchester: University of Manchester Press, 1996); Martin Purvis, "Societies of consumers and consumer societies: co-operation, consumption and politics in Britain and continental Europe c. 1850-1920," *Journal of Historical Geography* 24, no. 2 (1998), 147–169; Stephen Yeo, ed., *New Views of Co-operation* (London: Routledge, 1988); John F. Wilson, Anthony Webster and Rachel Vorberg-Rugh, *Building Co-operation: A Business History of The Co-operative Group, 1863-2013* (Oxford: Oxford University Press, 2013).
[17] Gurney, *Co-operative Culture*, 118.
[18] George Jacob Holyoake, *Self-Help by the People: The History of Co-operation in Rochdale* (London, 1858).
[19] Gurney, *Co-operative Culture*, 118.
[20] Ibid.

class movements. In this variety of history, the co-operative movement tends to be relegated to a place of general inefficacy or unimportance in relation to other forms of working class organisation and movement. Within these broader histories of labour, "[t]here was a tendency...to use the movement as an example to support broader debates rather than studying the movement in its own right."[21] Robertson attributes this to a broader marginalization of the consumer side of working class affairs. While these approaches diverge considerably in the meaning and significance they attribute to co-operation, they also share a similar outline and periodisation of its history. This section offers a brief overview of this shared outline.

Although the Rochdale Pioneers are often described as the first modern co-operative and positioned as the point of origin for the contemporary co-operative movement, they were by no means the first co-operative society. It was not until the 1830s that 'co-operative' emerged as a term for a specific form of organisation; however, some of the earliest roots of co-operative forms of organisation can be found in the food riots and rebellions of the late eighteenth century, as part of what Thompson called "the moral economy of the English crowd."[22] These early societies were formed, often on the back of riots, in response to the creation of local monopolies and increased prices in staple products such as corn and flour, and they took a variety of different forms.[23] Local shipwrights in Woolwich and Chatham founded corn mills with bakeries attached in 1760. In other places, such as Derbyshire, associations of working men formed to pool resources and buy grain in bulk. The Fenwick Weavers (in Scotland) are thought to have started the first co-operative retailing effort in 1769, dealing locally in oatmeal, and the first such effort in

[21] Robertson, *Co-operative Movement and Communities*, 4.
[22] Thompson, "Moral Economy," 76.
[23] Joshua Bamfield, "Consumer-Owned Community Flour and Bread Societies in the Eighteenth and Early Nineteenth Centuries," *Business History* 40, no. 4 (1998): 16. These societies did not have any particular legal form, although they were sometimes set up as Friendly Societies, at least after the first Friendly Societies Act in 1795. Their legal status will be discussed in greater detail in chapters 2 and 4.

England is thought to have opened in Oldham in 1796.[24] Several mills were also founded closer to the turn of the century in places such as Hull and Barnham Downs as a result of the increase in the price of corn caused by the French Wars. These were relatively small clubs, with members pooling money to purchase and mill their own corn.[25] They were also often quite militant and set up with the explicit intent of undercutting local millers and bakers.[26]

There are some forty-six 'flour and bread societies' on record between 1759 and 1820.[27] However, despite their prevalence, these societies have been marginalised in histories of the co-operative movement. They are usually mentioned in passing, as part of a vague and inchoate past. For instance, G.D.H. Cole writes that "[t]hese beginnings, however, were not followed up, and never constituted a movement. They were, except the Corn Mills, isolated experiments, and no one knows now who inspired most of them."[28] Without a leader or a broader strategy of which they would form a part, these efforts are thought to have had little direct bearing on the co-operative 'movement' which begins to take shape in the nineteenth century. As Catherine Webb wrote, indicating both the insignificance of this period to the history of the movement and its inferiority in relation to later forms of co-operative organisation, "we close the book of the eighteenth century on simple, medieval ways of life...."[29] Considerably more has been learned about the moral economy since Cole wrote his *Century of Co-operation* in 1944; however, the importance afforded to these early societies has not really changed.

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[24] G.D.H. Cole, *A Century of Co-operation* (Manchester: The Co-operative Union Ltd., 1944), 14.
[25] For a more detailed account of their activities see Jennifer Tann, "Co-operative Corn Milling: Self-Help during the Grain Crises of the Napoleonic Wars," *The Agricultural History Review* 28, no. 1 (1980): 45-57.
[26] Bamfield, "Consumer-Owned Community," 31.
[27] Ibid., 20-21.
[28] Cole, *Century,* 15.
[29] Catherine Webb, *Industrial Co-operation: The Story of a Peaceful Revolution* (Manchester: Co-operative Union Limited, 1907), 8.

Leaving behind the earliest societies, most histories of the co-operative movement begin from the early nineteenth century, and subsequently divide the movement into two main periods: Owenite and Rochdale. The Owenite period is named for its close connection to the industrialist, philanthropist and early socialist, Robert Owen. He is often considered to have been the 'Father of English Socialism' and the 'Father of Co-operation'.[30] Owen envisioned the creation of utopian "Villages of Co-operation," where labourers would live and work together, receive a high quality of education, and be free of the worst forms of exploitation driven by the profit motive. They would work shorter hours, receive higher pay, and there would be a complete ban on child labour.[31] His efforts, and those of the Owenite co-operative societies, were mostly geared toward raising capital to fund these utopian communities.

Although the early nineteenth century was filled with a wide variety of co-operative projects, historiographical approaches have tended to focus on those efforts explicitly connected to Owen and Owenism.[32] Amongst these are the first labour exchanges and the Grand National Consolidated Trades Union, as well as the experimental communities developed at New Lanark and elsewhere. This period is described as one of 'Enthusiastic Experiment', which has the effect both of marking it as exceptional and of downplaying it.[33] On the one hand, there has been, as Stephen Yeo puts it, a focus on "prophets" over "working people's practices."[34] One finds, for instance, the early co-operators described as those "whose enthusiasm was kindled and whose imaginations were fired by the social

[30] Beatrice Potter, *The Co-operative Movement in Great Britain* (London: Swan Sonnenschein & Co. Ltd., 1904), 16.
[31] Ibid., 13. Robert Owen's views are most thoroughly elaborated in two publications: Robert Owen, *A New View of Society: Or, Essays on the Principle of the Formation of the Human Character and the Application of the Principle to Practice* (London: Cadell and Davies, 1813) and Robert Owen, *A Report to the County of Lanark* (Glasgow: University Press, 1821).
[32] See Andy Durr, "William King of Brighton: Co-operation's Prophet?" in *New Views of Co-operation*, ed. Stephen Yeo (London: Routledge, 1988), 10-26.
[33] Webb, *Industrial Co-operation*, 13.
[34] Stephen Yeo, ed., introduction to *New Views of Co-operation* (London: Routledge, 1988), 10.

teachings of Owen."[35] On the other, although it is acknowledged that the co-operative movement and many forms of co-operation developed independently of Owen, these efforts are also seen as uniquely dependent on his intellectual insights. Holyoake wrote that "Owen set men's minds on the track of co-operation, and time and need, failure and gain, faith and thought, and the good sense and devotion of multitudes have made it what it is."[36] Alongside the focus on Owen's achievements is a corresponding emphasis on the ultimate failure of these experiments. At this time, Owenism is said to have been eclipsed by Chartism; the struggle for the franchise. A decade of relative inactivity followed, until the founding of the Rochdale Society of Equitable Pioneers in 1844.[37]

The period from the foundation of the Rochdale Pioneers to the present day, is taken to be the modern period of co-operation. For many, this is when co-operation found its most durable, and ultimately successful, model. Within the co-operative movement, "[t]he myth of Rochdale has to do with twenty-eight impoverished weavers who started a shop in Toad Lane (Rochdale) in 1844; a shop that became the first successful co-operative in the world; a co-operative that defined the principles for all later co-operatives to follow."[38] From the founding of the Rochdale Society, the consumers' co-operative model spread and eventually led to the formation of the Co-operative Wholesale Society in 1862; a federal structure for a burgeoning national movement.[39] Legal recognition for co-operation is

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[35] Webb, *Industrial Co-operation*, 2.

[36] George Jacob Holyoake, *The History of Co-operation in England: Its Literature and Its Advocates, Volume I* (Philadelphia: J.B. Lippincott & Co., 1875), 70. Quoted in Webb, *Industrial Co-operation*, 10. However, as Gurney reminds, "Holyoake did not obscure the Owenite and Chartist credentials of the Pioneers. The dividend was not regarded as a sign of 'embourgeoisement' but rather as a stepping-stone to the co-operative community of the future." Gurney, "Heads, Hands," 5.

[37] Holyoake begins the second volume of his *History of Co-operation* with a chapter entitled "The Story of a Dead Movement" which covers the years immediately leading up to 1845. George Jacob Holyoake, *The History of Co-operation in England: Its Literature and Its Advocates, Volume II* (London: Trumbner & Co., 1879).

[38] Fairbairn, "Meaning of Rochdale," 1.

[39] The Co-operative Wholesale Society eventually, in the twentieth century, became the Co-operative Group, a very well-known and recognisable entity in the United Kingdom. For more on the Co-operative Wholesale Society, and how it eventually became the Co-operative Group, see Wilson et al., *Building Co-operation*, 53-98.

included alongside these developments, which are presented as part of a narrative of progress. As Yeo writes, the passage of legislation "seemed as it came, to confirm their capacities rather than to deny them. Thus it seemed transparent, rational, and progressive, that large-scale co-operation was the future form, competition the past." [40] The Owenite period is generally downplayed in importance in relation to the period commencing with the Rochdale Pioneers. For instance, Sir Arthur H.D. Acland and Benjamin Jones in *Working Men Co-operators* offer a chronology of the movement in which the entire period from 1800-1844 is labelled as "[t]he period preceding the formation of the Rochdale Pioneers Society."[41] Others, such as Samuel Smiles in *Thrift,* pass over it completely, jumping immediately from the foundation of the Hull Anti-Corn Mill in 1795 to a society in Leeds in 1847, claiming that "many years passed before the example... of Hull was followed."[42]

The historical narrative of the co-operative movement in England, insofar as it ultimately centres on the Rochdale Pioneers, is based on the idea of a clear divide between the Owenite and Rochdale periods. This divide is not only temporal, with nearly a decade of inactivity clearly separating them, but also qualitative, with key differences in the ideas and practices of co-operation characterising each period. The movement is thought to have become more pragmatic in the transition. As Cole suggests, [t]he Pioneers had settled down to develop Co-operation not apart from the world as it was but in that world and subject to its limiting conditions. They had become realists, even if they had not shed their idealism."[43] The main differences identified between earlier, Owenite, forms of co-operation and those which became prominent in the second half of the nineteenth century, are the practices of

[40] Yeo, *New Views*, 4.
[41] Sir Arthur H. D. Acland and Benjamin Jones, *Working Men Co-operators: An Account of the Co-operative Movement in Great Britain* (Manchester: Co-operative Union Ltd., 1937), 13.
[42] Samuel Smiles, *Thrift* (Chicago: Donohue, Henneberry & Co., 1890), 118.
[43] Cole, *Century*, 89.

shopkeeping and the distribution of dividends. However, although these became primary features of consumers' co-operation, they are nowhere to be found in Owen's writings, nor were they terribly common practices in co-operative societies before the 1850s. In the 1820s and 30s, shopkeeping was initially adopted as a means to an end. As co-operators, specifically Owenites, failed to attract significant philanthropic interest in large-scale, co-operative communities, shopkeeping came to be seen as a way to generate capital, albeit slowly, for co-operative settlements. While some societies at this time were giving out dividends, most were set up for the purpose of accumulating capital, which would then be invested in the purchase of land for new co-operative villages. As Cole notes, "[t]he leading Owenites were mostly very little interested in the growth of store-keeping, save to the extent to which it could help them to finance their own plans."[44] While the endeavour to raise funds for a village settlement through shopkeeping was never successfully completed by any society, shopkeeping was effectively introduced to the movement as a common practice.[45] With the introduction of shopkeeping and dividends, it became possible to see co-operation as a form of business, rather than as an experiment in "world-making."[46]

Those who celebrate the Rochdale model of co-operation regard this transition positively. Co-operation became more practical and, as a result, more successful. A "stroke of practical genius" inspired the Rochdale Pioneers to found their model and to give up "the journey towards a better order of society."[47] By contrast, for those who are more critical of the co-operative movement, this moment of change was when co-operation ceased to be political. For Sidney Pollard, a collectivist historian, "this new model of co-operation, centred on the shop and the dividend, indicated that men were motivated by their personal

[44] Ibid., 68.
[45] Sidney Pollard, "Nineteenth-Century Co-operation: From Community Building to Shopkeeping," in eds. Asa Briggs and John Saville, *Essays in Labour History* (London: Macmillan, 1960), 84.
[46] George Jacob Holyoake, *The History of Co-operation in England: Its Literature and Its Advocates, Volume I* (Philadelphia: J.B. Lippincott & Co., 1875), 22.
[47] Webb, *Industrial Co-operation*, 14.

interests rather than grand visions."[48] The dividend, in particular, has been singled out as detrimental to the ideals of co-operation. In Pollard's estimation, "the dividend was a practical device, designed to create confidence and attachment among new members, without the realisation that the ends were being subtly changed by changing the means."[49] The dividend "represented the first major breach with Owenism, and one that proved fatal to its ultimate ideal."[50] While dividends in co-operatives function differently from those in companies, this practice seemed to make co-operatives dangerously similar to joint stock companies, in their pursuit of profit for shareholders.[51]

This change in practices, coupled with the consolidation of industrial capitalism, and the spread of prosperity, in some degree, to the working classes, is thought to have led to the demise of any kind of transformative potential within the co-operative movement.[52] The co-operative movement, in these accounts, had lost its vision. "Nothing is more striking," we are told, "than the contrast between the firm outlines of [Owen's] New Moral World and the shapeless yearnings of the latter-day co-operators, whether inspired by religion or not, as soon as they leave the firm ground of shopkeeping."[53] In this movement away from more communitarian and idealistic forms of organisation, as well as from more direct forms of antagonism with the existing order of society, the movement is thought to have entered a period of reformism. This view of the co-operative movement carries on in

[48] As Pollard explains, "[t]o describe, at that time, storekeeping as a co-operative end would have been as justifiable as making a raffle for church funds the occasion of describing the running of a lottery as one of the aims of the church: both were thought of as convenient ways of providing funds for higher purposes." Pollard, "Nineteenth Century Co-operation," 83.
[49] Ibid., 97.
[50] Ibid., 95.
[51] Dividends within a co-operative are not profits, but rather surpluses on trading with the members themselves. Thus the dividend serves as a way of returning money to members who have effectively overpaid. As such the introduction of dividends to the co-operative model does not necessarily indicate a turn toward a focus on profit generation, even though some societies were founded as or eventually became joint-stock companies, in some cases abandoning the co-operative project. See E.V. Neale, *The Distinction Between Joint-Stockism and Co-operation* (Manchester: Co-operative Printing Society, 18--).
[52] Ibid., 106.
[53] Ibid., 102.

Marxist histories of nineteenth century working class politics, in which co-operation is part of a broader "drift to reformism," that characterised much of working-class politics during this time.[54] As Eric Hobsbawm notes,

> ...the Chartist and Owenite leaders of the new movements—whether Engineers or Rochdale co-operators — in no sense intended to abandon their long-term aims. It was simply that the content of the old slogans changed in a new economic context; until for lack of a clear socialist theory, they became increasingly devoid of meaning.[55]

While the drift is read as being relatively benign, it is nonetheless the product of a "lack of a clear socialist theory."[56] This implication of co-operation in the "drift to reformism" reflects an overall marginalisation of co-operation in accounts of labour history.[57]

The effect of these diverse readings of co-operative history and the history of the co-operative movement is to organise it into three discrete phases which are determined more or less explicitly by their relationship to the political. The earliest societies are pre-political and characterised by their perceived remove from formal political structures and coherent ideologies. The Owenite period is political *par excellence*, when co-operation is most closely associated with early socialism. Both for those who celebrate and those who critique the co-operative movement, this is co-operation's political phase. Likewise, the Rochdale or modern period of co-operation is unpolitical, having moved away, for better or for worse, from socialism and Chartism.

While this narrative has been influential, it is also problematic and in some respects simply inaccurate. This periodisation obscures elements of both continuity and plurality

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[54] Hobsbawm, *Labouring Men*, 341.
[55] Ibid., 319, n4. Moreover, the co-operative movement at this time in particular is considered to be part of the labour aristocracy as "...only workers with substantial resources could — individually, or through bodies like the co-ops—get access to the only consumer goods of a good range and quality, which were at middle-class price-levels." (319). See also H. F Moorhouse, "The Marxist Theory of the Labour Aristocracy," *Social History* 3, no. 1 (1978): 61–82.
[56] Ibid.
[57] Ibid., 341.

in the history of co-operation. Contrary to the dominant narratives, there is no clear break between the Owenite period and the Rochdale period. While a number of historians suggest that there is a ten-year gap between them, there was actually continuous activity during this time.[58] Not only were a range of societies in operation during this period, but co-operation was used as a strategy amongst Chartists.[59] In addition, Rochdale did not inaugurate a new or unheard of model of co-operation. It is not the origin of the dividend, and shopkeeping long preceded the Rochdale Society, even if their success helped to popularise it as a model. Moreover, the Rochdale Society did not simply appear out of nowhere; Rochdale had long been a "centre of co-operative activity."[60] As Fairbairn notes, "even the Rochdale Pioneers, whose success in retrospect seems almost magical, were the result of decades of hard work, failures, and disappointments."[61]

*Politics and Periodisation*

Peter Gurney suggests that some of the main oversights and generalisations in dominant co-operative historiography can be attributed to a tendency to view the movement through "middle class spectacles."[62] Co-operation was an important site of ideological conflict in the mid-nineteenth century, and historians have tended to take the terms of those struggles as determinative of co-operation as such. As Gurney explains, "[o]ne reason why the Co-operative movement has been so grossly misunderstood by historians is that they have taken the definitions and representations of middle-class reformers as the truth rather than as specific and intentional interventions in a continuing debate."[63] While this is true, I want to suggest that over and above this reliance on middle class and 'outsider' accounts of

[58] See Robin Thornes. "Change and Continuity in the Development of Co-Operation, 1827-1844," in *New Views of Co-operation*, ed. Stephen Yeo (Cambridge: Cambridge University Press, 1988), 27–51.
[59] Peter Gurney, "Exclusive Dealing in the Chartist Movement," *Labour History Review* 74, no. 1 (2009): 90–110.
[60] Fairbairn, "Meaning of Rochdale," 3.
[61] Ibid.
[62] Gurney, *Co-operative Culture*, 2.
[63] Ibid., 148.

co-operation, dominant historiographical approaches to the co-operative movement have also been shaped by an essentialised notion of the political. This essentialism distributes the political in the history of the co-operative movement according to the perceived presence or absence of specific practices and theories, which themselves are deemed inherently political or not. Whether the co-operative movement shed its idealism in favour of a more pragmatic and workable model, or gave up that idealism in pursuit of groups' own narrow self-interest, these perspectives associate the political with the former, but not the latter. In addition, the earliest co-operative societies are thought to exist outside of any structure in which they might be conceived as political, whether for lack of participation in representative structures of government, or for lack of a coherent ideology.

This way of periodising the movement reflects the predominance of the discourse of political economy in the mid-nineteenth century, as well as its continuing influence. While as a phrase, 'political economy' refers to a particular "method of government," the overall discourse of political economy introduces a conceptual framework based on a well-defined separation between the politics and the economy.[64] This distinction, in turn, allows certain activities and practices to be clearly discerned and categorised as either political or economic. As I will suggest below, the discourse of political economy structured debates around the nature and meaning of co-operation in the mid-nineteenth century, and set the terms on which we would come to understand co-operation in the present. This section explores how these terms came about and shaped perceptions of co-operation, leading to the periodisation that dominates most approaches to the history of the co-operative movement.

The discourse of political economy originates in the late eighteenth century. Increasing market stability and regularity (in prices and wages) alongside minimal

[64] Foucault, *Birth of Biopolitics*, 13.

government intervention allowed for society to be increasingly thought of as operating under a series of natural, economic laws which were separate from the political sphere.[65] The construction of the market as "an autonomous realm subject to its own laws" can be attributed to Adam Smith; however, as Mitchell Dean observes, for Smith "these laws are moral ones with specific political implications."[66] Classical political economy departs from Smith's moral and political premise, positing a market that is regulated by "the laws of production and distribution" and which "requires no prior polity for its constitution and does not arise from the moral proclivities of individuals or collectivities."[67] Figures such as Joseph Townsend and Thomas Malthus observed the operation of these natural laws particularly in relation to the question of poverty, in their efforts to argue against the system of poor relief (which remained intact until 1834). Townsend noticed, for instance, that "[t]hough no law constrained the laborer to serve the farmer, nor the farmer to keep the landlord in plenty, laborers and farmers acted as if such compulsion existed."[68] This tendency was attributed to man's biological nature, and to his compulsion to satisfy his own needs and wants. As such, no government intervention was required. The operation of these natural laws comprised economic society, and the basis of a newly emerging political economy. "Economic society," as Polanyi explains, "had emerged as distinct from the political state."[69] In relation to political liberalism, this separation between the political and the economic maintains an older conception of right, in which political rights are those held against a sovereign; the autonomous sphere of the economy and the dimension of political right subsist in a paradoxical relation. As Dean explains, "[a]t the same time that theorists and revolutionaries were constructing a sphere of liberty and universal rights, a liberal

[65] Polanyi, *Great Transformation*, 120.
[66] Mitchell Dean, *The Constitution of Poverty: Toward a Genealogy of Liberal Governance* (London: Routledge, 2013), 152.
[67] Ibid., 152.
[68] Ibid.
[69] Polanyi, *Great Transformation*, 120.

government of poverty was being formed around a particular, patriarchal domain of personal responsibility against the claims of a right to subsistence."[70]

In the mid-nineteenth century, co-operation was a site of intense ideological struggle, and it came to be articulated within the discourse of political economy, particularly as political economy gained a greater hold in government.[71] Middle classes sought to appropriate co-operation, in part as a response to the relative success of the Chartist movement.[72] The demand for political rights for the working classes, represented by the vote, was regarded as an incredible threat to the status quo, as well as an expression of the genuine dislocation and impoverishment caused by industrialisation. In this context, co-operation came to be seen by middle class philanthropists as a way of ameliorating tensions between capital and labour; instead of political rights, the working classes could be given what were effectively regarded as economic rights.[73] As will be discussed in more detail in chapter 4, enabling working class participation in the market was seen as a way to diffuse political radicalism, both by giving working classes a small stake in the economy, but also by enabling them to witness the operation of its natural laws.

In order for co-operation to be able to perform this disciplinary function, it had to be severed from its historical connection to 'politics', which included both Chartism and Owenism. Much of this ideological work was performed by the Christian Socialists, as well as by liberals such as John Stuart Mill, and later, Samuel Smiles. Charles Kingsley, a prominent Christian Socialist, provides a good example in his pamphlet *Who are the*

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[70] Dean, *Constitution*, 154-155.
[71] See Geoffrey Russell Searle, *Morality and the Market in Victorian Britain* (Oxford: Clarendon Press, 1998), 27-47.
[72] While the Chartists ostensibly 'failed' in the short term, the latent threat of the struggle for the franchise exercised a considerable influence on the imagination of middle classes. As will be discussed in chapter 4, John Saville traces the development of Christian Socialism to the 1848 demonstration at Kennington Common, which had been feared would lead to revolution. See John Saville, "The Christian Socialists of 1848," in ed. John Saville, *Democracy and the Labour Movement* (London: Lawrence & Wishart Ltd, 1955), 135-159.
[73] See Loftus, "Capital and Community," 93–120. This argument will be developed in more detail in chapter 4.

*Friends of Order?* [1852], written in response to critics who claimed that the Christian Socialists were fomenting a revolutionary spirit amongst the working classes through their support of co-operation.[74]

> ...We tell people simply to do their duty in that state of life to which God has called them...[the results of our work have been] to make ardent and discontented spirits among the working classes more patient and contented; more respectful of those institutions of which they have never been taught the value, and of which they have too little experienced the benefit; to turn their minds from those frantic and suicidal dreams of revolution....[75]

To this end, as Gurney suggests, the separation between the Owenite and Rochdale periods of co-operation was actively manufactured as part of an attempt to appropriate and domesticate co-operation. In effect, "the movement's own historical links with Owenite Socialism...had to be severed to make co-operation palatable to members of the SSA [Social Science Association]."[76] The narrative of success that attends the later co-operative movement is in part premised on an understanding that the earlier efforts to develop co-operation "failed because they 'were tainted too deeply with the crude socialistic theories of Robert Owen'."[77]

This distinction relied upon the separation between politics and the economy that characterised the discourse of political economy, which by the mid-nineteenth century had come to form an underlying "consensus."[78] It also entailed both a retrospective

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[74] Charles Kingsley, *Who Are the Friends of Order? A reply to certain observations in a late number of Fraser's Magazine on the so-called Christian Socialists* (1852), 16. Cited in Saville, "Christian Socialists," 151-152.
[75] Ibid.
[76] Gurney, *Co-operative Culture*, 161. The Social Science Association, or The National Association for the Promotion of Social Science, was the main forum for "social and institutional reform in mid-Victorian Britain," where social policy of all manner was discussed, and knowledge produced. For a general overview see Lawrence Goldman, *Science, Reform, and Politics in Victorian Britain: The Social Science Association 1857-1886* (Cambridge: Cambridge University Press, 2004), 1-23. For the relationship between Owenism and the SSA, see Eileen Janes Yeo, *The Contest for Social Science: Relations and Representations of Gender and Class* (London: Rivers Oram, 1996).
[77] Ibid.
[78] This is generally referred to as the 'mid-Victorian consensus'. There is a considerable debate about whether or not such a consensus did in fact exist. For the purposes of this thesis, the discursive and ultimately legal effects of this consensus are important, even if, or perhaps because, there was not a consensus in practice. For an overview and critique of the idea of the idea of the 'mid-Victorian consensus',

consolidation of a wide range of activities associated with co-operation under Owenism and a determination of those activities as 'political'. While Owenism is widely regarded as the forebear of modern socialism and firmly opposed to the operation of 'competition', it is worth remembering that in the early nineteenth century, the battle lines were not so clearly drawn. Owen himself—at least in his earlier and more influential work—had a disdain for 'politics'. As Thompson notes, Owen "...simply had a vacant place in his mind where most men have political responses."[79] Owenism emerges as a critique of political economy, but one which shares a number of its premises. Owen's plans for Villages of Co-operation were informed by an increasingly technical understanding of the economy as governed by its own internal rules, alongside the prevailing concern with what to do with the dislocated poor. While Malthus argued that poor relief should be abolished altogether, Owen believed that character was a product of environment and thus that the degraded morality of the poor was a consequence of the competitive system, not simply an inevitable part of nature.[80] What differentiated Owen from the political economists was that he "insisted upon a just reward for the act of labour itself, a reward linked moreover to a conception of exactly calculable equal exchange."[81] It is this critique that makes Owen an early socialist.[82] As Polanyi writes,

> ...the characteristic trait in Owenism was that it insisted on the *social* approach: it refused to accept the division of society into an economic and political sphere, and, in effect, rejected political action on that account. The acceptance of a separate economic sphere would have implied the recognition of the principle of gain and profit as the organizing force in society. This Owen refused to do.[83]

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see John Host, *Victorian Labour History: Experience, Identity, and the Politics of Representation* (London: Routledge, 1998), 60-91.

[79] Thompson, *English Working Class*, 861.

[80] Gregory Claeys, *Machinery, Money and the Millennium: From Moral Economy to Socialism* (Princeton: Princeton University Press, 1987), 45

[81] Ibid. For a more detailed account of Owen's relationship to the moral economy tradition and to the ideas of political economy, see 57-66.

[82] Ibid., 45.

[83] Polanyi, *Great Transformation*, 178.

However, Owen's paternalism made him an ambiguous figure. He was at once "the *ne plus ultra* of Utilitarianism, planning society as a gigantic industrial panopticon" and at the same time a man "who thought a good deal about children, liked to see them happy, and really was outraged at their callous exploitation."[84] This orientation toward utilitarianism attracted Jeremy Bentham himself as an investor in one of Owen's settlements. It also garnered considerable criticism from more radical political figures. One of Owen's most vocal critics, William Cobbett, suggested that Owen's villages would be like prisons, "a community of vassals."[85] Although demonstrating a genuine affinity for the plight of the working classes, Owen's plans were not ultimately so far removed from the Malthusian workhouse system of poor relief just then taking root. That the working class would pursue the creation of these co-operative communities "by its own activity and toward its own goals" was not something Owen had considered or expected.[86]

This is not to suggest that Owenism should not be regarded as political simply because Owen was an ambiguous figure who himself had rejected politics. In his analysis of the development of early British socialism, Claeys identifies the views associated with Owen an early socialism as a kind of "anti-politics," which he suggests was no less a theory of politics than any other.[87] Owen's views, like those of the radicals, "derived from the belief that representative institutions and popular sovereignty were incapable of resolving the complex and deeply divisive problems of a market-oriented and industrialising society."[88] Instead, I want to suggest that it is only from the vantage of the mid-nineteenth century that Owen's views can be clearly separated from those of his contemporaries and identified as political. Owenism, in this sense, comes to present a retrospective and constitutive division

[84] E.P. Thompson, *English Working Class*, 859.
[85] Ibid., 861.
[86] Ibid., 859.
[87] Gregory Claeys, *Citizens and Saints: Politics and Anti-Politics in Early British Socialism* (Cambridge: Cambridge University Presss, 1989), 2.
[88] Ibid.

within political economy, at least insofar as the history of the co-operative movement is concerned.

As co-operation was being actively appropriated by middle class philanthropists, it was also rejected an effective political strategy by Karl Marx, and one of his main followers in England, Ernest Jones. Marx's ultimate rejection of co-operation explains much of the tendency to marginalise co-operation in histories of nineteenth century working class social movements.[89] In his address to the inaugural meeting of the International Working Men's Association, Marx praised co-operation as a "victory over the political economy of property," and called co-operatives "great social experiments" which "by deed instead of argument... have shown that production on a large scale, and in accord with the behests of modern science, may be carried on without the existence of a class of masters employing a class of hands."[90] Yet, despite these laudatory remarks, he did not ultimately see co-operatives as politically viable or relevant. In the same speech, Marx also claimed that the appropriation of the movement by middle classes was inevitable because co-operatives were too casual and could not pose a real challenge to the established order.

> At the same time the experience of the period from 1848 to 1864 has proved beyond doubt that, however excellent in principle and however useful in practice, co-operative labour, if kept within the narrow circle of the casual efforts of private workmen, will never be able to arrest the growth in geometrical progression of monopoly, to free the masses, nor even to perceptibly lighten the burden of their miseries.[91]

He concluded the address by citing the movement among a number of "incoherent efforts."[92] Marx's solution to the problem of appropriation was that co-operation should be

[89] See Carl Boggs, "Marxism, Prefigurative Communism and the Problem of Workers' Control," *Radical America* 6, Winter (1977): 99-122. Bruno Jossa, "Marx, Marxism and the Cooperative Movement," *Cambridge Journal of Economics* 29, no. 1 (2005): 3-18.
[90] Karl Marx, "The First International."
[91] Ibid.
[92] Ibid.

"developed to national dimensions, and, consequently... fostered by national means."[93] Co-operatives were only viable alongside an effort to "conquer political power" through the creation of working men's parties.[94] To this end, the co-operative movement was actively juxtaposed to Chartism and the struggle for the franchise.

According to Avineri, Marx had very specific if flexible ideas about how politics would progress for the English working classes.[95] He strongly supported the Chartist efforts to attain universal suffrage. This was not meant as an end in itself, but as part of a series of actions that would make the state fulfil its claim to universality, the result of which would be the sublation of civil society in the state. Through the operation of the dialectic, there would cease to be a separate sphere of the state, or the political. As Marx wrote, reflecting on the Chartists,

> But Universal Suffrage is the equivalent of political power for the working class of England, where the proletariat forms the large majority of the population, where, in a long, though underground civil war, it has gained a clear consciousness of its position as a class, and where even the rural districts know no longer any peasants, but only landlords, industrial capitalists (farmers) and hired labourers. The carrying of Universal Suffrage in England would, therefore, be a far more socialistic measure than anything which has been honoured with that name on the Continent.[96]

Marx's analysis was grounded in a critique of political economy, yet at times that critique also reproduced the terms of political economy. As William Clare Roberts suggests, Marx's

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[93] Ibid. The clearest expression of this position comes from the Chartist, Ernest Jones, *Notes to the People, Volume 1* (London: J. Pavey, 1851). Jones makes the case that co-operation can only succeed if developed on a national basis. Without a national basis for co-operation, individual societies are isolated and vulnerable, often working against each other, in competition. He accuses individual societies of profitmongering, merely following in the footsteps of capitalists. Co-operation, in its present form "would be a curse to the community" (31). "Why do the rich smile on it? Because they know it will prove in the long run harmless as regards them--because they know it has always failed, hitherto, to subvert their power. True the attempts often succeed in the beginning--and why? Because the new idea attracts many sympathisers--while it is too weak to draw down the opposition of the money lord. Thence co-operators are enabled to pick up some of the crumbs that fall from the table of the rich" (ibid.).

[94] Ibid.

[95] Shlomo Avineri, *The Social and Political Thought of Karl Marx* (Cambridge: Cambridge University Press, 1968), 41-64.

[96] Karl Marx, *On Britain* (Moscow: Foreign Languages Publishing House, 1953), 361. Quoted in Avineri, *Social and Political*, 214.

critique of political economy can be divided into three interrelated parts.[97] The first is a critique of particular political economists who, in various ways, had misunderstood the operation of political economy. The second concerns a historicisation of political economy and capitalism, where Marx "tries to locate capitalism as one mode of production among others, with its local laws and locally effective mechanisms."[98] The third aspect of his critique sets him thoroughly outside the discourse of political economy. As Roberts describes,

> At a third level, though, Marx's critique of political economy is the critique of the forms of thought proper to capitalism, and to the capitalism that gives rise to them, in the name of liberation. It is not just that the categories of political economy are valid only within a circumscribed historical setting; they are also the concepts proper to a system of domination, a system in which 'the most complete subjugation of individuality under social conditions assuming the form of objective powers' nonetheless appears as a system of 'individual freedom'.[99]

It was in part this critique that led Marx to reject worker separatism as well as co-operation as viable political strategies. The project of worker separatism simply failed to understand how political economy functioned. However, in this dismissal, Marx's adherence to the critique of political economy as a means of determining what would be the most effective political strategy had the effect of presupposing the dominance of political economy as such. Utopian socialism was simply regarded as an inferior form of socialism.[100] In

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[97] William Clare Roberts, *Marx's Inferno: The Political Theory of Capital* (Princeton: Princeton University Press, 2016), 53.
[98] Ibid.
[99] Ibid.
[100] Although he had little, if any direct contact with them, in advocating for his communitarian vision, Owen is grouped amongst other writers from the same period, particularly Charles Fourier and Henri de Saint-Simon, as a 'utopian socialist'. The first usage of the term 'utopian socialist' to refer to Owen and Fourier specifically is reported as being in 1833, in the work of Jerome-Adolphe Blanqui. See J.F.C. Harrison, *Robert Owen and the Owenites in Britain and America: The Quest for the New Moral World* (Abingdon: Routledge, 1969), 35. It is eventually taken up by Marx and Engels, notably as a term of abuse in the *Communist Manifesto*, but developed in Friedrich Engels, *Socialism: Utopian and Scientific* (Chicago: Charles H. Kerr & Company, 1908). The term socialism itself did not come into wide circulation until the 1830s, and was applied by the Owenites to themselves, in an effort to move away from eponymous titles. As Harrison explains, "[t]he label socialist was adopted by the Owenites because it stressed what they felt was the core of their doctrine: socialists were those who emphasised a social, as opposed to an individual, approach in all fields of human endeavour--including, though not limited to economic organisation" (*Robert Owen*, 35). Prior to this period, co-operation was often used as a general term to refer to the ideas that would come to be called socialist. Harrison also recounts that by the 1840s, Owenism and socialism were interchangeable, such that Marx and Engels were forced to use the word *communist* instead when writing the *Communist Manifesto*, so as to distinguish their views. For details of the interactions between Owenites,

particular, it was thought that utopian socialism developed before the working class had been formed as such, while the capitalist mode of production was still consolidating. Thus, as Engels summarises, "[t]o the crude conditions of capitalistic production and the crude class conditions corresponded crude theories."[101] The working classes were not yet capable of "independent political action" thus making them vulnerable to these paternalistic schemes.[102]

Dominant historiographical approaches to the co-operative movement, as Gurney suggests, have inherited the terms of these debates. The idea of a clear break or separation between the 'Owenite' and 'Rochdale' periods of this history reflects middle class efforts to affect that separation, while the marginalization of co-operation in labour history reflects Marx's own rejection of co-operation as an effective political strategy. However, as suggested above, it is not only that dominant approaches have received the terms of this struggle and taken the views of middle class appropriators as definitive accounts of co-operation, but that they have adopted the essentialised idea of the political that shaped the terms of this struggle. The casting of the 'modern' form of co-operation as predominantly economic rather than political, and the naturalisation of the economic in this relation, reflect the relative success of middle class liberal efforts to appropriate co-operation. This success is evidenced in the definition of co-operation provided in the 1877 *Encyclopedia Britannica*.

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Saint-Simonians and Fourierians, see H. Deroushe, "Images and Echoes of Owenism in 19th Century France" in Sidney Pollard and John Salt eds., *Robert Owen: Prophet of the Poor* (Lewisburge: Bucknell University Press, 1971), 239-284.

[101] Engels, *Socialism*, 58.

[102] Ibid., 57-58. The privileging of Owenism that ultimately happens in histories of the co-operative movement comes largely from the Fabians, who tended to embrace Owen and the apparent idealism his views represented. The Fabians "found him to be a sympathetic though misguided reformer, and in Owenism they recognised a native socialist theory which owed nothing to Marx." J.F.C. Harrison, "A New View of Mr. Owen," in Sidney Pollard and John Salt eds., *Robert Owen: Prophet of the Poor* (Lewisburg: Bucknell University Press, 1971), 2. The second generation of Fabians (supported in part by Marxists) gave Owen "a niche in the standard histories of British labour and socialism, and Owenism was seen as a link in the continuous chain which stretched from 1789 to the present-day labour movement" (ibid., 2-3).

> Co-operation, as technically understood, occupies a middle position between the doctrines of the communists and socialists...on the one hand, and the private property and freedom of individual labour on the other. It takes its departure from communism at a very definite and significant point. While the latter would extinguish the motive of individual gain and possession in the sentiment of a universal happiness or good, and remodel all the existing rights, laws, and arrangements of society on a basis deemed consonant to this end, co-operation seeks, in consistence with the fundamental institutes of society as hitherto developed, to ameliorate the social condition by a concurrence of increasing numbers of associates in a common interest.[103]

While Marx appreciated the potential significance of co-operative efforts, his ultimate rejection of co-operation as an effective political strategy reinforces this largely successful appropriation. By attributing the appropriation of co-operation to an inherent failing in co-operation as an idea and practice, his analysis obscures the fact of that appropriation. It makes the assimilation of co-operation to the market appear inevitable and necessary.

I suggested in the introduction that the contemporary idea of the co-operative often takes for granted that co-operatives will function on a market. The success of co-operative efforts is measured in terms of capital turnover and membership numbers, while the very form of the co-operative itself is often, unquestioningly, assumed to be a meaningful alternative. From the above analysis, it is possible to see how this idea has come about in part as a product of how the history of co-operation has been told, and of the derivation of the terms of this history from the nineteenth century debates over the meaning and significance of co-operation. The perception of the conditions of the market or the economy as inevitable or natural reflects the ascendancy and dominance of the discourse of political economy, and with it, the relative success of middle classes in appropriating co-operation and subjecting it to this order. In turn, the critique of co-operation from labour history, derived from Marx's own rejection of co-operation as a viable political strategy, has inadvertently supported the naturalisation of these terms, by diagnosing the failure of co-

[103] Quoted in Gurney, *Co-operative Culture*, 253.

operation as an inherent flaw or shortcoming both in relation to its connection to early socialism and to a mistaken understanding of the 'true' operation of political economy, but also through what has been subsequently perceived as a disavowal of the political in the modern form of co-operation.

*Genealogy and Law*

The diverse approaches to the history of the co-operative movement recounted above have served, paradoxically, to remove co-operation from its history. Whether they attribute the depoliticisation of co-operation to a shift in practices, or to an inherent failing of the idea of co-operation itself, these histories obscure the ways in which the co-operative was constituted as such in the mid-nineteenth century, as well as the mechanisms by which this constitution was effected. In this section, I instead propose a genealogy of the co-operative. As a "history of the present," genealogy introduces historical contingency into the terms that shape present realities and truths.[104] In so doing, genealogy both provides a critique of dominant approaches to history, exposing their conditions of possibility, and offers a means of tracing an altogether different type of history, "two tasks [that] are never completely separable."[105]

Some terms of the constitution of the co-operative have already been explored in the foregoing section. In the mid-nineteenth century, co-operation was articulated within a discourse of political economy that has subsequently shaped perceptions of both its past and its present. Historiographical approaches to the co-operative movement have often relied on these terms, reproducing and naturalising the divisions they inaugurated. In the present, this has contributed to the understanding of the co-operative as an entity that will

[104] Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage Books, 1995), 31.
[105] Michel Foucault, "The Order of Discourse," in *Untying the Text: A Post-Structuralist Reader*, ed. Robert Young (Boston: Routledge and Kegal Paul Ltd, 1981), 71.

function primarily as a business, specifically through the maintenance of a clear, if unacknowledged, divide between the political and the economic. This section builds on that argument. It suggests that the discourse of political economy not only structures how the history of the co-operative has been understood, but also obscures what Foucault identifies as the fundamentally productive function of power. In the process, I argue, it conceals the role of law in constituting the co-operative.

In his most sustained elaboration of the concept of genealogy, Foucault focuses on its relationship to a "search for 'origins'," that characterises much historical work.[106] Reflecting on Nietzsche, Foucault describes this search as "an attempt to capture the exact essence of things, their purest possibilities, and their carefully protected identities."[107] The search for origins "assumes the existence of immobile forms that precede the external world of accident and succession."[108] In Nietzsche's own genealogy of morality, the origin was epitomised in God and nature, standing resolutely outside of history. Within such a history, everything already has its place in reference to the origin, and history proceeds as "a great sequence of events taken up in a hierarchy of determinations."[109] History becomes "untouchable," as the discourses that constitute it become fixed.[110]

Genealogy's critique and eschewal of origins derives from the observation that language and discourse do not have a determinate relationship to the world. This is not to suggest that they are completely separable, but rather that language does not simply "double" existence.[111] As Foucault explains, words are always "fewer in number than the

[106] Michel Foucault, "Nietzsche," 370.
[107] Ibid., 371.
[108] Ibid.
[109] Michel Foucault, "On the Ways of Writing History," in *Essential Works of Foucault, Volume 2: Aesthetics, Method and Epistemology*, ed. J.D. Faubion, trans. Robert Hurley (London: Penguin, 1994), 280.
[110] Ibid.
[111] Michel Foucault, *Raymond Roussel* (Paris: Gallimard, 1963), 207-208. Quoted in Beatrice Han, *Foucault's Critical Project: Between the Transcendental and the Historical*, trans. Edward Pile (Stanford: Stanford University Press, 2002), 53.

things they designate, and due to this principle of economy must take on meaning."[112] Origins obscure this insufficiency by positing a moment, a transcendent point of reference, from which truths and fixed meanings might be derived. The origin is taken to lie "at a place of inevitable loss, the point where the truth of things is knotted to a truthful discourse, the site of a fleeting articulation that discourse has obscured and finally lost."[113] The origin creates an immutable reference that establishes the 'true' relation between words and things.

In relation to the history of the co-operative movement, this point of origin is the "myth" of the Rochdale Pioneers.[114] This society, while real, has been rendered ideal and placed outside of history, as a radical break from the past and as the manifestation of a set of values that had hitherto struggled to find their expression. However, as shown above, this narrative reproduces the discourse of political economy, positing the co-operative as always-already what it will become. Other historical accounts suggest that this rendering of the history of the co-operative movement is not entirely accurate. They suggest that it involves manufacturing a break or rupture, where one cannot, in the complexity of history, actually be located. The myth of origin, in this sense, operates in a reciprocal fashion with the discourse in which it is articulated. It provides a transcendent reference upon which the discourse can both determine a particular truth, and supply an effective essence of co-operation that, in turn, reinforces the terms of political economy.

Yet, as Foucault suggests, "[p]olitics and the economy are not things that exist, or errors, or illusions, or ideologies. They are things that do not exist and yet which are inscribed in reality and fall under a regime of truth dividing the true and the false."[115] There

[112] Michel Foucault, *Death and the Labyrinth: The World of Raymond Roussel*, trans. Charles Ruas (London: Continuum, 1986), 167.
[113] Foucault, "Nietzsche," 371.
[114] Fairbairn, "Meaning of Rochdale," 1.
[115] Foucault, *Birth of Biopolitics,* 20.

is, in effect, a prior operation that determines this discursive separation and what will be understood as 'political' and 'economic', respectively. As Foucault explains, "the inseparability of economics and politics is not due to a relation of functional subordination, nor to a formal identity, but to another level which it is clearly necessary to uncover."[116] This is where Foucault locates power; operating at the interstice between the discursive and the non-discursive, *creating* the relationship between them and determining what can be articulated as 'true' or 'false'. The discourses through which history is constructed are neither necessary nor immutable, but discourse is already an effect of power. As Foucault explains, "...in every society the production of discourse is at once controlled, selected, organised and redistributed by a certain number of procedures whose role it is to ward off its power and dangers, to gain mastery over its chance events, to evade its ponderous, formidable materiality."[117] The contingency of discourse - the fact that it is not completely determinate - makes discourse a tool, as the means through which truths about the world are created. Discourse is "...a violence which we do to things, or in any case a practice which we impose on them...."[118] It is "the power which is to be seized."[119] It is through discourse that objects are formed: the articulation of an object in discourse is a constitutive process.

Power, for Foucault, is fundamentally productive and constitutive. It is not something to be possessed or wielded, rather "it is exercised from innumerable points..."[120] It is "everywhere...because it comes from everywhere."[121] Power, in this sense, is relational:

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[116] This is a modified translation of this quote, provided by Beatrice Han in *Foucault's Critical Project*, 115, n26. The original translation of this passage from Foucault's "Two Lectures" runs as follows "...it is not the models of functional subordination or formal isomorphism that will characterise the interconnection between politics and the economy. The indissolubility will be of a different order, one that it will be our task to determine." Michel Foucault, "Two Lectures," in *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*, ed. Colin Gordon, trans., Colin Gordon *et al* (New York: Pantheon Books, 1980), 89.
[117] Foucault, "Order of Discourse," 52.
[118] Ibid., 67.
[119] Ibid., 53.
[120] Michel Foucault, *The History of Sexuality, Volume 1: An Introduction*, trans. Robert Hurley (New York: Vintage Books, 1990), 93.
[121] Ibid., 93.

it "circulates," and it is "exercised rather than possessed."[122] Foucault counterposes this idea of power to a prevalent conception of power as repressive, operating as a negative force upon entities that precede or exist outside of power, and are then subject to it. In particular, Foucault identifies models of power in liberalism and Marxism that presuppose this negative function of power. An "economism in the theory of power" forms a "common point" between liberal and juridical models of power, on the one hand, and Marxism ("or at any rate a certain conception currently held to be Marxist") on the other.[123] In the juridical or liberal theory of power, it is "taken to be a right, which one is able to possess like a commodity, and which one can in consequence transfer or alienate, either wholly or partially, through a legal act or through some act that establishes a right, such as takes place through cession or contract."[124] Within Marxism, it is not a juridical model of power that dominates, so much as "something which one might term an economic functionality of power."[125] In this model,

> power is conceived primarily in terms of the role it plays in the maintenance simultaneously of the relations of production and a class of domination which the development and specific forms of the forces of production have rendered possible...the historical *raison d'etre* of political power is to be found in the economy.[126]

Yet, as Foucault asks, if power only functioned in this way, negatively and through repression, why would we obey it? As he suggests, "[w]hat makes power hold good, what makes it accepted, is simply the fact it doesn't only weigh on us a force that says no, but it traverses and produces things, it induces pleasure, forms of knowledge, produces discourse."[127] Power is not "superstructural," operating from "a position of exteriority" but

[122] Foucault, *Discipline and Punish*, 26.
[123] Foucault, "Two Lectures," 88.
[124] Ibid.
[125] Ibid.
[126] Ibid., 89.
[127] Michel Foucault, "Truth and Power," in *The Foucault Reader*, ed. Paul Rabinow (New York: Pantheon Books, 1984), 61.

rather completely immanent to these relations, as "the internal conditions of these differentiations."[128]

In this sense, power is not something that one is simply subject to, as the power of a sovereign or the dominance of a particular class (which is not to say that these relations are without effect). It does not belong, as such, to "a dominant class" but is also "manifested and sometimes extended by the position of those who are dominated."[129] Theories of power as negative or repressive share a reliance on the subject as existing independently or outside of power. Then, power acts upon the subject, restricting or prohibiting it. Foucault argues, by contrast, that power "makes individuals subjects" and that identities are formed through power. [130] The objects and subjectivities that are effect of power are thoroughly invested with that power, in their very immanence, such that there is no outside of power.[131] However, this immanence does not mean that it is impossible to effect power relations. Instead, by locating power in relation, it becomes possible to understand that every subject has an inherent capacity to resist it. Individuals are not "caught within that totality which transcends them and trifles with them,"[132] but can resist and author their own subjectification, and "resist the grip it has on them."[133]

Thus, when it comes to the co-operative, genealogy as "a form of history which can account for the constitution of knowledges, discourses, domains of objects," would be concerned with the constitution of the co-operative as an object about which certain claims can be made.[134] However, the discourse of political economy, within which the co-operative emerges, obscures this question and the constitutive function of power more generally by

[128] Foucault, *History of Sexuality*, 94.
[129] Foucault, *Discipline and Punish*, 26-27.
[130] Michel Foucault, "The Subject and Power," in *Essential Works of Foucault, Volume 3: Power*, ed. J.D. Faubion (London: Penguin, 1994), 331.
[131] Foucault, *History of Sexuality*, 98.
[132] Foucault, "Writing History," 280.
[133] Foucault, *Discipline and Punish*, 26.
[134] Foucault, "Truth and Power," 59.

presupposing the stability and presence of the co-operative as an entity. The co-operative persists through history, even as it changes, with economic and political forces determining it from a position of exteriority. While in dominant approaches to the history of the co-operative movement, the co-operative does undergo change, it does so in a way that presupposes that there is an object that is capable of such change: it is "transcendental in relation to the field of events," becoming more or less political based on the supposed embrace or disavowal of certain practices or ideals, or by being unable to withstand the inevitable domination of economic forces.[135] By contrast, genealogy "attempts to restore the conditions for the appearance of a singularity born out of multiple determining elements of which it is not the product, but rather the effect."[136] Within such a project, "[t]here is no foundational recourse, no escape within a pure form," but only a singularity that emerges relationally.[137] The analysis of discourses "does not reveal the universality of a meaning, but brings to light the action of imposed scarcity, with a fundamental power of affirmation."[138]

As I will argue in this thesis, one of the key mechanisms through which the co-operative was constituted in the mid-nineteenth century was legal recognition.[139] The co-operative was recognised as a discrete entity and given a replicable model. Law, in this sense, helped to give effect to the discourse of political economy. As Gurney describes, the "*modus vivendi* between the English bourgeoisie, the capitalist state and organized labour was clearly symbolized by the Industrial and Provident Societies Act of 1852," the act that gave co-operatives their own legal form.[140] The relatively successful appropriation of co-

[135] Ibid.
[136] Michel Foucault, "What is Critique?" in *The Politics of Truth*, eds. Sylvere Lotringer & Lysa Hochroth, trans. Lysa Hochroth and Catherine Porter (New York: Semiotext(e), 1997), 57.
[137] Foucault, "What is Critique," 55.
[138] Foucault, "Order of Discourse, 73.
[139] That law could function in this capacity, as a productive and constitutive mechanism of power, may appear to be a misapplication of Foucault's theory. As noted in the Introduction, Foucault himself often referred to law as a paradigmatic example of a negative, repressive form of power. See for instance Foucault, *History of Sexuality*, 136. In chapter 3, I will argue that a constitutive theory of law can be read in Foucault.
[140] Gurney, *Co-operative Culture*, 17.

operation by middle classes was made manifest in law, which "simultaneously conferred certain privileges and set certain limitations on co-operative practice."[141]

However, law, as noted above, has not generally received much attention in histories of the co-operative movement, because law is seen in an instrumental capacity. Within the more celebratory accounts of the movement, legal recognition, when it happened, did not add anything other than legitimacy to what co-operatives were already doing. If the Rochdale Pioneers had taken up successful market practices, legal recognition enabled them to pursue these projects without hindrance. In the Introduction, this view was exemplified by the Christian Socialists, who thought that "the Building Society, the Co-operative Society, is not the creature of Parliament, but the working man's own creation."[142] This reflects a more broadly liberal interpretation of the law, in which it is regarded as "technically neutral."[143] While the state and sovereignty are the locus of politics, liberalism "presumes the legitimacy of a state in which we are guaranteed equality before the law."[144] As such, rights gained vis à vis the state are understood to be real freedoms. The law, in and of itself, is unproblematic, even if particular laws or the denial of legal recognition may be repressive.

There is not much mention of law in more critical accounts of the co-operative movement. However, the absence of specific consideration suggests that legal recognition is taken as part of the broader play of forces: if co-operatives had already abandoned their ideals, legal recognition is only a further indication of this abandonment. Within a more simplistic or crude rendering of Marxism, the law is part of the 'superstructure', built upon

[141] Ibid.
[142] J.M. Ludlow and Lloyd Jones, *Progress of the Working Class 1832-1867* (London: Alexander Strahan, 1867), 96. Thus even though the Christian Socialists did not want the working class to gain political rights as such, law could still be a mechanism for enabling their participation in the economy.
[143] Wendy Brown and Janet Halley, introduction to *Left Legalism/Left Critique*, eds. W. Brown and J. Halley (Durham: Duke University Press, 2002), 5.
[144] Ibid., 5-6.

an economic base which is determined by the relations of production.[145] As Thompson suggests, in a Marxist analysis "... the law is, perhaps more clearly than any other cultural or institutional artefact, by definition a part of a 'superstructure' adapting itself to the necessities of an infrastructure of productive forces and productive relations. As such it is clearly an instrument of the *de facto* ruling class...."[146] Whether the law functions to enable the market, or is determined by economic forces, law does not make its own contribution to the process, but rather supports and entrenches what has already been economically-determined.

In both accounts, the law is regarded primarily as an instrument, and legal recognition must be either enabling or illusory and repressive. By contrast, an approach to law that regards it as functioning constitutively, according to a model of power that is fundamentally productive, avoids the polarity of these positions, while also acknowledging the integral role that law plays in constituting the relations it recognises. Law is, as Thompson suggests, "something more than...a pliant medium to be twisted this way and that...."[147] While law may have mediated and given form to class relations, "this is not the same thing as saying that the law was not more than those relations translated into other terms."[148] Law has its own history and dominant forms, many of which long precede their use in the nineteenth century. Moreover law, like discourse, is "not once and for all

[145] This is by no means meant to be a representation of Marxist legal theory which has been significantly developed by, for instance, Nicos Poulantzas, *State, Power, Socialism*, trans. Patrick Camiller (London: Verso, 1980). For a concise overview of Marxist legal theory, see Alan Hunt, "Marxist Theory of Law," in ed. Dennis Patterson, *A Companion to Philosophy of Law and Legal Theory* (Chichester: Blackwell Publishing, 2010), 350-360. However, in relation to the co-operative movement, these developments in Marxist legal theory have not inspired a revised approach to its history.
[146] Thompson, *Whigs and Hunters*, 259. While Thompson does not isolate any one theorist or historian, the paradigmatic expression of this variety of Marxist approach to law can be read in Evgeny Bronislavovich Pashukanis, *The General Theory of Law & Marxism* (New Brunswick: Transaction Publishers, [1978] 2003), 47-64.
[147] Thompson, *Whigs and Hunters*, 262.
[148] Ibid.

subservient to power or raised up against it."[149] Law must also be genuinely responsive, even if, as I will argue in the next chapter, there is ultimately a limit to that responsiveness.[150]

However, the history of the co-operative movement, as currently told, does not leave much room for a consideration of how law and legal recognition may have mattered in the formation of the co-operative. In dominant approaches to this history, there is no sense of what may have been at stake in legal recognition. Appropriation could only happen because there was something to appropriate. The domesticating discourses of Victorian middle class liberals obscure that dependence. The co-operative appears in these histories as a fully-formed object, already subsumed within a discourse of political economy. Yet, as Gurney suggests, "[m]any bourgeois reformers found the CWS [Co-operative Wholesale Society] threatening precisely because this huge, democratically-owned and controlled organisation demonstrated in a most blatant and concrete way that large-scale production was possible without the intervention of a capitalist class."[151] In order to appreciate how law matters in the history of the co-operative movement, there is a need to return to history. As Foucault reminds, "[t]he genealogist needs history to dispel the chimeras of the origin...."[152] The next section begins to sketch an alternative account of the history of the co-operative movement.

### *The 'Beginnings' of Co-operation*

From a contemporary vantage, Marx's diagnosis of the co-operative movement—that co-operation would be appropriated by middle classes and that co-operatives would not provide a significant challenge to capitalism—seems prophetic. Co-operatives have been a largely assimilated to a commercial framework, so much so that it is frequently taken for

[149] Foucault, *History of Sexuality*, 100-101.
[150] On the need for law to be responsive, see Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge: Cambridge University Press, 2001), 70-73.
[151] Gurney, *Co-operative Culture*, 153.
[152] Foucault, "Nietzsche," 373.

granted that they will compete on a market. However, this was by no means a necessary outcome, the result of an inevitability derived from an inherent failing or virtue in the idea of co-operation. Nor is it a totalising one: co-operatives continue to manifest alterity and provide a meaningful locus of political organisation, even as they are constrained by their subjection to the market. These final two sections argue that in order to appreciate this tension in co-operation, and to understand how the co-operative was constituted in the mid-nineteenth century, it is necessary to explore a history of the co-operative movement that is not already determined by the discourse of political economy.

In addition to the critique offered above, genealogy offers an alternative approach to history. Genealogy returns to history, to "[make] it intelligible but with the clear understanding that this does not function according to a principle of closure."[153] While genealogy rejects the search for origins, "it will not," as Wendy Brown suggests, "neglect as inaccessible the vicissitudes of history and altogether eschew the problem of what Foucault significantly renames as 'beginnings'."[154] Beginnings, by contrast to origins, may have little or no resemblance to what they will become: rather, "[w]hat is found at the historical beginning of things is not the inviolable identity of their origin; it is the dissension of other things. It is disparity."[155] The origin of the co-operative movement, as suggested in the last section, is usually cited as the founding of the Rochdale Society of Equitable Pioneers in 1844, while the earliest co-operative societies—operating long before they could be called 'co-operatives'—are usually relegated to a vague and inchoate past. As Cole described them, they were "isolated experiments" and "no one knows now who inspired most of them."[156] An approach to the history of the co-operative movement that seeks its 'beginnings' rather

[153] Foucault, "What is Critique," 57.
[154] Brown, *Politics*, 101.
[155] Foucault, "Nietzsche," 371-372.
[156] Cole, *Century,* 15.

than its 'origin', through a "strategy of reversal" would need to take these early societies more seriously.[157]

Thompson's reading of the "moral economy of the crowd" in the eighteenth century provides a corrective to this analysis.[158] From at least the sixteenth century, riots and other forms of popular direct action were relatively commonplace amongst the poor in England. Lamenting a tendency amongst historians to read these actions as spasmodic reactions to changes in price, Thompson articulated the idea of the moral economy as a way of recognizing the framework in which these actions were carried out and legitimized. Thompson did not invent the term moral economy, nor, he claims, can he remember where he first heard it.[159] However, Thompson is nonetheless widely acknowledged to be the first to use it in this context, to conceptualise the diverse and meaningful actions of what might be thought of broadly as common people.[160] The moral economy of the crowd stresses the presence and importance of how common people thought and felt, how traditions and beliefs shaped their responses in ways that elude the prevailing and often pejorative designation of 'riot'. As Thompson explains, "[t]he food riot in the eighteenth century was a highly-complex form of direct popular action, disciplined and with clear

[157] Wendy Brown draws out three elements of a "strategy of reversal" (*Politics*, 98), the last of which is that "genealogy also conjures a reversal in the course of history—it challenges the progressive accounts with intimations of regression..." (ibid.).

[158] Thompson, "Moral Economy," 76. For an overview of uses of the term, see William James Booth, "On the Idea of the Moral Economy," The American Political Science Review 88, no. 3 (1994): 653–667. That said, Thompson is by no means the only one, nor the first, to articulate a shift of this nature—from a morally or socially guided ethic to one based on a natural law of the market. R.H. Tawney, for instance, does so in his *Religion and the Rise of Capitalism* (London and New York: Routledge, 2017), although he would place the shift a few centuries earlier. Karl Polanyi suggests that this 'great transformation' required the active creation of markets through regulation and the removal of old paternalist protections which would have prevented 'free' markets. For Polanyi the economy had to be *disembedded* from other forms of relation—religious, social, political—in order to be conceived of and treated as an autonomous sphere. Polanyi, *Transformation,* 45-58. For an overview of these historiographical approaches see Dean, *Constitution*, 106-121.

[159] E.P. Thompson, "The Moral Economy Reviewed," in *Customs in Common* (London: Penguin Books, 1993), 337. He identifies one early usage in a Chartist pamphlet, in which it is explicitly anti-capitalist in its orientation. This usage is the one he claims to approximate by his own.

[160] Thompson's usage precedes James C. Scott's also well-known *The Moral Economy of the Peasant: Rebellion and Subsistence in Southeast Asia* (New Haven: Yale University Press, 1976). While Scott references Thompson's article several times, he does not attribute the phrase to him.

objectives."[161] The common people who participated in these riots, often led by women, were not simply motivated by their hunger: they "were informed by the belief that they were defending traditional rights or customs; and, in general, that they were supported by the wider consensus of the community."[162] The poor in the eighteenth century were still largely embedded within a subsistence economy and they were particularly sensitive to changes in the price of bread.[163] This sensitivity was accompanied by an expectation that the price of bread (or wheat or corn) would be fair, and that scarcity and dearth would not be artificially induced for the sake of profit. It was widely held that marketing should be as direct as possible, while "millers...and bakers were considered as servants of the community, working not for a profit but for a fair allowance."[164] As the eighteenth century progressed, marketing became increasingly complex and transparency decreased as more intermediaries entered the market. Any failure of authorities to enforce these regulations sanctioned direct action by the crowd.[165]

This normative framework did not derive only from communities of the poor, but was also supported by a paternalistic regulatory order, codified in statute, that Thompson traces back to the Elizabethan *Book of Orders* [1631].[166] These collective actions often

[161] Thompson, "Moral Economy," 78.

[162] Ibid. The expression of the moral economy was not confined to food riots but included other forms of popular justice, for instance the pelting of a child or wife murderer, the resistance to enclosures, and more widespread movements such as Luddism. Thompson explains that at this time, there was an enormous gap between formal law and "the unwritten popular code" (*English Working Class*, 60). Penalties for minor criminal offences, those most likely to be committed by the propertyless, were disproportionately harsh. The number of capital punishments for crimes against property increased exponentially, with more than sixty-three new offences created between 1760 and 1810—"the early years of the Industrial Revolution...took place in the shadow of the gallows" (ibid., 61).

[163] As Thomson notes, "[w]hen bread is costly...the poor do not go over to cake" (*Moral Economy*, 91).

[164] Ibid., 83.

[165] Ibid., 110.

[166] This broader conception of the moral economy can be encapsulated in the values of "fair exchange, just price and the right to charity," which Claeys traces back to Aristotle, for whom there was a strong division between the household economy, which should be self-sufficient, and trade. For Aristotle, trade only occurs "at the expense of other men" (*Millennium*, 2). When out of necessity trade occurred, it had to be reciprocal. The nature of this reciprocity, whether based on a measure of labour or voluntary mutual satisfaction is not clear, but treating money as an end in itself was a reprehensible goal. This idea of reciprocal exchange, in turn, informed Christian ideas of the just price, first articulated by Augustine (ibid., 3); wealth could be acquired or accumulated, "provided these were used for the good of mankind" (ibid.).

entailed confronting the particular miller or baker who had undermined the moral economy, seizing his goods, and selling them directly at the 'fair price'. The rioters were effectively "taking the law into their own hands," and often with the implicit support of authorities who were known to sometimes welcome the "popular hubbub" against forestallers.[167] Moreover, the moral economy did not belong to any determined group. There are few, if any, named organisations as such—those who endorsed the crowd "comprise the articulate and the inarticulate, and include men of education and address."[168] However, Thompson notes that the crowd and paternalistic authorities had different motivations in supporting the moral economy: unlike the authorities, the crowd was not interested in maintaining the status quo.[169]

The earliest 'flour and bread' societies were formed, often as an extension of the activities of rioters, in this context.[170] Of the 46 flour and bread societies on record between 1759 and 1820, more than 80% "were set up in the years noted for riot when it is likely that resentment about the operation of markets was most acute."[171] As Bamfield notes, the coincidence of these societies with riots indicates "a further, practical, self-help dimension of the 'moral economy' in response to the privations of the late eighteenth century."[172] Far from being isolated efforts as Cole had suggested, the early co-operative societies formed as part of the moral economy, drawing on the energies and structures of existing

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A fundamental sense of entitlement for the poor arises from the idea that God gave the earth to mankind in common (which the liberal tradition is ultimately subverted to justify inequality)—charity is not simply a duty but a condition of property. This set of ideas, albeit not in any kind of static relation, can be traced throughout the centuries leading up to the Industrial Revolution (ibid.).

[167] John Bohstedt, *The Politics of Provisions: Food Riots, Moral Economy and Market Transition in England, c. 1550-1850* (London: Routledge, 2010), 272; Thomson, "Moral Economy," 95.

[168] Thompson, "Moral Economy," 94.

[169] Ibid.

[170] Bamfield, "Consumer-Owned Community," 16.

[171] Ibid., 20-21. The suggestion of the direct connection between the two is also supported by Martin Purvis, Purvis, Martin, "Co-operative Retailing in England, 1835-1850: Developments Beyond Rochdale," *Northern History* 22, no. 1 (1986): 205.

[172] Bamfield, "Consumer-Owned Community," 17. However, the societies are also linked to the presence of a "labour aristocracy" (shipwrights, masons) indicating that they would be more prevalent amongst a certain portion of the working classes, and not necessarily those who were leading the riots (ibid., 30).

combinations of workers, including friendly societies, to create more permanent solutions to problems the crowd attempted to rectify.[173] Thompson refers to this as co-operative direct action.

These early societies and the moral economy have not figured prominently in histories of the co-operative movement. The homogenising tendencies of periodisation both relegate the moral economy to the past, while also consolidating plural forms of co-operation under unitary monikers, such as Owenism. In contrast to the clear shifts and discernible periods that structure dominant historiographical approaches to the co-operative movement, Thompson's emphasis on the moral economy and co-operative direct action exposes a thread of continuity from the earlier societies to the modern form of co-operation. Rather than disappearing, or being supplanted by more respectable modes of organisation, Thompson notes that in the context of a broader shift from moral to political economy, the moral economy persists.

> The breakthrough of the new political economy of the free market was also the breakdown of the old moral economy of provision. After the wars all that was left of it was charity--and Speenhamland. The moral economy of the crowd took longer to die: it is picked up the early co-operative flour mills, by some Owenite socialists, and it lingered on for years somewhere in the bowels of the Co-operative Wholesale Society.[174]

This continuity confounds dominant narratives of the history of co-operation, which depend on the possibility of creating firm separations between different periods. Dominant approaches to the history of the co-operative movement also tend to neglect the fact that, in the early nineteenth century, the broad take-up of Owenism relied upon prior associations among working classes. Owen's proposals were met with ideas and practices

[173] For an overview of the origin of Friendly Societies, see J.M. Baernreither, *English Associations of Working Men*, trans. Alice Taylor (London: Swan and Sonnenschein & Co., 1889), 155-168. See also P.H.J.H. Gosden, *The Friendly Societies in England, 1815-1875* (Ann Arbor: University of Michigan Press, 1961).
[174] Thompson, "Moral Economy," 136.

derived from the moral economy, as many Owenite activities were the extension of the activities of friendly societies and trade unions.[175] Many societies formed completely independent of his influence.[176] Moreover, as communities took up Owenite ideas, they did not simply reproduce Owen's visions. These societies tended to emphasise economic independence and were motivated less by a utopian vision than, as Thompson summarises, by "the simple question: Why not?"[177]

The tendency to marginalise and downplay the moral economy in histories of the co-operative movement is in part a consequence of the discourse of political economy in which this history has been told, and of the propensity to view the moral economy retrospectively through its terms. As Thompson writes, "[o]ne symptom of [the moral economy's] final demise is that we have been able to accept for so long an abbreviated and 'economistic' picture of the food riot, as a direct, spasmodic, irrational response to hunger --a picture which is itself a product of a political economy which diminished human reciprocities to the wages-nexus."[178] The maintenance of the integral separation between the political and the economic within the discourse of political economy, through which the modern co-operative has been cast as a predominantly commercial entity, has meant that forms of activity that do not conform neatly to it are either mischaracterised, or are simply disregarded and relegated to the past.

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[175] Thompson, *English Working Class*, 869.
[176] See Durr, "William King," 13, 19-20.
[177] Thompson, *English Working Class*, 874. In Brighton, for instance, where a well-known middle class Owenite reformer Dr. William King was active, the co-operative activities he supported preceded him. As Durr recounts, "The Brighton co-operatives were born out of the working-class trades societies, the failure of the Mechanics' Institute, and the friendly societies, rather than through the vision of a professional such as Dr. King" (Durr, "William King," 13). And further "[i]n Brighton the co-operators were not standing still but setting up producer cooperatives. These were based on ideas long preceding Owen's concept of Utopian communities and nearer to eighteenth-century isolated co-operative ventures at Hull, Oldham, Woolwich, Chatham, Sheerness, and so on, where co-operative bakeries and mills had been formed" (ibid., 19-20).
[178] Thompson, "Moral Economy," 136.

One key example of this is the attitude toward the distribution of dividends in the 'modern' form of co-operation. Within dominant approaches to the history of the co-operative movement, the dividend has been regarded either as an indication of the discovery of a successful business model, or more critically, as part of the "embourgeoisment" of co-operation.[179] This analysis suggests that the distribution of dividends was a thoroughly 'economic' practice within the narrow terms of political economy. However, for many co-operative societies, the distribution of dividends was a way of undermining and preventing certain form of organisational hierarchy, as rather than accumulating profits centrally, they would be immediately redistributed for the benefit of members. The dividend, as Gurney describes, "was part of the 'practical knowledge' used by working people to cope with and simultaneously reconstruct capitalist social relations."[180] He further speculates that the dividend was an indication of the abdication, moral and material, of profit-seeking. The dividend, in keeping with the moral economy tradition, was a direct way to "put food in bellies and clothes on backs."[181] As Cole explains, "...the great merit of the dividend has been that it has made it possible for Co-operators both to eat their cake and to have it."[182]

However, it is not read as an 'ideal' because of an "assumed separation of ideals and material interests, of heads from bodies."[183] And despite being taken retrospectively as an example of "embourgeoisment" and depoliticisation, the dividend also did not fit into the virtuous model of working class savings and investment advocated by the Christian Socialists. The Christian Socialists actively derided this aspect of co-operation. Though they were at pains to dissociate co-operation from its connection to Owenism, they also wanted

[179] Gurney, *Co-operative Culture*, 10.
[180] Ibid., 11.
[181] Ibid., 10.
[182] Cole, *Century*, 69.
[183] Gurney, *Co-operative Culture*, 9.

co-operation to foster certain moral values. This manifested in a critique of the dividend,[184] which the Christian Socialists referred to as "The Gut's Gospel."[185] They accused the consumers' co-operative movement of having "no faith in co-operation (or anything else) that 'goes down deeper than their dinner'."[186]

If practices such as the distribution of dividends, and the emphasis on subsistence (and ultimately consumption in general), as well as what Thompson described as "the simple question: Why not?", derived from the moral economy, persisted throughout later periods, this continuity calls the periodisation itself into question.[187] In particular, as I will suggest in the next section, this continuity confounds narratives of a straightforward depoliticisation. The modern form of co-operation, in dominant histories, was founded on a disavowal of the political, and on the embrace of practices associated with business. However, as the temporal divisions on which these political distinctions rely prove untenable and manufactured, so too does the concept of the political itself. At the very least,

[184] Some accounts of the dividend suggest that the way in which co-operative societies divided surplus each year was a form of resistance to more totalising associational structures. See Marc Brodie, "'You Could Not Get Any Person to Be Trusted except the State': Poorer Workers' Loss of Faith in Voluntarism in Late 19th Century Britain," *Journal of Social History* 47, no. 4 (2014): 1071–1095. This becomes clearer in relation to friendly societies which worked alongside although often separately from co-operatives. Amongst them there was a division between those friendly societies which 'accumulated' their profit and those which 'divided' (distributed dividends) annually. As a result of the relative autonomy afforded to Friendly Societies through the privilege of arbitration—having the power to decide their own disputes internally—members had little or no recourse if their claims were rejected. Poorer members who had not always been able to keep up with their payments were increasingly denied benefits when they became too ill or old to work, thus losing any contributions they had made. Thus many preferred 'dividing societies'—although they were illegal until 1875—which would redistribute any funds leftover at the end of the year to members, preventing accumulation. In this narrative, the dividend acted as a check on hierarchy and profit-seeking within voluntary associations. Brodie compares the ethic of these dividing societies to that of co-operatives, as both were broadly anti-statist forms of working class association. While faith in voluntarism and friendly societies diminished as working classes came to look toward the state for the provision of social services, this was not the case with co-operatives. They were able to "continue to represent working-class voluntarist virtue" (ibid., 1085). Further, many local co-operatives were known for taking care of their members when they were ill or in difficulty.

[185] This phrase, "The Gut's Gospel," can be traced back to Thomas Hughes and it is originally quoted by Holyoake, *History of Co-operation Volume II*, 620.

[186] Thomas Hughes, quoted in Philip N. Backstrom, *Christian Socialism and Co-operation in Victorian England: Edward Vansittart Neale and the Co-operative Movement* (London: Croom Helm, 1974), 211.

[187] Thompson, *English Working Class*, 874

this narrative of depoliticisation holds true only insofar as history conforms to the discourse of political economy.

From a genealogical perspective, locating the 'beginnings' of co-operation in the disparate practices and beliefs that comprised the moral economy, begs the question of how the co-operative came about as a specific organisational form; as well as how the fact of this constitution was suppressed. While the term, as noted above, emerged in the 1830s, I argue that the co-operative was constituted as an entity that is thought to function primarily as a business through a process of legal recognition. While even the earliest flour and bread societies did not exist completely outside the law, and the moral economy more generally existed in a complex relationship with legal structures, the riots and early societies (generally) existed without any specific form of authorisation, and could easily be repressed.[188] In the nineteenth century there was a shift in the relationship between state and associational life, "from overt repression to control through regulation," that will be discussed in more detail in the next chapter. [189] Chapter 3 will consider how, as part of this shift, law both constituted the co-operative through the creation of a distinct legal form, and how that form came to be regarded as a reflection of the real unity of the association itself. This analysis will be extended in chapter 4 through an analysis of the body corporate form itself, and its role in the construction of the 'free' market in the mid-nineteenth century.

*The Possibility of the Political*

This thesis argues that legal recognition was depoliticising for the co-operative, not in the narrow terms afforded by political economy, but by virtue the constitution of the co-operative as such. Dominant approaches to the history of the co-operative movement

[188] See Bamfield, "Consumer-Owned Community," 22-24. See also John Walter, "Grain Riots and Popular Attitudes to the Law: Maldon and the Crisis of 1629," in eds. John Brewer and John Styles, *An Ungovernable People: The English and their Law in the Seventeenth and Eighteenth Centuries* (New Brunswick: Rutgers University Press, 1980), 47-84.
[189] Purvis, "Societies of Consumers," 158.

suggest that the modern form of co-operation was founded on the basis of a disavowal of the political, through the adoption of the practices of shopkeeping and the distribution of dividends, as well as the abandonment of socialist ideology. If the political is associated not with a set of discrete practices or commitment to a particular ideology, but with the very possibility of alterity, then depoliticisation happens precisely as the co-operative becomes fixed within the system to which it would be 'alternative', and its subordination to the state and subjection to the market are taken for granted. This final section presents an alternative account of the political as the possibility of alterity; a possibility that inheres fundamentally in our sociality. Through this conception, it becomes possible to regard the moral economy and co-operative direct action as political. This not only allows for a greater significance to be afforded to those actions and their various manifestations in later forms of co-operation, but also helps to conceptualise what was potentially at stake in legal recognition.

It matters whether or not co-operation is considered to be political. Claude Lefort suggests that the political is fundamentally concerned with the "*shaping* [*mise en forme*] of human co-existence."[190] The question of whether or not co-operation is political thus concerns the extent to which it has any bearing on this shaping. However, when the political is restricted to a particular domain within society or a discrete set of activities, as it is within the discourse of political economy, it takes for granted the existence of the very system that would be put into question by the political. As Lefort suggests, "it is simply because the very notion of society already contains within it a reference to its political definition that it proves impossible... to localize the political *in* society."[191] The discourse of political economy, as described above, operates on the basis of a firm divide between the 'political' and the

[190] Lefort, "Theologico-Political," 217. Emphasis in original.
[191] Ibid. l Emphasis in original.

'economic'. The political is generally restricted to a narrow field of activity, usually associated with the state.

Within such a division, the activities associated with the moral economy and co-operative direct action cannot be regarded as properly 'political' and have even been defined by this absence of any connection to politics. As one recent history comments regarding the moral economy and the early societies, "[w]ithout political representation they sought redress for their grievances through violent disorder: rioting."[192] Their actions are defined primarily by their violence, and in this capacity, they are dissociated from later forms of co-operation, while also being cast as exterior to 'political' mechanisms of engagement. Even Thompson, while giving much greater significance to food riots and early co-operative societies through the framework of the moral economy, struggled to call the moral economy 'political'.

> While this moral economy cannot be described as 'political' in any advanced sense, nevertheless it cannot be described as unpolitical either, since it supposed definite, and passionately held, notions of the common weal -- notions which, indeed, found some support in the paternalist tradition of the authorities; notions which the people re-echoed so loudly in their turn that the authorities were, in some measure, the prisoners of the people.[193]

However, in a later clarification of his idea of the moral economy, he expresses a certain dissatisfaction with the inability to call the moral economy political. In a response to his critics written several years after the publication of his seminal essay on the moral economy, Thompson qualifies these comments somewhat, or at least indicates a more complicated relationship between the moral economy and 'the political'. On being challenged for using the word 'moral' he indicates that he would have preferred to refer to it as a 'political economy' had that phrase not been so overused and abused for what he deems to be misguided purposes. As he explains,

[192] Wilson et al., *Building Co-operation*, 25.
[193] Thompson, "Moral Economy Reviewed," 271.

> I could have perhaps called this 'a sociological economy', and an economy in its original meaning (*oeconomy*) as the due organisation of a household, in which each part is related to the whole and each member acknowledges her/his several duties and obligations. That, indeed, is as much, or more, 'political' than is 'political economy', but by usage the classical economists have carried off the term.[194]

This struggle to identify the moral economy as political reflects the narrow, restricted conception of the political designated by the discourse of political economy.

The co-operative movement itself long ascribed to a principle of 'political neutrality', further demonstrating the inability of dominant conceptions of the political to account for co-operation. This neutrality expressed a commitment to transcending political divisions among the working class. As Cole states, "[p]olitical neutrality meant in practice neutrality between the rival factions which were then appealing for working class support."[195] This was not intended to signal a lack of commitment to co-operative ideals or vision of change. As Yeo claims, "'political neutrality' was not invented by the Rochdale Pioneers so that they might be left alone to become respectable grocers. It was worked out, in part during the Congresses of 1829-33, as a critique, by working people, of reformism."[196] However, one consequence of this inability to conceptualise co-operation as political is that the sense in which it may actually manifest alterity is obscured. The commitment to 'political neutrality' within the co-operative movement may have removed co-operation from the fray of state-centred forms of politics and indicated a higher aspiration, but within a limited discursive framework 'political neutrality' also reinforces the sense that co-operatives are primarily economic entities. That the co-operative movement is taken to have moved away from its commitment to political neutrality only with the formation of the

[194] Ibid.
[195] Cole, *Century*, 73.
[196] Yeo, *New Views*, 189.

Co-operative Party in 1917 further illustrates this restricted discourse of the political, by associating the political with advocating co-operative interests in Parliament.[197]

Nancy and Lacoue-Labarthe refer to this tendency to restrict the political to a predetermined sphere as "the closure of the political."[198] This closure can be traced back as far as Aristotle and the designation of the *polis* as a discrete sphere of political relation, but has become more severe with the rise of the discourse of political economy.[199] Politics, they suggest, has been largely replaced by a socio-technical discourse, reduced to questions of management and population, and the distribution of resources.[200] Overcoming this tendency requires something more than just a different form of politics. Some have suggested, for instance, that the moral economy presents a kind of 'informal politics'. As Bohstedt describes,

> Struggles over food were *political* in the sense that they involved the distribution of goods ('who gets what?'), under widely-held though contested public norms, within a system of rules and authorities, sanctioned ultimately on both sides by physical force: the power of crowds vs. the power of muskets and gallows.... The everyday dynamics of power--extra-institutional politics sometimes called 'informal politics' to distinguish it from both partisan contest and radical movements.[201]

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[197] Advocating for the formation of a co-operative political party, William Maxwell, then president of the Scottish Co-operative Wholesale Society suggested that "I do not seek to introduce politics into co-operation, but I am most anxious to see co-operation introduced more into politics." William Maxwell, quoted in Rachael Vorberg-Rugh and Angela Whitecross, *The Co-operative Party: An Alternative Vision of Social Ownership*, in eds. Peter Ackers and Alastair J. Reid, *Alternatives to State-Socialism in Britain: Other Worlds of Labour in the Twentieth Century* (Cham: Palgrave Macmillan, 2016), 63. See also Alfred Barnes, *The Political Aspect of Co-operation* (Manchester: Co-operative Union Ltd., 1926).

[198] Philippe Lacoue-Labarthe and Jean-Luc Nancy, "Opening Address to the Centre for Philosophical Research on the Political," in ed. Simon Sparks, *Retreating the Political* (London: Routledge, 1997), 112.

[199] Ibid., 110.

[200] The distinction has a long history in Western political thought, which has been thoroughly explored by Oliver Marchart, *Post-Foundational Political Thought: Political Difference in Nancy, Lefort, Badiou and Laclau* (Edinburgh: Edinburgh University Press, 2007), 35-60. The distinction was introduced by Lacoue-Labarthe and Nancy who were themselves reflecting on Jacques Derrida's "The Ends of Man" [in *Margins of Philosophy* (Chicago: University of Chicago Press, 1982), 109-136]. It has been subsequently quite widely taken up. Chantal Mouffe, for instance, describes her own use of this distinction: "by 'the political' I mean the dimension of antagonism which I take to be constitutive of human societies, while by 'politics' I mean the set of practices and institutions through which an order is created, organizing human co-existence in the context of conflictuality provided by the political." Chantal Mouffe, *On the Political* (Abingdon: Routledge, 2005), 9.

[201] Bohstedt, *Provisions*, 6.

While creating a means through which to understand the moral economy as political, such definitions still maintain the centrality and dominance of 'closed' conceptions of the political, not least because they simply expand that definition, making it more inclusive, but not fundamentally altering it.

Instead of just expanding the prevailing definitions of the political, Lacoue-Labarthe and Nancy argue for a 'retreat' of the political that would allow for the withdrawal of the political (*le politique*), from instituted forms of politics (*la politique*).[202] This retreat, as they suggest, is "necessary in order to render possible a questioning which refuses to confine itself to the categories ordinarily grouped under 'the political'."[203] If particular forms of politics cause the "closure of the political," the retreat of the political asks "on the basis of what, or along what, does this closure trace itself?"[204] It is a question of finding "the essence of the political—drawn back from the total completion of the political in the techno-social."[205] If, as Lefort suggests, most forms of determined politics take for granted the presence of the very system that would be put into question by the political, the retreat of the political suggests the possibility, and the necessity, of stepping back from that system and the determination of the political within any particular discourse.

This essence of the political (*le politique*) retreated from politics (*la politique*) is the question of *relation*, which must always be maintained as a question.[206] It is not an empirical positivity, but rather a "philosophical fact."[207] Nancy elaborates this concept in his later work as the fact of an "originary or ontological 'sociality'," or the idea that we are always-already

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[202] For an explanation of the distinction between *le politique* and *la politique* as a deconstructive gesture, see Stella Gaon, "Communities in Question: Sociality and Solidarity in Nancy and Blanchot," *Journal for Cultural Research* 9, no. 4 (2005): 391

[203] Lacoue-Labarthe and Nancy, "Opening Address," 112.

[204] Lacoue-Labarthe and Nancy, "Retreat," 132.

[205] Ibid. In this sense, what Lacoue-Labarthe and Nancy pursue with this distinction differs from the otherwise closely related projects of Hannah Arendt and Carl Schmitt, both of which pursue a retreat, but in order to arrive at the autonomy of the political. See Marchart, *Post-Foundational*, 36.

[206] Lacoue-Labarthe and Nancy, "Opening Address," 118.

[207] Lacoue-Labarthe and Nancy, "Retreat," 134.

in common with one another, prior to and co-extensive with all other forms of sociality.[208] This sociality is in one sense a form of community, but not a community of individuals who come together incidentally for a cause or specific purpose, nor is it a preconceived unity, such as the nation. It is rather the inescapable community of a shared finitude—a birth and death that can only be experienced for us by others, in community. As Nancy explains, "only the community can present me my birth, and along with it the impossibility of my reliving it, as well as the impossibility of my crossing over into my death."[209] We do not experience our own birth or death; rather, it is experienced in and through community, always by others. Or as Maurice Blanchot suggests, '[t]his is what founds community. There could not be a community without the sharing of that first and last event which in everyone ceases to be able to be just that (birth, death).'[210] It is an inoperative or an unavowable community, in which being is always "being-in-common."[211]

The political is "the place of community," where sociality is always exceeding its instituted forms.[212] The political, in this sense, is not a characteristic or quality that can serve in an evaluative capacity; it is not "the organization of society" but rather "the disposition of

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[208] Jean-Luc Nancy, *Inoperative Community* (Minneapolis: University of Minnesota Press, 1991), 28. Of course, the notion of community itself, which forms the ontological basis of Nancy's conception of the political in particular, is incredibly fraught. While the idea of community, whether Nancy's or otherwise, is not itself at issue in this thesis, it nonetheless intersects with questions of politics and the political, as well as the tendency to mythologise, romanticise or naturalise social forms like co-operatives. The attachments that many scholars, and particularly feminists, have argued attend notions and ideals of community are clearly replicated in the attachments given to co-operation and co-operatives (Iris Marion Young, "The Ideal of Community and the Politics of Difference," *Social Theory and Practice* 12, no. 1 [1986]: 1-26). Nancy, Lacoue-Labarthe and Blanchot's approaches to community and sociality, as well as the political, do risk reproducing a romanticisation of community, while also potentially vacating community of any meaning through the gesture of retreat, as Miranda Joseph has suggested. See Miranda Joseph, *Against the Romance of Community* (Minnesota: University of Minnesota Press, 2002). However, in contrast to Joseph's reading, here Nancy and Lacoue-Labarthe are not taken to advocate passivity, but rather to offer sociality or community as a form of excess, and a generative resource – one that raises the question of how we come together as the very essence of the political, but without necessarily positing a politics to accompany it. For the purposes of the historical and genealogical analysis of the moral economy, this lack of 'naming' of the politics – as feminist, prefigurative (see note 221), or otherwise – while also opening the space to think of the moral economy as political, seems prudent.

[209] Ibid., 15.

[210] Maurice Blanchot, *The Unavowable Community* (Barrytown: Station Hill Press, 1988), 9.

[211] Nancy, *Inoperative*, xxxvii.

[212] Ibid.

community as such."[213] It is not a question of power relations in a field constituted by political economy, but rather "the place where community as such is brought into play."[214] The political is the *exposure* of originary sociality or inoperative community as that which exceeds, opens and undermines determined communities. Indeed, as Nancy suggests, "...there would be no power relations, nor would there be such a specific unleashing power...if the political were not the place of community."[215] The terms of our "relation," as Nancy and Lacoue-Labarthe describe, would already be settled; and there would be no scope to question them.[216]

This implies that "everything is political," but not such that the political becomes meaningless; rather, as Nancy qualifies, "everything is political" only "insofar as the 'everything' can neither be total nor totalized in any way."[217] Everything is political because every moment of relation "presupposes that we are brought into the world, each and every one of us, according to a dimension of 'in-common' that is in no way 'added onto' the dimension of 'being-self', but that is rather co-originary and coextensive with it."[218] In other words, the political, retreated from politics, is not a question of a given set of relations that are then determined to have political significance within the confines of particular order; rather, the political is already imminent in relationality as such. Foucault echoes this when he suggests that "the political is not something which determines in the last analysis (or over-determines) relations that are elementary and by nature 'neutral'. Every relation of force implies at each moment a relation of power (which is in a sense its momentary expression) and every power relation makes a reference, as its effect but also as its condition of

[213] Ibid., 40.
[214] Ibid., xxxvii.
[215] Ibid.
[216] Lacoue-Labarthe and Nancy, "Retreat," 133.
[217] Jean-Luc Nancy, *The Truth of Democracy*, trans. Pascale-Anne Brault and Michael Naas (New York: Fordham University Press, 2010), 51.
[218] Nancy, *Inoperative*, xxxvii.

possibility, to a political field of which it forms a part." The idea that "everything is political...affirms[s] this ubiquity of relations of force and their immanence in a political field...."[219] They comprise an "indefinite knot" to which there is no end or ultimate resolution.[220]

The retreat of the political thus allows, at a minimum, a way to understand the moral economy and co-operative direct action as political without immediately reproducing the terms of political economy, and without reference to a predetermined field of activity associated with the state.[221] It is possible to think of the food riots and early co-operative societies as 'political', even though they did not engage directly with questions of political right. Politics, as Nancy suggests, does not need to "have history as its career, sovereignty as its emblem, and sacrifice as its access."[222] This is not to suggest that the forms of politics

[219] Michel Foucault, "History of Sexuality," in *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*, ed. Colin Gordon, trans. Colin Gordon *et al* (New York: Pantheon Books, 1980), 189.
[220] Ibid.
[221] This critique of dominant models of 'politics' and the search for an alternative conception of the political to some extent follows the gesture of the New Left and the idea of "prefigurative" politics. See Carl Boggs, "Marxism," 99-122. Indeed, co-operatives are often included amongst a range of organizational forms that are considered to be part of a prefigurative process of social change. The rise of the prefigurative came from "the failure of Marxism to spell out the process of transition," and the subsequent emphasis on parliamentary and bureaucratic conceptions of politics (100). The prefigurative creates the possibility of seeing practices which had been dismissed as apolitical as politically legitimate. As Boggs explains, "[i]n the broadest sense, prefigurative structures can be viewed as a new source of political legitimacy, as a nucleus of a future socialist state. They would create an entirely new kind of politics, breaking down the division of labour between everyday life and political activity" (105). Since its broader take up in the late sixties, prefigurative politics has come to describe "counterhegemonic institutions and modes of interaction that embody the desired transformation," particularly in organizations that are 'horizontal' and consensus-based, emphasizing participatory democracy [Darcy K. Leach, "Prefigurative Politics," in eds. David A Snow, Donatella della Porta, Bert Klanderman and Doug McAdam, *The Wiley-Blackwell Encyclopedia of Social and Political Movements* (Hoboken: Blackwell Publishing Ltd., 2013), 1]. While co-operatives may be rightly described as prefigurative, I will largely avoid that characterization for the simple reason that it is a product of the 1960s and does not necessarily suffice to describe early co-operative societies and the movement more generally. While the resonances are clear and many involved in contemporary efforts to build co-operation would use such a terminology, I want to avoid imposing such a designation on the past, at least for the purposes of this project. However, this project can still be seen as contributing to a wider conversation about prefigurative politics. Francesca Polletta points to a dilemma in prefigurative politics, that "they wanted to effect political change without reproducing the structure that they opposed" [Francesca Polletta, *Freedom is an Endless Meeting: Democracy in American Social Movements* (Chicago: University of Chicago Press, 2002), 6]. She emphasizes that this was a dilemma rather than a mistake or folly. Insofar as this analysis supports the overall project of a 'prefigurative politics', it might be seen as contributing to an understanding of these dilemmas.
[222] Jean-Luc Nancy, *Sense of the World*, trans. Jeffrey S. Librett (Minneapolis: University of Minnesota Press, 1997), 89.

associated with political economy are not important or relevant, or that we should abandon the struggles that have been waged in those terms, as "these are the givens of epoch and of the domination of the political and technology or of the domination of political economy."[223] It is a question, rather, of "no longer subjugating these struggles, in their finality, to this domination."[224] As shown in relation to the history of the co-operative movement, these terms can become totalising in their own right, and preclude or marginalise other forms of relation or struggle. As Lacoue-Labarthe and Nancy suggest, sociality or the question of relation is taken for granted in restricted or 'closed' conceptions of the political, as though only some relations, rather than others, would be political. These conceptions of politics tend to presuppose the relation of subjects, already individuated: it is "the absolute *presupposition* of the *relation of* subjects...alone allows the ordering of the political as *telos*."[225] Whether it is individuals coming together to form a social contract and to create a sovereign state, or the reduction of politics to the relation of economic forces and predetermined classes, these result in a closure of the political. As Nancy suggests, the Western tradition, including Marx, "ended up giving us only various programs for the realization of an *essence* of community," the consequence of which is to reduce or restrain the possibility of alterity inherent in sociality.[226]

The retreat of the political is thus concerned with revealing or exposing the possibility of alterity. It is, as Ian James suggests, a question of "releasing the possible unthought from that which has traditionally or already been thought, releasing future possibilities from the limit points of what we think we know about the past and the present."[227] While the "essence of the political" is not itself another form of politics, it makes it possible to reconceive

[223] Lacoue-Labarthe and Nancy, "Opening Address," 117.
[224] Ibid.
[225] Ibid.. Original emphasis.
[226] Nancy, *Inoperative*, xxxviii.
[227] Ian James, *The Fragmentary Demand: An Introduction to the Philosophy of Jean-Luc Nancy* (Palo Alto: Stanford University Press, 2005), 112.

politics.[228] Following the retreat of the political, it is necessary to return to questions of politics: if there is an imperative that arises from the retreat of the political, it is to seek modalities of politics that "[do] not stem from the will to realize an essence."[229] Blanchot similarly directs us to seek out 'new relationships, always threatened, always hoped for, between what we call work, *oeuvre*, and what we call unworking, *désoeuvrement*.'[230] This means, in short, finding modes of politics that would remain open to the political, that would remain open to their own unworking, that would "inscribe the sharing of community."[231] A politics that is open to the exposure of community or the political, "must order [*ordonner*] – in all senses of the word – in such a way that the passage towards the beyond of its order remains free of obstacles."[232] In one instance, Nancy refers to such a politics, following the retreat of the political, as a kind of gesture: "[p]olitics would henceforth be neither a substance nor a form but, first of all, a gesture: the very gesture of the tying and enchainment of each to each...."[233]

It is this political gesture that, I suggest, is given by the idea of co-operative direct action and associated with the moral economy.[234] Ascribing this gesture to co-operative

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[228] Thus, they stress, "in speaking of *the political* we fully intend not to designate politics." Lacoue-Labarthe and Nancy, "Retreat," 125. It is worth noting that Lacoue-Labarthe and Nancy, as well as poststructuralism more generally, have frequently been accused as offering nothing, and even detracting from, political struggle. For all the effort they put into drawing the political back from politics, "...they stop short of embracing any normative political conclusions," as Nancy Fraser laments. Nancy Fraser, "The French Derrideans: Politicizing Deconstruction or Deconstructing the Political?" *New German Critique* 33 (1984), 149. Those who would suggest that deconstruction and its affiliates are not political and are even actively depoliticizing seem to miss this necessary return to politics that happens following the retreat of the political.

[229] Nancy, *Inoperative*, xl.

[230] Blanchot, *Unavowable*, 56.

[231] Nancy, *Inoperative*, 41.

[232] Jean-Luc Nancy, "The Political and/or Politics," Lecture, Frankfurt, March 14, 2012, http://www.bbk.ac.uk/bih/nancy-jean-luc-the-political-and-or-politics-frankfurt-2012.pdf (Accessed 4 July 2017).

[233] Nancy, *Sense*, 112.

[234] Constituent power, and particularly the idea of an 'open' constituent power, resonates strongly with the idea of the political engaged here. While acknowledging the complementarity of these ideas, I have intentionally chosen not to use the framework of constituent power. This is for several reasons. Firstly, it is closely bound to an analysis of constitutionalism and the 'constituted' power of the state; as such the framework did not seem readily appropriate for an analysis of associations that would be considered subordinate to the state. In the next chapter I will show how the distinction between state and lessor associations is a constructed one, however, there would be considerable work required to bring the idea of constituent power along. Secondly, the idea of 'open' constituent power marks only the gesture of going

direct action stops short of retrospectively attributing a particular political programme to the moral economy. It is instead an attempt to conceptualise the actions themselves, and the ways in which they manifest alterity. Like the food riots, the early co-operatives drew their power from the possibility of coming together to assert a rebalancing of the moral economy, or to create new structures that would better adhere to the moral economy. The collective brought the moral economy into being, rather than the moral economy being a totality from which the collective would arise and take its identity and direction. The riots and early societies relied on prior relationships, but also created new ones. As Bohstedt describes, "...collective action required previously existing memberships and shared expectations among crowds" but also "rioters created community, they enacted it, realized a community in potential."[235]

While they would sometimes be founded with permission from local authorities, they did not require explicit authorization from an entity such as the state which would be superior to them (and under which they would be subsumed); nor were they themselves fixed or closed—they overlapped considerably with other forms of organisation, and did not have a determinate or exclusive identity. Through their own self-authorisation, they revealed that the conditions which had been set were not immutable, but could be called out and checked, and that it was possible for people to come together, not only to disrupt egregious practices, but also to form something new. In this sense, co-operation, as

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outside the constituted order. As Illan Wall argues, all such attempts to sustain an 'open' constituent power inevitably fail, as they are folded back into constituted modalities of power. Illan Wall, *Human Rights and Constituent Power: Without Model or Warranty* (Abingdon: Routledge, 2012), 112. In contrast, the political (le politique) as the exposure of community as being-in-common also shows how constituted and constituent forms of power are not simply opposed to one another (nor completely separable) — it is only the persistence of being-in-common that keeps sovereignty from realizing itself in the world. With the political (*le politique*), the question then becomes (as it does for Nancy) not one of avoiding constituted forms per se, as though there were the possibility of remaining always in the excess of the outside, but of finding more open structures that allow for the possibility of alterity. This is what Nancy appears to be suggesting when he writes that "Politics must order [*ordonner*] – in all senses of the word – in such a way that the passage towards the beyond of its order remains free of obstacles." Nancy, "Politics/ Political," 5.

[235] John Bohstedt, *Riots and Community Politics in England and Wales 1790-1810* (Cambridge: Harvard University Press, 1983), 276.

Holyoake described, had been an experiment in "world-making."[236] However, this is not to suggest that the early flour and bread societies were a pure expression of the interests of the poor. They were often, as Bamfield notes, funded by businessmen. Subscription fees at many of the early societies would also have been prohibitive for many of the poorest, and they were not necessarily democratic.[237]

Calling co-operative direct action political is not about identifying a model of perfection: it is enough to suggest that, at a minimum, the politics of the moral economy did not follow the model of sovereignty, and did not attempt to "realize the essence of community."[238] As such, co-operative direct action can be read as a form of politics which does not obscure or efface the political, but rather "gives form and visibility to the possibility of living together." Not, as Nancy explains "one particular determination of living but the constitutive determination for human life."[239] The political, according to Lacoue-Labarthe and Nancy, is the exposure of community (or sociality) and the unworking of the excess shown by that sociality. The gesture by which co-operatives show that the present order is not fixed or necessary, and demonstrate the possibility of other, less determinative modalities of being together, offers just such an exposure. This politics allowed for the opening and consideration of the question of community—it was predicated on just such a possibility.

I have suggested that the legal recognition of the co-operative in the mid-nineteenth century was depoliticising. This is not the result of the adoption or abandonment of specific practices, or the disavowal of utopian ideals, but the closure of the political that happens as a consequence of the constitution of the co-operative as such, particularly insofar as the fact of this constitution is taken for granted. This is what Lacoue-Labarthe and Nancy refer to

[236] Holyoake, *History of Co-operation Volume I*, 22.
[237] Ibid.
[238] Nancy, *Inoperative*, xxxviii.
[239] Nancy, "Political/Politics," 5.

as "immanentism" or "totalitarianism."[240] In particular they identify a "new totalitarianism" which "would itself proceed from the dissolution of transcendence, and, henceforth, come to penetrate all spheres of life now devoid of any alterity."[241] The legal recognition of co-operatives as bodies corporate in the mid-nineteenth century, as I will argue, subordinates them to the state and subjects them to the market. In particular, the legal form of the body corporate constitutes the co-operative as a discrete unity. Despite the origins of this form in a transcendent, theological metaphysical structure, this form comes to be seen as a reflection of the natural unity of the group itself. The closure of the political, or depoliticisation, occurs as a consequence of the immanentisation and normalisation of this metaphysical structure, and the subsequent naturalisation of this legally-constituted conception of the co-operative.

As Nancy suggests, "economic ties, technological operations, and political fusion (into a *body* or under a *leader*) represent or rather present, expose, and realize this essence necessarily in themselves. Essence is set to work in them; through them, it becomes its own work."[242] They evoke "the total immanence or the total immanentisation of the political in the social" which dramatically reduces and obscures the possibility of alterity.[243] The co-operative itself becomes "devoid of alterity" on the presumption of its own presence as an object.

It is important to differentiate this closure of the political and loss of alterity from what Nancy describes as a longing for a lost community; this is not an argument for a return to an ideal past or pre-market mode of relation. This kind of characterization is not uncommon when it comes to co-operation, which has sometimes been described as

[240] Lacoue-Labarthe and Nancy, "Opening Address," 115; Nancy, *Inoperative*, 3.
[241] Ibid., 129.
[242] Nancy, *Inoperative*, 3.
[243] Lacoue-Labarthe and Nancy, "Opening Address," 115

manifesting a "spirit of association."[244] As Webb writes, [t]he Co-operative Movement is but a modern development of that spirit of association which may be traced all through our social history, as is seen in many features of the life of the early English village communities in Saxon and Norman times."[245] Webb's "spirit of association" attributes co-operation with an ancient and timeless quality, serving to legitimate the co-operative movement and to demonstrate its importance with reference to the past, and all in a rhetoric that implicitly conveys the authenticity of these modes of relation. As Tann recounts, the older flour and bread societies which survived into the mid-nineteenth century became part of "the full flowering of co-operative production of the 1860s," proving, according to one speaker at a Co-operative Congress in the 1880s, that "the independent productive societies which we find now scattered over the whole of Great Britain are representatives of a very ancient race."[246] Moreover, Tann suggests that

> [t]he co-operative milling societies of the Napoleonic period, with their classic co-operative features of no credit, no debt, and fixed interest rates, should not be viewed as forerunners of the Owenite ideal, nor was there any obvious link with political activity. They were a spirited, rational, but only partial solution to a problem that affected all ranks of society, but particularly the lower orders.[247]

In this account, which skips over fifty years of history, the early co-operative societies are not political. This is both because they are not connected to Owenism and because they are only a 'partial' solution. Casting the early societies as unpolitical helps to construct the narrative of the modern co-operative movement as also being unpolitical, while simultaneously contributing to the construction of an origin story for the co-operative movement.

This plays into a wider narrative, in which co-operatives would be an exception to a more general loss of these forms of association and community; a sense of loss that Nancy

[244] Webb, *Industrial*, 2.
[245] Ibid.
[246] Tann, "Co-operative Corn Milling," 57.
[247] Ibid.

suggests is constitutive of modernity. As Nancy explains, "[t]he consciousness of this ordeal belongs to Rousseau, who figured a *society* that experienced or acknowledged the loss or degradation of a communitarian (and a communicative) intimacy…Until this day history has been thought on the basis of a lost community."[248] Politics is then often figured as attempting to make up for this loss through other forms of order (society) or working toward the realization of these lost communities as a political goal, as a desire for communion. Yet, as Nancy reminds, "[o]ne associates or assembles individuals. The individual is a product or a secondary, limited, temporary effect, which occurs intermittently amid the discontinuous structure of the "with". That structure is nothing other than the structure of being."[249] Instead of a timeless spirit of association, co-operatives have demonstrated the possibility of alterity in association that is at the heart of the political, as Blanchot writes, "the heart or the law."[250] It is a question of its exposure, rather than its retrieval.

*Conclusion*

This chapter has argued that dominant approaches to the history of the co-operative movement have been shaped by a discourse of political economy, derived in part from mid-nineteenth century conflicts over the meaning of co-operation. These histories tend to remove co-operation from its history and take the co-operative for granted as an object, precluding a consideration of how the co-operative was constituted in the first place. Law, if it figured at all in these histories, tended to be marginalized and treated in an instrumental capacity. Drawing on the insights of Foucault's genealogy, it was suggested that one reason for the marginalization of law in these histories is the more general obfuscation of the productive and constitutive function of power that happens within the discourse of political economy. In order to appreciate the role of law in the history of the co-operative

[248] Nancy, *Inoperative*, 9. Emphasis in original.
[249] Nancy, "Political/Politics," 4.
[250] Blanchot, *Unavowable*, 26.

movement, it was necessary to articulate a history of the co-operative movement that is not already determined by the discourse of political economy. The disparate 'beginnings' of co-operation, rather than a mythic origin, were sought in the moral economy of the eighteenth century. The framework of the moral economy showed how the earliest co-operative societies were not isolated efforts but rather reflected a broader system of beliefs and customs, as well as networks of relation and association. This framework, in turn, raised the question of how these disparate practices and forms of association were consolidated in a discrete organizational form, the co-operative.

It is to this question that this thesis will now turn, examining the function of legal recognition in the mid-nineteenth century as well as the particular form, the body corporate, given to co-operatives. The next chapter will take up the relationship between state and association, arguing that the state must subordinate potentially competing forms of association in order to constitute itself as the state, in an attempt to manifest its claim to an impossible sovereignty. Legal recognition of the co-operative movement occurred in the context of a broader shift between state and association, from one of tacit consent and tolerance to the provision of legal forms and direct regulation. As Martin Purvis suggests, "the retreat to a series of institutions with prescribed and restricted functions constrained popular initiatives."[251]

[251] Purvis, "Societies of Consumers," 158.

# Chapter 2: Co-operation and the Laws of Ordering

"Impossible, yet there it is!"[1]

*Introduction*

The last chapter argued that law does not figure prominently in histories of the co-operative movement because these histories have been told within a discourse of political economy. The law, in terms of this discourse, served in a predominantly instrumental capacity, whether that was to enable and legitimate the co-operative as a working-class form of organisation, or to reinforce the appropriation of co-operation that had already been determined by economic forces. In contrast to these narratives, I will argue that the law played an integral role in transforming the disparate practices associated with the moral economy into a discrete organisational form that would function primarily as a business. To this end, the next two chapters will offer interrelated theoretical arguments about legal recognition. First, that legal recognition functions as a means by which the state constitutes itself; and second, that legal recognition also constitutes that which it recognises. The historical shift from moral economy to co-operative is not a matter of "bringing within" from "outside," as the Christian Socialists suggested,[2] but a more complex constitutive dynamic that reflects shifting modalities of governance and power in the development of the modern state.

This chapter begins with a discussion of the relationship between law and sociality, starting from the concept and theoretical framework of legal pluralism. Legal pluralism has been a relatively common means of approaching both the moral economy and co-

[1] Georges Bataille, *The Accursed Share, Volumes II and III*, trans. Robert Hurley (New York: Zone Books, 1991), 243.
[2] J.M. Ludlow and Lloyd Jones, *Progress of the Working Class 1832-1867* (London: Alexander Strahan, 1867), 96.

operatives. The basic contention of legal pluralism is that law is not exclusive to the state. As Eugen Ehrlich wrote, "all law is social law," meaning that wherever there is association, there is also law.[3] In this reading, law is not simply an instrument, but a form of ordering that is integrally related to our sociality. However, there has also been a tendency within legal pluralism, and socio-legal studies more generally, to implicitly presuppose the influence and centrality of state law—what Marianne Constable refers to as "socio-legal positivism."[4] The moral economy, for instance, is thought to manifest a form of traditional or customary law, a framing and terminology which implies a relationship of autonomy from, but also inferiority to, the state.[5] Co-operatives, in turn, have been regarded as a means of maintaining these traditional forms of relation and legality within state law, while taking for granted the ways in which the co-operative may already be the product of a relationship with the state.[6]

Despite their insights, these readings of the moral economy and co-operatives implicitly instrumentalise the law, even as they pluralise it, specifically by regarding law as the entirely dependent on association—be it the state, society or another form of association.[7] Peter Fitzpatrick suggests that this persistent instrumentalism is a consequence of how concepts such as the state, society, and in turn law, are understood in the first place.[8] In an ostensibly secular modernity, Fitzpatrick argues, the state and society function as "deific substitutes," taking the place once occupied by a transcendent god.[9] The state is

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[3] Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, trans. Walter L. Moll (New Brunswick: Transaction Publishers, 2002), 44.
[4] Marianne Constable, *Just Silences: The Limits and Possibilities of Modern Law* (Princeton: Princeton University Press, 2005), 10.
[5] See for instance Harry Arthurs, "Review: Customs in Common: Studies in Traditional Popular Culture," University of Toronto Law Journal 43 (1993): 289.
[6] See Stuart Henry, *Private Justice: Towards Integrated Theorising in the Sociology of Law* (London: Routledge & Kegan Paul plc, 1983), 92-96.
[7] Peter Fitzpatrick, "Being Social in Socio-Legal Studies," *Journal of Law and Society* 22, no. 1 (1995): 106.
[8] Peter Fitzpatrick, "Being Social in Law and Society," in Tara Mulqueen and Daniel Matthews, eds., *Being Social: Ontology, Law, Politics* (London: Counterpress, 2015), 38.
[9] Peter Fitzpatrick, "What are the Gods to Us Now?: Secular Theology and the Modernity of Law," *Theoretical Inquiries in Law* 8, no. 1 (2007): 162. See also Fitzpatrick, "Law and Society," 36.

taken to be something which exists "unto itself," with law flowing from it [10] They participate in what Claude Lefort describes as "an illusion...that the institution of the social can account for itself."[11] Sociological explanations easily become "sociological reduction[s]," which risk eliding the rhetorical production of the state with its material manifestations.[12] Yet they are resolutely impossible, and unable to fully account for themselves. To this end, as Timothy Mitchell suggests, "we should examine it not as an actual structure but as the powerful, apparently metaphysical effect of practices that make such structures appear to exist.'[13]

Inverting the usual relationship, Fitzpatrick argues that it is actually "law which renders society possible."[14] The idea of a fundamental sociality, discussed in the previous chapter in relation to the concept of the political, appears here again, this time as law. The "law of community," or the "law of an originary sociability," is that we are always-already in common with one another.[15] It is only on the basis of this prior sociality that exceeds any determined form of association that any particular association, state or otherwise, can attempt to delimit itself in the first place. Law also helps to constitute the state by providing a form of "enforceable positive determination" for it, making it manifest in the world.[16] This

[10] Michael Taussig, *The Nervous System* (New York: Routledge, 1992), 112.
[11] Claude Lefort, *The Political Forms of Modern Society: Bureaucracy, Democracy, Totalitarianism*, ed. John B. Thompson (Cambridge: The MIT Press, 1986), 201. Quoted in Fitzpatrick, "Socio-Legal Studies," 107.
[12] Philip Abrams, "Notes on the Difficulty of Studying the State (1977)," *Journal of Historical Sociology* 1, no. 1 (1988): 64.
[13] Timothy Mitchell, 'Society, Economy, and State Effect' in Aradhana Sharma and Akhil Gupta eds. *The Anthropology of the State: A Reader* (Blackwell Publishing Ltd., 2006), 169, n180. As Otto von Gierke elegantly expressed it, "We see a regiment marching to ringing music; we notice voters who cast their votes into the urn; at a public demonstration we are roughly pushed back by a squad of policemen;--and we know immediately by this and a hundred other sensual impressions that things are happening which have to do with the continuation of the life of the state." Otto von Gierke, "The Nature of Human Associations," in *T*he *Genossenschaft-Theory of Otto von Gierke*, ed. John D. Lewis, 139–157 (Madison: University of Wisconsin, 1935), 146.
[14] Fitzpatrick, "Socio-Legal Studies," 106.
[15] Jean-Luc Nancy, *Inoperative Community*, trans. Peter Connor, Lisa Garbus, Michael Holland and Simona Sawhney (Minneapolis: University of Minnesota Press, 1991), 28; and Jacques Derrida, *The Politics of Friendship*, trans. George Collins (London: Verso, 2005), 231.
[16] Fitzpatrick, "Law and Society," 41.

inversion gives way to a more complex constitutive dynamic between the moral economy, the co-operative and the state.

In the remainder of the chapter, this constitutive dynamic is explored in more detail through a reading of the relationship between state and association in an unlikely source, Thomas Hobbes' *Leviathan.*[17] For Hobbes, "the originator of modern sovereignty,"[18] the sovereign is no less than a "Mortal God."[19] However, this chapter approaches Hobbes not as the author of a totalising sovereignty but, following James Martel, as one "who helps us to understand how sovereignty is not so much an actual font of authority, but a rhetorical production."[20] Notionally, Hobbes argues that all associational life must be subordinate to the commonwealth, and he has often been read as such.[21] Yet this very claim to authority and an inherent supremacy over other associations, as I will argue, gives the lie to modern forms of sovereignty.

Notwithstanding this constitutive function of legal recognition, the vast majority of associational life in the commonwealth exists by virtue of the sovereign's silence and tacit consent, in a way that betrays not only the impossibility of sovereignty, but also the state's tenuous and carefully negotiated grasp on authority. The final section of this chapter will consider the role of this silence and tacit consent in Hobbes' approach to riots, and then situate this approach in the historical context of the early modern state. This, in turn, allows

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[17] Thomas Hobbes, *Leviathan* (Oxford: Oxford University Press, 2008).
[18] Fitzpatrick, "What are the Gods," 168.
[19] Hobbes, *Leviathan*, 114.
[20] James R. Martel, *Subverting the Leviathan: Reading Thomas Hobbes as a Radical Democrat* (New York: Columbia University Press, 2007), 239.
[21] It is a key facet of the modern state that there can be no intermediate forms of association between individual and state; all must be "subordinate and dependent powers." Baron de Montesquieu, *The Spirit of the Laws*, trans. Thomas Nugent (Cambridge: Cambridge University Press, 1989), 17. The idea finds its most severe expression in social contract theory, within which even the "intermediate ranks" must be abolished (ibid., 18). As Jean-Jacques Rousseau writes in *The Social Contract*, "[i]t is important, then, to have a clear declaration of the general will, that there should be no factions in the state, and that every citizen should express only his own option." ("The Social Contract," in ed., Susan Dunn *The Social Contract and The First and Second Discourses* (New Haven: Yale University Press, 2002), 173. And, notably, *The Declaration of the Rights of Man and Citizen* holds as its third edict that "[t]he principle of all sovereignty resides essentially in the nation. No body nor individual may exercise any authority which does not proceed directly from the nation."

for a reconsideration of the relationship between the moral economy, co-operatives and the state. This relationship is not so much one of competing legal orders, as it is the outcome of different modes of relation with the state: the moral economy and the co-operative emerge from and reflect particular modalities of power and relations of governance, albeit without being completely determined by those relations. Instead of being a form of 'traditional' or 'customary law' that exists outside of the state, the moral economy can be seen as emerging in part from a particular relationship *with* the state, and a predominantly negative and paternalistic form of power that Foucault would associate with early modern sovereignty.[22] The legal recognition of the co-operative in the nineteenth century, in turn, reflects a shift in this modality of power, to one of discipline and biopolitics.[23]

*Law and Sociality*

While law has not figured prominently in histories of the co-operative movement in England, co-operatives have been a source of interest for the sociology of law, particularly within the interrelated traditions of legal and political pluralism. Legal pluralism, broadly speaking, refers simply to "the presence in a social field of more than one legal order."[24] The co-operative, particularly in the early texts of sociology of law, tends to be seen as an example of this plurality. The co-operative may be a one of a diversity of "particular groups," comprising an "inclusive society."[25] Or the co-operative, as it does for the nineteenth century German jurist Otto von Gierke, may have a distinctive legal personality

[22] Michel Foucault, "Two Lectures," in *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*, ed. Colin Gordon, trans. Colin Gordon et al (New York: Pantheon Books, 1980), 94.
[23] Ibid., 105. See also Michel Foucault, *The History of Sexuality, Volume 1: An Introduction*, trans. Robert Hurley (New York: Vintage Books, 1990), 144.
[24] John Griffiths, "What is Legal Pluralism?" in *The Journal of Legal Pluralism and Unofficial Law* 1, no. 1 (1986): 2. Sally Engle Merry, writing some years later, defined it similarly as "a situation in which two or more legal systems coexist in the same social field." Sally Engle Merry, "Legal Pluralism," *Law and Society Review* 22, no. 5 (1988): 870.
[25] Georges Gurvitch, *Sociology of Law* (London: Kegan Paul, Trench, Trubner & Co., Ltd., 1947), 49.

of its own that is not derived from that of the state. For Gierke, the producers' co-operative in particular is "the highest form of personal economic fellowship."[26] For those he influenced, amongst them G.D.H. Cole, whose history of the co-operative movement in England featured in the last chapter, the state should be built from a pluralistic arrangement of such associations.[27] However, as I will argue in this section, the pluralist approach not only to the co-operative, but also to the linked notion of the moral economy, are built on a view of law that ultimately obscures how they are already bound up with the state.

Legal pluralism is often defined in contrast to "legal centralism," which is regarded as an ideology that accompanies legal positivism.[28] This ideology, as it is described, identifies law as only the law of the state, in relation to which other forms of order are subordinate. Legal pluralism, in contrast, suggests that multiple legal orders may exist that have no connection to the state, and may have little resemblance to state law.[29] This basic claim of

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[26] Otto von Gierke, *Community in Historical Perspective: A translation of selections from Das deutsche Genossenschaftsrecht (The German Law of Fellowship)*, ed. Antony Black, trans. Mary Fischer (Cambridge: Cambridge University Press, 1990), 223. , Gierke uses 'fellowship' to mean "the company of brothers, linked by the right hand of fellowship, and knit together by a spirit of fraternity, who pursued the common interest of the group (whether based on profession, or occupation, or the simple foundation of voluntary association), and vindicated its common honour with a common ardour." George Heiman, introduction to *Associations and Law: The Classical and Early Christian Stages*, by Otto von Gierke, ed. George Heiman (Toronto: University of Toronto Press, 1977), 18. He is quoting Ernst Barker, introduction to *Natural Law and the Theory of Society 1500-1800,* by Otto von Gierke, trans. Ernst Barker (Cambridge: Cambridge University Press, 1958), lviii.

[27] See for instance G.D.H. Cole, "The State and Inclusive Association," in ed., Paul Hirst, *The Pluralist Theory of the State: The Selected Writings of G.D.H. Cole, J.N. Figgis and H.J. Laski* (London: Routledge, 1989), 69-82. G.D.H. Cole is included amongst a fairly disparate group of thinkers referred to as the English pluralists. English pluralism refers to the ideas of a diverse set of thinkers and a current of thought which were prominent in the early 20th century, represented by writers such as G.D.H. Cole, John Neville Figgis Harold Laski, as well as Frederic Maitland, whose reading and translation of the work of German jurist Otto von Gierke were very influential for English pluralism. For overviews of English pluralism, see Paul Q. Hirst, ed. *The Pluralist Theory of the State: The Selected Writings of G.D.H. Cole, J.N. Figgis and H.J. Laski* (London: Routledge, 1989), David Nicholls, *The Pluralist State* (London: The Macmillan Press Ltd., 1975) and David Runciman, *Pluralism and the Personality of the State* (Cambridge: Cambridge University Press, 1997). The English pluralists were motivated in part by what was conceived of as an English cultural tradition of working class associationalism, focused on values of mutual aid. There is a romanticisation of 'voluntary association' found in the work of the pluralists, when they invoke the idea of the association, they have in mind the particular history of associational life in England, including friendly societies, co-operatives, and trade unions, as well as companies and trusts. For an overview of the "cultural tradition" of English pluralism, see Julia Stapleton, "English Pluralism as Cultural Definition: The Social and Political Thought of George Unwin," *Journal of the History of Ideas* 52, no. 4 (1991): 665-684.

[28] Griffiths, "Legal Pluralism," 1.

[29] Ibid., 3.

legal pluralism suggests that law must be something more than just an instrument. For instance, Eugen Ehrlich, who is often taken to be a foundational source for the sociology of law and legal pluralism, argued that "all law is social law," and within this category of social law, official state law is narrowly circumscribed.[30] There is no requirement that to call something law, it must be connected to the state. Law, he tells us, is simply an "ordering."[31]

> [I]t is not an essential element of the concept of law that it be created by the state, nor that it constitute the basis for the decisions of the courts or other tribunals, nor that it be the basis of a legal compulsion consequent upon such a decision. A forth element remains, and that will have to be a point of departure, i.e. the law is an ordering.[32]

As an ordering, law is ubiquitous. As he explains, "[j]ust as we find the ordered community wherever we follow its traces…so we also find law everywhere, ordering and upholding every human association."[33] Thus, for Ehrlich, wherever there is association there is also law. And in whatever form one finds it, Ehrlich observes that the force of law derives from "the fact that the individual is never actually an isolated individual he is enrolled, placed, embedded, wedged, into so many associations that existence outside of these would be unendurable, often even impossible, to him."[34] Law's efficacy comes from the very fact of our association, from its inevitability, and from our utter dependency on social relations.

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[30] Ehrlich, *Fundamental Principles*, 42. "Gierke contrasts the law of the state and of the corporations of public and private law, which he styles as social law, with the entire remaining private law, which he styles individual law. But this antithesis is unwarranted. There is no individual law. All law is social law." For an overview of Ehrlich's continuing relevance see David Nelken, "Ehrlich's Legacies: Back to the Future in the Sociology of Law" in *Living Law: Reconsidering Eugen Ehrlich*, ed. Marc Hertogh (Oxford: Hart Publishing, 2009), 237-272. His work was largely ignored until the 1970s, as part of the more general reticence "to recognise legal pluralism at home" (Engle Merry, "Legal Pluralism," 874).

[31] Ehrlich, *Fundamental Principles*, 24.

[32] Ibid. Ehrlich further elaborates this notion of ordering by suggesting that "within the scope of the concept of the association, the law is an organization, that is to say, a rule which assigns to each and every member of the association his position in the community, whether it be of domination or of subjection, and his duties; and that it is now quite impossible to assume that law exists within these associations chiefly for the purpose of deciding controversies that arise out of the communal relation. The legal norm according to which legal disputes are being decided, the norm for decision, is merely a species of legal norm with limited functions and purposes" (ibid., 24-25). This law organises people as well as things.

[33] Ibid., 25.

[34] Ibid., 62.

These basic insights about the nature of law have been subject to vastly different interpretations in the historical development of legal pluralism. Engle Merry identifies two broad phases in this development, a 'classical legal pluralism' and a 'new legal pluralism.'[35] In its classical form, legal pluralism emerged as an "analysis of the intersections of indigenous and European law," a way to conceptualise the relationship between coloniser and colonised.[36] A 'new' form of legal pluralism emerged in the 1970s that, as Engle Merry describes, applied the pluralism that had been externalised to colonial territories to groups within and to the histories of western industrial countries.[37] One key development in this shift was an expanded claim that "plural normative orders are found in virtually all societies."[38] This transition mirrors a distinction that Griffiths draws between strong and weak legal pluralism. The weak variety of legal pluralism is completely compatible with legal centralism. It involves only the recognition within state law of forms of order that do not necessarily originate with the state. Often these would be forms of customary or religious law, which are *made* law for particular portions of society by virtue of their elevation to this status by the state. This 'weak' form of legal pluralism can be traced back, according to Griffiths, to at least 1772, in an order made by the East India Company, though it is likely much older.[39] Strong pluralism, by contrast, refers "to a sort of situation in which not all law is state law nor administered by a single set of state legal institutions, and in which law is therefore neither systematic nor uniform."[40] Strong forms of legal pluralism assert that "[l]egal pluralism is the fact. Legal centralism is a myth, an ideal, a claim, an illusion."[41]

[35] Engle Merry, "Legal Pluralism," 872.
[36] Ibid.
[37] Ibid. This also involved a return to some of the foundational texts of the sociology of law.
[38] Ibid., 873.
[39] Griffiths, "Legal Pluralism," 5.
[40] Ibid.
[41] Ibid., 4.

Notwithstanding the evolution and expansion of the concept of legal pluralism—whether from classical to new, or weak to strong—legal pluralism has had to contend with the pervasive influence of legal centralism. This manifests in a variety of ways, but most commonly in the definition of law itself. As Griffiths observes, there is a continual tendency within legal pluralism to confuse "what law *is*" with "a particular idea about what it *ought to be*."[42] In other words, conceptions of law even when approached pluralistically, are not neutral, but are derived from particular histories. They inevitably come with a set of assumptions about what law should be. As Simon Roberts argues,

> [t]he problem of invoking law as a category of analysis is that it stands out in terms of both its provenance and its confident self-definition when we use it to gain purchase on adjacent forms of ordering. So much of our sense of what law 'is', is bound up with, and has been created through, law's association with a particular history – early on, the emergence of secular government in Europe; later, the management of colonial expansion.[43]

These concerns over how law is defined structured debates in legal pluralism in the 1980s and 1990s, and the question of what "can and cannot be called law," continues to be relevant, not least because it has proven difficult to trace the often subtle influence of legal centralism.[44] The problem takes a more insidious form in relation to socio-legal studies more broadly, manifesting as what Constable calls "socio-legal positivism," a concept which suggests that sociological approaches to law are "not conceptually plural at all."[45] "Socio-legal positivism," as Constable explains, "in effect maintains that any so-called law that precedes a given legal positivist system was itself socially powerful in the manner of positive

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[42] Ibid., 3. Emphasis in original.
[43] Simon Roberts, "Against Legal Pluralism," *Journal of Legal Pluralism and Unofficial Law* 30, no. 42 (1998): 98.
[44] Engle Merry, "Legal Pluralism," 879. See also Brian Z. Tamanaha, "The Folly of the 'Social Scientific' Concept of Legal Pluralism," *Journal of Law and Society* 20, no. 2 (1993): 192-217; Franz von Benda-Beckmann, "Who's Afraid of Legal Pluralism?" *Journal of Legal Pluralism and Unofficial Law* 34, no. 47 (2002): 37-83. For a more recent overview of these issues see Christopher Tomlins, "Bucking the Party Line: Calavita's *Invitation to Law & Society* (In Which the Author Is Invited to a Party Where He Encounters Many Old and Familiar Faces, Becomes Argumentative, Stays Up Too Late, and Finally Departs in Search of New Adventures)," *Law & Social Inquiry* 39, no. 1 (2014): 226-233.
[45] Tomlins, "Bucking the Party Line," 231.

law or was not really law at all...."[46] Fitzpatrick has also observed that "[j]urisprudence is littered with isolated and opposed notions about law but the field retains a unity of engagement with law."[47] These notions tend to reinforce law's "singular character" and assume a unified content to law, a content which tends to be Western and takes for granted law's effectiveness, by virtue of its self-appointed status as law.[48]

There is no consensus as to whether this tendency can, or indeed should, be overcome. Roberts, for instance, suggests that legal pluralism and the attempt "to fix a conception of law going beyond the robust self-definitions of state law" is "inevitably problematic."[49] Instead, other forms of ordering should be understood "in their own terms."[50] Similarly, Engle Merry worries that, even without the influence of legal centralism, "calling all forms of ordering that are not state law by the term law confounds the analysis," and suggests that there should be a "clearly demarcated boundary between normative orders that can and cannot be called law."[51] By contrast, Margaret Davies has recently argued that we should "set aside...anxiety over where law stops and social normativity starts."[52] As she suggests, "[t]his concern unduly limits legal theory to questions of definition, and prevents an expansive and experimental approach to understanding law's multiplicity."[53] Either way, there is no simple solution to the problem, not least because the assumptions that often underlie the designation of plural legal orders are not overcome simply by abandoning the terminology.[54]

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[46] Constable, *Just Silences,* 10.
[47] Peter Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992), 2-3.
[48] Ibid., 7.
[49] Roberts, "Against Legal Pluralism," 105. It is for this reason that scholars such as Sally Falk Moore opted instead to use different terms for non-state legal orders, while also rejecting legal centralism. Sally Falk Moore, *Law as Process: An Anthropological Approach* (London: Routledge & Kegan Paul, 1978), 18.
[50] Ibid.
[51] Engle Merry, "Legal Pluralism," 878-879.
[52] Margaret Davies, *Law Unlimited: Materialism, Pluralism, and Legal Theory* (Abingdon: Routledge, 2017), 76.
[53] Ibid.
[54] Here, for instance, Sally Falk Moore's approach in *Law as Process* provides an illustrative example. She introduces the term "reglementation" to refer to the "enforceable and binding rules of all durable,

These debates are particularly relevant for a history of the co-operative movement in England, especially when that history is taken to include the moral economy. In a flattering review of E.P. Thompson's *Customs in Common*,[55] Harry Arthurs specifically praises the significance of this work for broadening conceptions of law. As he writes,

> [w]e modern lawyers are used to thinking of law as something explicit and purposive, emanating from the state, enforced by the state, virtually constitutive of the state. But there is another view of law. Many people who are not modern lawyers –not modern, not lawyers – think of law as something explicit and circumstantial, as a pervasive presence in everyday life. In this view, not only the state, but all communities, all organized and recurring relationships, are understood to generate law and to be defined by law.[56]

Arthurs suggests that through the idea of the moral economy "Thompson gives us...a picture of two very different notions of law – of different provenance, under different auspices – co-existing and clashing, and characterizing and resolving the same human concerns in very different ways."[57] As such, Arthurs concludes that "the 'moral economy' of the crowd—its normative system and the means by which that system achieved practical results – can with considerable justification be called 'law', although it is not the law of the state, and indeed was perceived by state law in a hostile and repressive way."[58] While emphasizing the multiplicity of sites and forms of law, and observing in the moral economy a kind of law that bears little, if any resemblance to state law, Arthurs nonetheless reproduces the presumption of legal centralism by describing the moral economy as a form of "customary right."[59] The very idea of customary law, as many have argued, already

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organized social units" reserving law to refer to those rules that are "potentially enforceable by government" (16-17). Yet even the criteria of "enforceable and binding" and "organized social units," which she refers to as "corporate groups," betrays the influence of a Western conception of law, as will be discussed in more detail below.

[55] E.P. Thompson, *Customs in Common* (Pontypool: The Merlin Press, 2010).

[56] Arthurs, "Review," 289.

[57] Ibid.

[58] Ibid.

[59] Ibid., 290. 'Customary right' in this sense, would be distinguished from the broader tradition of the common law.

presumes a subordinate position in relation to state law.[60] As Falk Moore notes, customary law is always presented in contrast to the law of the state, only emerging in the context of this opposition. Unlike state law, "customary laws were not thought of as having been imposed from above, but rather as having emerged from popular practice."[61] With this, it is presumed that "such law was part of an immemorial traditional order, largely immutable and closely linked to the rest of the cultural 'system'."[62] It then becomes possible to "differentiate with exaggerated sharpness between the customs of such 'early' societies and the statutes of self-conscious modern states."[63]

This reading of customary law, as something distinguished from state law and located in traditional culture, becomes entrenched as co-operatives are regarded as a means of recognition for indigenous and customary forms of society.[64] Particularly in colonial and post-colonial contexts, as Johnston Birchall explains, co-operatives have been seen as "a bridge between traditional and modern societies, and it was felt that contractual co-operation could be grafted on to the traditional forms."[65] Similarly, even without being connected to a traditional or customary form of society, co-operatives have also been seen as a site of "private justice" and a form of normative ordering that is distinct from that of

[60] See for instance Francis G. Snyder, "Colonialism and Legal Form: The Creation of 'Customary Law' in Senegal," *Journal of Legal Pluralism* 19 (1981): 49-90. Peter Fitzpatrick, "Traditionalism and Traditional Law," *Journal of African Law* 28, nos. 1 & 2 (1984): 20-27.
[61] Falk Moore, *Law as Process*, 13.
[62] Ibid.
[63] Ibid., 14.
[64] For a specific example see Peter Fitzpatrick, "A New Law for Cooperatives," *Annals of Public and Co-operative Economy* 46, no. 3 (1975), 278. For a recent and particularly unreconstructed, but nonetheless informative, account of the relationship between co-operation and colonialism, see Rita Rhodes, *Empire and Co-operation: How the British Empire Used Co-operatives in Its Development Strategies 1900-1970* (Edinburgh: John Donald, 2012). See also "Co-operation in the Colonies," A Report from a Special Committee to the Fabian Colonial Bureau (London: George Allen & Unwin Ltd., 1945), 17-25. (is this a book, please check)
[65] Johnston Birchall, *The International Co-operative Movement* (Manchester: Manchester University Press, 1997), 133. Birchall also quotes Margaret Digby who suggests that "the value of co-operation is that it provides for a transition from the primitive to the modern economic and social worlds, which involves no violent disruption, [and] prevents the exploitation of the less advanced by individuals or groups" (ibid., 133).

the state.[66] Like the early sociology of law, within Engle Merry's "new legal pluralism," associational forms such as trade unions and co-operatives offer the possibility of multiple and overlapping forms of law and self-regulation within society.[67] "Co-operatives," as Stuart Henry suggests, "develop their own normative orders, which are partially rooted in their own social forms and, to this extent, tend to be organized along different lines than state law."[68] However, within this approach, there is a tendency to presume the autonomy of the legal form in relation to state law. While in Henry's account, the co-operative may be undermined "from below" by individual actions and decisions that rely on frameworks derived from the state, the form itself retains an unquestioned integrity. This is in spite of its inclusion within (and ultimately, creation by) the state.[69] Here, socio-legal positivism appears not by presupposing the inferiority of the form, as in the case of customary right, but by disregarding the influence of state law.

In these pluralist perspectives on the moral economy and co-operatives, there is a persistent thread of socio-legal positivism that influences not only how the moral economy and co-operatives are respectively conceived, but also the passage between these two forms. In a reading that is ultimately not so unlike that of the Christian Socialists, the customary is regarded as being 'outside' the law and then maintains this exteriority even as it is 'brought within' in the form of the co-operative. This form then retains its integrity in relation to its origin outside the law of the state. In the last chapter, the reading of legal recognition was attributed to a form of instrumentalism and a limited conception of power in which it

[66] Stuart Henry, *Private Justice: Towards Integrated Theorising in the Sociology of Law* (London: Routledge & Kegan Paul plc, 1983), 92-96.
[67] Engle Merry, "Legal Pluralism," 872.
[68] Stuart Henry, "Community Justice, Capitalist Society, and Human Agency: The Dialectics of Collective Law in the Cooperative," *Law and Society Review* 19, no. 2 (1985): 310.
[69] While Stuart Henry's argument is precisely that co-operative and other collective structures will ultimately interact with, and often be undermined, by recourse to state structures, he nonetheless begins from the presumption of their autonomy. Moreover, his argument concerns the way that individual members may look to or rely upon state justice, as opposed to the way in which the organizational form itself already represents a compromise. See "Community Justice," 319-323.

functions only negatively, particularly in relation to the discourse of political economy. I suggested that it is important for the legal recognition of the co-operative not be regarded as simply giving form to a practice that had existed outside of law (thereby assuming the technical neutrality of law), or to assume the appropriation of co-operation as a foregone conclusion. Legal pluralism goes some way toward this, by showing how other legal orders may exist beyond that of the state, such that the encounter between state law and forms that exist within it is not a simple "bringing within" but may also involve opposition and conflict between competing systems.[70] However, as shown above, an enduring socio-legal positivism and influence of legal centralism lead to the reproduction of a similar set of assumptions within legal pluralism. The terms of analysis may implicitly or explicitly presuppose a relationship between state law and other forms of order, while also taking for granted the influence of state law on ostensibly plural structures, both in how they are conceptualised and how they are constituted in practice.

*The Laws of Ordering*

The instrumentalism of 'law and society' and 'sociology of law' is not just incidental, but, as Fitzpatrick argues, an underlying assumption of these approaches, in which "law is often conceived of as the entirely dependent offspring of society."[71] Not only society, but also the state, and by extension groups deemed to be in possession of law, are thought to be discrete, coherent entities, capable of containing and commanding their respective laws, however those forms of law may be conceptualised. Fitzpatrick suggests that this presumption is in part a consequence of the fact that the concept of the social has not received much examination, "especially for a field that often took oppositional identity as

[70] Ludlow and Jones, *Progress*, 96.
[71] Fitzpatrick, "Law and Society," 38. He observes only a "partial relief" from this problem in theories that endow law with a 'relative autonomy'(ibid.).

social--that is, an identity in contraposition to positive, or merely posited, law."[72] However, there is also a more fundamental reason than just lack of attention. As Fitzpatrick explains, "[t]he failure to grasp 'society' is...indicative of the impossibility of society as a self-generating entity."[73] The persistent instrumentalisation of law is in part a consequence of the unexamined presumption of the ontological presence of entities such as the state and society, a presumption that obscures their fundamental impossibility. The state and society participate in "the modern claim to ontological completeness," while at the same time being unable to fully account for themselves.[74]

This impossibility, for Fitzpatrick, is evidenced in part by the contradictory existences of society in modernity. Society is a delimited and determined entity, managed and controlled by forces beyond it. At the same time, it must serve as the source of those very forces, illimitable and always able to "absorb" them.[75] In maintaining these mutually exclusive positions, it occupies the empty place that once belonged to the transcendent figure of God, before the advent of an ostensibly secular modernity. Drawing on Friedrich Nietzsche's aphorisms on the death of God, Fitzpatrick suggests while God may have been killed, "deific substitutes" such as the state and society reproduce the same transcendent metaphysical structure.[76] "State and society" are "two players of the sacred game, two deific substitutes asserting a transcendent competence by absorbing the illimitable into its determinate or determining being—a competence of a markedly monotheistic kind."[77] At the same time, however, the state and society cannot directly or straightforwardly occupy this transcendent position, as the modern "supposedly secular world" demands immanence

[72] Fitzpatrick, "Socio-Legal Studies," 106.
[73] Ibid., 106.
[74] Peter Fitzpatrick, "Marking Time: Temporality and the Imperial Cast of Occidental Law," *Birkbeck Law Review* 1, no. 1: 71.
[75] Fitzpatrick, "Law and Society," 35.
[76] Ibid., 36.
[77] Ibid.

and "cannot explicitly accommodate" them[78] So, this transcendence is achieved not through reference to somewhere beyond the earthly confines of the world, but through negation—specifically what Fitzpatrick refers to as the "negative universal reference."[79] Put simply, society and the state are defined by what they are not, and in this negation take on a transcendent universality. This, in turn, allows society and the state to straddle the divide between limitable and illimitable without immediately betraying their fundamentally "unmodern" transcendence.[80] The negative universal reference is "a reference which does not itself, in itself, take on positive, explicate content but, rather derives its content negatively."[81] It is formed through "the elevation of an absence voiding enquiry."[82] There are many examples of this in modernity and "numerous routes" by which this is accomplished.[83] In relation to society, Fitzpatrick has drawn on Foucault to demonstrate the constitution of society through a specifically racialized negation.[84] How this constitution through negation takes place more specifically in relation to the state will be explored in the next section of the chapter. This section will conclude by considering the implications of the impossibility of state and society for an understanding of law, and drawing out some initial implications for a reading of the moral economy and co-operatives.

In relation to this transcendence and impossibility, law takes on a very different role and meaning than it would if it were entirely dependent on some determined entity.

[78] Fitzpatrick, "Marking Time," 71.
[79] Fitzpatrick, "Law and Society," 36.
[80] Ibid., 36.
[81] Fitzpatrick, "Marking Time," 71.
[82] Fitzpatrick, "Law and Society," 37.
[83] Fitzpatrick, "Marking Time," 71.
[84] Peter Fitzpatrick, "Foucault's other law," in *Re-reading Foucault: On Law, Power and Rights*, ed. Ben Golder (Abingdon: Routledge, 2013). The negative universal reference appears in four stages. First there must be the presupposition of a general unity. Then, within that unity, there is an internal differentiation, for instance between superior and inferior. In relation to the categories of normal and abnormal, for instance, "the abnormal is ascribed a positive content in the negation of which the normal acquires its content" (ibid., 47). However, the universal must also include this antithesis within itself. So, in Fitzpatrick's example, "the utterly excluded are nonetheless bidden to progress" (ibid., 48), while "the bearers of the universal" are always at risk of regressing.

Inverting the usual relationship, Fitzpatrick argues that it is actually "law which renders society possible."[85] Law is "appropriated" by society and "effects the possibility of society in a complex of compensations for its impossibility."[86] This happens broadly in two ways, which reflect two interrelated dimensions of law. Law constitutes society both by providing a form of "enforceable positive determination" for it and also being a form of "pure" transcendence that can take on an "autonomous distinctness" from society and stand apart from it.[87] This inversion suggests that law must be more than what would be narrowly restricted to the category of 'state law' and its derivations within the literature on legal pluralism, while nonetheless still encompassing those same forms of determined law. To this end, Fitzpatrick suggests, turning to Jacques Derrida, that law is much more like sociality itself. For Derrida, there is a "law of originary sociability."[88] This law exists "...prior to all organized *socius*, all *politeia*, all determined 'government', *before* all 'law'."[89] This law, he suggests, may even be "the very essence of law."[90] Similarly, Jean-Luc Nancy would conceive of the inoperative community, discussed in chapter 1, as also being a law. He, too, refers to an "originary or ontological 'sociality' that in its principle extends far beyond the simple theme of man as a social being (the *zoon politikon* is secondary to this community)."[91] This is the "law of community,", or "community as law."[92] Within poststructuralist thought, law is not only the determined law of the state or of a given social

[85] Fitzpatrick, "Socio-Legal Studies," 106. The inversion of the relation is also nicely expressed by Lars D. Eriksson, Ari Hirvonen, Panu Minkkinen and Juha Poyhonen As they suggest, "if manifestation of pluralism are possible in law in general, plurality must somehow be connected to the way in which we understand law itself. Instead of having many 'laws'...perhaps law itself accounts for the plurality of the world." Lars D. Eriksson, Ari Hirvonen, Panu Minkkinen and Juha Poyhonen , "Introduction: A Polytical Manifesto" in *Polycentricity: The Multiple Scenes of Law*, ed. Ari Hirvonen (London: Pluto Press, 1998), 3.
[86] Fitzpatrick, "Law and Society," 38. And Fitzpatrick, "Socio-Legal Studies," 109.
[87] Fitzpatrick, "Law and Society," 41.
[88] Ibid.
[89] Ibid. Emphasis in original.
[90] Ibid.
[91] Nancy, *Inoperative Community*, 28.
[92] Ibid.

formation, but is also conceived of as law "in general," and as the condition of possibility for determined law.[93] Law, as sociality, does not merely accompany association, it is the very fact of sociality and the condition of possibility for determination.

Such a notion goes beyond, but does not contradict, Ehrlich's assertion that there is law wherever there is association. But where for Ehrlich, law was incidental to the association, in this account there is something utterly unavoidable about this law, that it precedes any determined form of association. This law of an originary sociality or law of fraternity, like Ehrlich's social law, also orders: "[t]he law gives nothing; it orders."[94] However, in contrast to Ehrlich, this order is a command. This order is, as Nancy describes, a "categorical imperative" which "constitutes the absolute law of being," by commanding presence.[95] Nancy likens this law to a voice which

> ...*constitutes* the law, to the extent that it orders; and, to that extent, the law *is* the voice. What this voice utters, however, perhaps can no longer be described as the command of an action to be carried out or as the injunction of a provision to be observed. Perhaps this order says, in some strange way, *ecce homo*. It is not a prescriptive, but a constative, as a linguist would say. Nevertheless, here the constative would be heard as a prescription.[96]

This law is the unrelenting command that there be law, that there be order. Both Nancy and Blanchot refer to this law in the idiom of abandonment: this is an "absolute, solemn order, which prescribes nothing but abandonment."[97] Abandonment is "the ultimate form of the communitarian experience," which Blanchot recounts through an anecdote about Bataille.[98]

> If it is true that Georges Bataille had the feeling (especially before the war) of being abandoned by his friends, if, later, during a few months (*Le Petit*), illness forced him to remain aloof, if, in a way, he lives solitude all the more deeply in that he is

[93] Derrida, *Politics of Friendship*, 231.
[94] Jean-Luc Nancy, "Abandoned Being" in *The Birth to Presence*, trans. Brian Holmes (Stanford: Stanford University Press, 1993), 45.
[95] Ibid., 46.
[96] Ibid.
[97] Ibid., 44.
[98] Maurice Blanchot, *The Unavowable Community*, trans. Pierre Joris (Barrytown: Station Hill Press, 1988), 25.

> unable to bear it, he knows all the better that the community is not destined to heal or protect him from it, but that it is the way in which it exposes him to it, not by chance, but as the heart of fraternity; the heart or the law."[99]

This abandonment, as Blanchot suggests, exposes us to community: it is in moments when we are most alone that this sense of abandonment *to* community is most acute.

Crucially, what being is abandoned *to* is precisely ordering, in a sense that is much closer to Ehrlich's use of the term: "[o]ne abandons to a law."[100] Nancy explains that "[t]o *abandon* is to remit, entrust, or turn over to such a sovereign power, and to remit, entrust, or turn over to its *ban*, that is, to its proclaiming, to its convening, and to its sentencing."[101] That is, we always find ourselves within an order; while the order is our abandonment, we are also abandoned *to* an order. "The law of abandonment is the other of the law, which constitutes the law."[102] Law as ordering is something which we can never avoid, it is this condition to which we are abandoned. This idea is echoed by Foucault when he claims in "The Thought from the Outside" that "[a]nyone who attempts to oppose the law in order to found a new order, to organize a second police force, to institute a new state, will only encounter the silent and infinitely accommodating welcome of the law."[103] There is no true

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[99] Ibid., 25-26.
[100] Nancy, "Abandoned Being," 45.
[101] Ibid., 44. Emphasis in original..
[102] Ibid. The more familiar use of abandonment in relation to law comes from Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford: Stanford University Press, 1998), 15-29. Agamben understands sovereignty on the basis of the exception or the ban, and a form of abandonment through which the one abandoned finds itself all the more subject for having been abandoned. "The relation of exception," as Agamben explains borrowing from Nancy, "is a relation of Ban. He who has been banned is not, in fact, simply set outside of the law and made indifferent to it but rather abandoned by it, that is, exposed and threatened on the threshold in which life and law, outside and inside, become indistinguishable" (ibid., 28). The ban, for Agamben, "signif[ies] the exposure through which life is at once excluded from the political community and captured in the realm of sovereign power." Jessica Whyte, *Catastrophe and Redemption: The Political Thought of Giorgio Agamben* (Albany: State University of New York Press, 2013), 29. Within Nancy's thought, abandonment is the constitutive condition of being; and abandonment, while always abandonment to an order, is also freedom. For Nancy, "[f]reedom means that existence is 'abandoned' without being abandoned by anything that would precede it (e.g. God or Being) nor being abandoned to anything other than its own existence." Marie-Eve Morin, *Jean-Luc Nancy* (Malden: Polity Press, 2012), 35.
[103] Michel Foucault, "The Thought from the Outside," in *Foucault/Blanchot*, trans. Jeffrey Mehlman and Brian Massumi (New York: Zone Books, 1987), 38.

'outside' to this law, or an outside to ordering of some kind. The law of abandonment prescribes that we are always abandoned to an order: there is always law.

These are thus, as Fitzpatrick suggests, two distinct dimensions of law which are integrally bound to one another. The first, the law of "originary sociability," or the law of abandonment, makes the other, law as ordering, possible. As Fitzpatrick explains, "[t]here is a continuate coming together inextricably of these two elements in and as legal determination...."[104] In an infinitely reproducible and inherently provisional gesture, these two laws create the possibility of legal determination. And any given "[d]etermination then may seem 'positively' to set what law is."[105] This leads to a pluralism that is not the diffusion of a juridical and positivistic law throughout society, but one that sees a kind of law in all forms of sociality, in all orders. While this may "confound the analysis," as Engle Merry warns,[106] it also potentially enables a more specific analysis of what law is, in its most basic gesture. This approach embraces "the total trivialization of law" that Boaventura de Sousa Santos seeks to avoid in his approach to legal pluralism.[107]

While such determinations are inherently provisional and only ever "for the time being," Fitzpatrick also warns that they can also be "conspicuously enduring."[108] Amongst these, state law, particularly insofar as it shapes what we imagine law to be in the first place, is perhaps the most conspicuous. Legal pluralists, and their critics, for instance Brian Tamanaha, have warned against attributing too much significance to state law. Tamanaha argues in a critique of the very notion of legal centralism that "...it should not be assumed

[104] Fitzpatrick, "Law and Society," 44.
[105] Ibid.
[106] Engle Merry, "Legal Pluralism," 878.
[107] Boaventura de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (London: Routledge, 1995), 429. In spite of his concerns, or perhaps because of them, Santos' conceptions of plural legal orders seem remarkably 'juridical'. His definition of law as "a body of regularized procedures and normative standards, considered justiciable in any given group, which contributes to the creation and prevention of disputes, and to their settlement through an argumentative discourse, coupled with the threat of force" sounds like no more than a description of state law, albeit without any mention of the state (ibid., 428-429).
[108] Fitzpatrick, "Law and Society," 44.

that law is always functional."[109] The role of state law, he points out, "is often relatively marginal."[110] However, Tamanaha overlooks that while state law may not always be effective, it is an underlying and constitutive claim of state law that it should be. As Fitzpatrick suggests, law in its relation to the state, "severs the connection between other authority and any order, natural or sacred, that could compete with it."[111] Instead of presupposing or denying this dominance, it is necessary to interrogate how it is produced and negotiated, whether or not it is entirely successful.

The next section turns to a more specific account of the state as a deific substitute, and how law serves as both a form of "enforceable positive determination" for the state, particularly through processes of legal recognition, while also exceeding it, and undermining its claim to sovereignty.[112] This, in turn, will enable a different approach to the relationship between moral economy, co-operatives and the state. However, some initial implications for the overall argument can be drawn out here. In relation to the moral economy, this more expansive reading of law suggests that it is not necessary to saddle the moral economy with the weight of tradition or custom in order to conceptualise it as a form of law. To this end, Thompson's own reluctance to use the term 'custom' to describe the moral economy is informative. He criticises the idea of seeing these customs and folklore as "survivals," and as inherently subordinate or inferior structures.[113] As he writes, "some 'customs' were of recent invention and were in truth claims to new 'rights'."[114] Instead of being fixed or tied to the past, the discourse of custom "was the rhetoric of legitimation for almost any usage, practice, or demanded right." As such it "was in continual flux" and

[109] Brian Z. Tamanaha, "A Non-Essentialist Version of Legal Pluralism," *Journal of Law and Society* 27, no. 2 (2000): 301
[110] Ibid., 302.
[111] Fitzpatrick, "Socio-Legal Studies," 110.
[112] Fitzpatrick, "Law and Society," 41.
[113] E.P. Thompson, "Introduction: Custom and Culture," in *Customs in Common* (Pontypool: The Merlin Press, 2010), 1.
[114] Ibid.

supported "conflicting claims."[115] For Thompson, when customs are understood as "discrete survivals," a broader sense of custom is lost, as "*sui generis* – as ambiance, *mentalite,* and as a whole vocabulary of discourse, of legitimation and of expectation."[116] Moreover, the fact that this 'law' of the moral economy traversed popular and institutional contexts also suggests a more complex relationship with state authority than is conveyed by the notion of custom.

Turning to the co-operative, if the state appropriates law in order to compensate for its impossibility, then mechanisms such as legal recognition, as a form of "enforceable positive determination," might be seen to serve a constitutive function for the state.[117] That is, acts of legal recognition, such as the Industrial and Provident Societies Act 1852, are not so much a "bringing within," as the Christian Socialists imagined, but a means by which the state manifests itself in the first place.[118] As Fitzpatrick argues, "...in the constitution and maintenance of its identity, state law stands in opposition to and in asserted domination over social forms that support it."[119] Co-operatives may, as Henry suggests, have "their own normative order," but this appearance of opposition obscures the fact that it has already been circumscribed by state law through the very form of the co-operative itself. They are not just "permeated by influences of the larger system" and undermined by the pervasive influence of the broader society, but they are constituted within it.[120]

[115] Ibid., 4.
[116] Ibid., 2.
[117] Fitzpatrick, "Law and Society," 41.
[118] Ludlow and Jones, *Progress*, 96.
[119] Peter Fitzpatrick, "Law and Societies," *Osgoode Hall Law Journal* 22, no. 1 (1984), 116.
[120] Henry, "Community Justice," 323. To this end, Henry distinguishes between organisations such as employees' associations and self-help groups, and co-operatives, which are taken to be more socialistic. He suggests that co-operatives and communes are more marginal and outside the capitalist system and are therefore relatively ineffectual in their influence on the capitalist system (which Henry argues is altered gradually by its inclusion of alternative forms). Yet co-operatives are already very much a part of the system; their ethos, whether more or less socialistic, does not dramatically affect their form in a legal sense.

*The State as Deific Substitute*

In the foregoing section, society and the state were described as "deific substitutes."[121] In the transition to an ostensibly secular modernity, the transcendent metaphysical structure of medieval political theology was not lost, but rather maintained through the construction of a "pantheon" of "new idols."[122] These new idols, unable to constitute themselves with direct reference to a transcendent beyond, internalized that transcendence, becoming at once determinate and illimitable, and, in Fitzpatrick's terms, decidedly impossible. In relation to the state, this modern theological inheritance appears most overtly in the figure of Hobbes' Leviathan, who was no less than a "*Mortal God.*"[123] As "the originator of modern sovereignty" Hobbes provides an opportunity to examine the intimate constitution of the modern state, at a key historical moment when state authority is at least notionally divorced from reliance on anything greater than itself.[124] This section will offer a close reading of the *Leviathan*, particularly focused on the status of associations in the commonwealth, in order to demonstrate both how legal recognition serves as a means of "enforceable positive determination" through which the state is constituted, and how this same relation betrays the impossibility of the state and sovereignty.[125]

The *Leviathan* was written in the midst of the English Civil War, when King and Parliament fought for control of the country. While Hobbes was sympathetic to the monarchy, he also recognised the significance of the threat of popular sovereignty. He "sought the means of order" in the context of revolution.[126] He did this by navigating a

[121] Fitzpatrick, "Law and Society," 36.
[122] Fitzpatrick, "What are the Gods," 162.
[123] Hobbes, *Leviathan*, 114. Emphasis in original.
[124] Fitzpatrick, *What are the Gods*, 168.
[125] Fitzpatrick, "Law and Society," 41.
[126] Harold Laski, "The Pluralistic State," in *The Pluralist Theory of the State*, 186. In practice, this meant that Hobbes did not have many friends. This required him to critique the idea of the divine right of kings, the traditional justification of absolute monarchy, which made him a heretic. He was also accused of being an atheist. Skinner explains that Hobbes was not immediately influential; it wasn't until about fifty years after he wrote that his ideas became entrenched in state's self-understanding. "By the mid-eighteenth century, the idea of the sovereign state as a distinct *persona ficta* was firmly entrenched in English as well as

careful path between the competing theories of popular sovereignty and absolute monarchy, creating a synthesis between the two by constructing the state as an artificial person. Many, including Hobbes himself, regard this as a decisive break from medieval theories of the state, even if he constructed his ideas from a range of tools that were already at his disposal.[127] While the concept of artificial personality had been applied to corporations (*universitas*) since at least the thirteenth century, Hobbes was the first to apply it to the state.[128] As Hobbes writes, "...a corporation being declared to be one person in law, yet the same hath not been taken notice of in the body of a commonwealth or city, nor have any of those innumerable writers of politics, observed any such union."[129] The significance of this, and how Hobbes' *Leviathan* is more than just theological inheritance, is best appreciated in the context of the theories that preceded it, and particularly the relationship between theological conceptions of the church and the early secular state. The seminal work of Ernst Kantorowicz in *The King's Two Bodies* provides a useful overview.[130]

Throughout much of the early history of the state, it was not thought of as an artificial person, but as a whole composed of parts, or a head and body. This model of personality was derived more or less directly from the medieval church and a secularised idea of the *corpus mysticum*, or the mystical body of Christ.[131] Within the church, the term *corpus mysticum* originally referred to the Eucharist, but it gradually came to have a

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Continental theories of public and international law." Quentin Skinner, "A Genealogy of the Modern State," *Proceedings of the British Academy* 162 (2009): 354.

[127] See, for instance, Quentin Skinner, "Hobbes and the Purely Artificial Person of the State," *Journal of Political Philosophy* 7, no. 1 (1999): 2.

[128] Patricia Springborg questions whether Hobbes' contribution is really so novel, considering that the state had been attributed with different forms of corporate personality prior to Hobbes. She argues that Hobbes' true innovation was to make the creation of this unity in the state dependent on representation by the sovereign; the *universitas* of Roman law could exist without any such representation. Patricia Springborg, "*Leviathan*: The Christian Commonwealth Incorporated," *Political Studies* 24, no.2 (1976): 171.

[129] Ibid., 171.

[130] Ernst H. Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton: Princeton University Press, 1957).

[131] Ibid., 194. As Kantorowicz explains, "...the hierarchical apparatus of the Roman Church tended to become the perfect prototype of an absolute and rational monarchy on a mystical basis, while at the same time the State showed increasingly a tendency to become a quasi-Church or a mystical corporation on a rational basis" (ibid.).

"sociological" meaning that could be applied to the earthly collectivity of the church itself.[132] As Kantorowicz explains, "[t]he individual body natural of Christ was understood as an organism acquiring social and corporational functions: it served with head and limbs, as the prototype and individuation of a super-individual collective, the Church as *corpus mysticum.*"[133] In effect, the unity of the church was derived from the unity of Christ in heaven. Over time, the Church gradually "became a mystical body in its own right" through the further adaptation of the term to *corpus Ecclesiae mysticum.*"[134] This, for Kantorowicz, was a pivotal moment of secularization, when the idea of the church becomes "almost juristic."[135] The *corpus mysticum* allowed the Church to retain a distinct connection to the mystical and the liturgical, while also designating the Church as a body politic, "on a level with the secular bodies politic which were then beginning to assert themselves as self-sufficient entities."[136] The *corpus mysticum* eventually lost its mystical overtones, becoming more or less equivalent to the idea of a body politic. Once secularized in this manner, the idea was easily transferred to the secular state. The concept, as Kantorowicz explains, "fell prey to the world of thought of statesmen, jurists, and scholars who were developing new ideologies for the nascent territorial and secular states."[137] In the use of the term *corpus republicae mysticum* "...the jurist transferred to the Prince and the state the most social, organic, and corporational elements normally serving to explain the relations between Christ and the Church."[138]

However, the organological model, while providing a kind of structural unity for the state, did not transfer seamlessly from the theological to the secular context. The

[132] Ibid., 196.
[133] Ibid., 201.
[134] Ibid.
[135] Ibid.
[136] Ibid., 206.
[137] Ibid., 207.
[138] Ibid., 218.

organological model worked on a largely *ad hoc* basis and did not guarantee the immortality which has come to be associated with corporations. This had not been a problem for the church, because Christ himself was immortal. As Kantorowicz explains, "[t]he head of the mystical body of the Church was eternal, since Christ was both God and man. His own eternity, therefore, bestowed upon his mystical body likewise the value of eternity or rather timelessness. Contrariwise, the king as the head of the body politic was a common mortal."[139] This was resolved, in part, by the turn to a fictional or artificial person, which had long been applied to collectivities that were subordinate within the church. This artificial person came to be endowed by the scholastics with a form of immortality derived from a secular appropriation of angelic time. For the scholastics, angels occupied their own temporal sphere between God and man. God's time was eternal and could not be periodized, while the time of man was finite. Like man, angels were created by God, and thus had a definite beginning, but they were also eternal and did not die. With these characteristics, Kantorowicz asserts that there is a clear connection to the fictitious person of the jurists: "[l]ittle wonder then that finally the personified collectivities of the jurists, which were juristically immortal species, displayed all the features otherwise attributed to angels; for the legal 'fictitious persons' were, in fact, pure actualizations and thus appeared like the next of kin of the angelic fictions."[140] However, to the extent that these concepts and particularly the idea of *universitas* came to be applied to the body politic, the head and the body remained separate, if interdependent entities.

Thus, notwithstanding the growing influence of the theory of fictitious personality, the organological metaphor persisted into the sixteenth century.[141] As Kantorowicz explains, "[a]ll by itself, however, the corporational doctrine, so long as it was primarily organologic,

[139] Ibid., 271.
[140] Kantorowicz, *King's Two Bodies,* 282.
[141] Ibid., 225.

did not necessarily result in that complete identification of the limbs with the head, nor did it actually in mediaeval England."[142] The two "depended mutually on each other" and either the head or body might claim supremacy.[143] In practice, this was articulated as a division between the monarch or ruler, on the one hand, and the people, on the other. As Gierke explains, "[b]etween them there is a conflict as to which has the higher and completer right; but they are thought of as two distinct Subjects each with rights of a contractual kind valid against the other and with duties of a contractual kind owed to the other; and in their connexion consists the Body Politic."[144] These theories eventually culminate in the Tudor doctrine of the king's two bodies, in which the King was regarded as having both a natural body and a mystical or political body. The people, in this configuration, "possessed a separate personality."[145] This personality was often conceived of as *corporate*, but in a flexible way tended more toward a notion of partnership rather than corporate unity. As Gierke explains, while "they borrowed from the theory of the Corporation, they borrowed only those principles which fitted into this tendency."[146]

This configuration structured the conflict between popular sovereignty and absolute monarchy in the English civil war, as Parliament, armed with the seal of the King's body politic, could resist the King's natural body. It is precisely this "absurdity of the underlying fiction of the continuous presence of the king in Parliament" that Hobbes decries.[147] Hobbes thus "launches a scathing attack on the belief that sovereign power must originally have been possessed by the body of the people."[148] For Hobbes, there is no justification for

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[142] Ibid., 230.
[143] Ibid., 231.
[144] Otto von Gierke, *Political Theories of the Middle Age*, trans. Frederic William Maitland (Cambridge: Cambridge University Press, 1922), 70-71.
[145] Otto von Gierke, *Natural Law and the Theory of Society, 1500 to 1800*, trans. Ernest Barker (Cambridge: Cambridge University Press, 1934), 44.
[146] Ibid., 45.
[147] Mónica Brito Vieira, *The Elements of Representation in Hobbes: Aesthetics, Theatre, Law and Theology in the Construction of Hobbes's Theory of the State* (Leiden: Brill, 2009), 137.
[148] Skinner, "Genealogy," 342.

the argument that the sovereignty of the monarch would be less than that of the "body of the people" because there is no such thing as the body of the people prior to sovereignty—the people come into being as a unified collectivity in and through the sovereign, and not before.[149] While never completely abandoning the metaphor of the organic body, Hobbes transfers the notion of artificial personality to the state, which emerges as a coherent entity only through a process of representation. The head and the body are no longer of independent origin, rather the commonwealth emerges by virtue of its representation by the sovereign.

The basic structure of the constitution of the commonwealth in the *Leviathan* is well known. Hobbes begins from a state of nature in which each man is at war with every other, even if this only amounts to a lack of assurance of peace.[150] In this state of nature, "the life of man" is "solitary, poor, nasty, brutish, and short."[151] Men can only make agreements through contracts that ultimately have very limited binding force (only that which one person could enforce against another). These covenants are easily made and just as easily broken. To create a more enduring order, as men will be predisposed to do by virtue of their reason and desire, they must create a "common power, to keep them in awe, and to direct their actions to the common benefit."[152] The only way to create such a power is for men to

> ...confer all of their power and strength upon one man, or upon one assembly of men, that may reduce all their wills, by plurality of voices, unto one will: which is as much to say, to appoint one man, or assembly of men, to bear their person [...]. This is more than consent, or concord, it is a real unity of them all, in one and the same person, make by covenant of every man with every man....[153]

[149] Ibid., 342.
[150] Hobbes, *Leviathan*, 84.
[151] Ibid.
[152] Ibid., 113-114.
[153] Ibid., 114.

The person created in this union of the multitude is the commonwealth or *Civitas*. It is no less than a "*Mortal God,*" to which man is closely bound.[154] All authority within the commonwealth derives from the sovereign; thus, once the commonwealth has been instituted no one can "lawfully make a new covenant, amongst themselves, to be obedient to any other, in anything whatsoever, without his permission."[155] In this remarkably simple gesture, Hobbes accomplishes what no theorist before him had done: he "dealt a death-blow to the idea that the People possessed a separate personality," by creating a single "State personality."[156]

This single personality also becomes, in Fitzpatrick's terms, a "deific substitute."[157] While even the earliest conceptions of the state were fundamentally theological, the commonwealth is more than just another form of theological inheritance. In particular, Hobbes managed to wrest the sovereign from any immediate dependence on a transcendent god while at the same time vesting it with god-like power. As Fitzpatrick observes, "[h]is sovereign Leviathan is both the worldly creation of freely covenanting 'men' and a manifestation of God's tremendous power...."[158] "Hobbes," as Fitzpatrick explains, "sets the domain of this mortal god distinctly and self-sufficiently apart from the religious, with the ostensible exception of the laws of nature...."[159] While Hobbes does not do away with God entirely, he argues that we exist "in an in-between time (between the two kingdoms of God)."[160] In this context, the sovereign becomes the "only alternative social chaos and collapse."[161]

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[154] Ibid., 114. Emphasis in original..
[155] Ibid., 115.
[156] Gierke, *Natural Law*, 44.
[157] Fitzpatrick, "What are the Gods," 172.
[158] Ibid., 168.
[159] Fitzpatrick, "Leveraging the Leviathan," 13.
[160] Martel, *Subverting*, 110. It is for this reason that for Hobbes the earthly manifestations of religion, the church—must be thoroughly subordinate to the sovereign, who is the only true representative of god – hence Hobbes' support of the Anglican church
[161] Ibid., 112.

Without any immediate reliance on a transcendent god, the Leviathan must be able to account entirely for itself. As Fitzpatrick explains,

> [l]ike any competent monotheistic deity, this god would have marvellously to combine being determinate with an illimitable efficacy. Unlike the '*Immortal God*', however, the sovereign Leviathan has to do this without recourse to a transcendent reference fusing these contrary dimensions of its being.[162]

However, this is precisely what Hobbes is unable to do: "Hobbes offers no resolvable way in which the being-in-the-world of this mortal God could be comprehended."[163] There is a "threshold, and classic, problem" in Hobbes account of the Leviathan, that will be explored in more detail below, in which it is impossible for Hobbes to account for the binding force of the original covenant that creates the sovereign, in the absence of any prior civil authority.[164] Moreover, on closer examination, the Leviathan appears not to be as totalizing as its initial description, and many interpretations, would suggest. As Fitzpatrick points out, the Leviathan is equally bound by the civil laws which are "fastened at one end, to the lips of that man, or assembly, to whom they have given the sovereign power; and at the other end to their own ears" as well as by the laws of nature.[165] Not only that, but subjects retain certain rights against the sovereign that are not derived from him—in particular, the right not to incriminate or punish oneself. As Fitzpatrick explains, "[w]ith this accounting for the sovereign condition an irresolution seems to remain between the condition in which Hobbes leaves the subjects of Leviathan and the comprehensiveness of the commitment that Hobbes ascribes to them."[166] Not only is the sovereign not such a totalising figure, it is also not clear that Hobbes ever intended for it to be understood as one. As Martel suggests, the sovereign in Hobbes is an idolatrous figure, "something that purports to stand in for

[162] Fitzpatrick, "Leveraging the Leviathan," 13.
[163] Ibid., 14.
[164] Ibid., 15.
[165] Hobbes, *Leviathan*, 141.
[166] Fitzpatrick, "Leveraging Leviathan," 17.

but actually supplants what it represents."[167] It is a "separated essence" and an ultimately arbitrary form of authority.[168] The *Leviathan* is not meant to be read "too literally" or taken to have "an actual meaning instead of a rhetorical one."[169] The *Leviathan* may be an idolatrous figure and ultimately an arbitrary form of authority for Hobbes,; nonetheless, it goes on, as Fitzpatrick suggests, to create "sovereign affect."[170] One of the key ways in which this is done is through the subordination of other associations to its authority. While all associational life within the commonwealth is nominally subordinate to the sovereign, the precise manner in which the state relates to other associations reveals some of the limits of this sovereignty, particularly in the early modern period, and the insurmountable gap between the rhetorical production of sovereignty and its material manifestation. The commonwealth is produced through law—in particular, through a precarious combination of determination and a sociality that exceeds and undermines it.

*Levelling the Leviathan*

Gierke reads Hobbes intervention as a decisive break from medieval conceptions of political life. He laments the end of the organological model and, with it, what he regards as the inherent pluralism of medieval configurations of power. The organological model had allowed groups, at least to some extent, to create their own 'personality' independent of any sovereign authority. Even though "smaller communities contained in the State were never allowed to appear as having a birthright in Natural Law," it was at least believed that the state had been formed "through an ascending series of other associations."[171] Moreover, there was no sense that the creation of a government entailed the "surrender of every

[167] Martel, *Subverting the Leviathan*, 16.
[168] Ibid., 121.
[169] Ibid., 22.
[170] Fitzpatrick, "Leveraging Leviathan," 14.
[171] Gierke, *Natural Law*, 63.

political right," as it appears to for Hobbes.[172] In Hobbes theory, there is no possibility of group life outside of the state. As Gierke laments, on the basis of a single state personality,

> ...it became impossible to regard any intermediate groups, of any description, as natural 'group-steps' standing between the Individual and the State [...]. They could only come into existence with the State, after it had been created.[173]

To this end, Hobbes has been regarded, particularly by the English pluralists, as "the prince of monist thinkers."[174] There is certainly some basis for this reading in the *Leviathan*; however, as I will demonstrate below, the moment when Hobbes' circumscription of associations within the commonwealth seems most acute is the same moment that exposes the impossibility of sovereignty.

While Hobbes does not ultimately devote much attention to the status of associations within the commonwealth, he does make clear that any such associations must be subordinate to the sovereign. In Chapter XXII, Hobbes offers a careful delineation of "systems subject" within the commonwealth, with systems defined as "any numbers of men joined together in one interest, or one business."[175] The permitted associations are first categorized as 'regular' and 'irregular'. The regular are those in which "one man, or assembly of men, is constituted representative of the whole number."[176] Amongst these, only commonwealths are "absolute and independent."[177] The regular are then further divided between the political and the private. Bodies politic are directly authorized by the sovereign—predominantly, chartered corporations. Private may be lawful or unlawful. The lawful are "those that are constituted without letters, or other written authority, saving the

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[172] Ibid., 44.
[173] Ibid., 164. Frederic William Maitland, who was deeply influenced by Gierke, similarly argues that "[t]he federalistic structure of medieval society is threatened. No longer can we see the body politic as *communitas communitatum*, a system of groups, each of which in its turn is a system of groups. All that stands between the State and the individual has but a derivative and precarious existence." Frederic William Maitland, "Moral and Legal Personality," in *The Collected Papers of Frederic William Maitland, Volume III*, ed. H.A.L Fisher (Cambridge: Cambridge University Press, 1911), 310.
[174] Harold J. Laski, *Studies in the Problem of Sovereignty* (New Haven: Yale University Press, 1917), 25.
[175] Hobbes, *Leviathan,* 148.
[176] Ibid.
[177] Ibid. Emphasis in original.

laws common to all other subjects."[178] However, the only example Hobbes provides of such a system is the family, which, like the body politic, is modelled after the commonwealth. Private, but unlawful, regular systems

> are those that unite themselves into one person representative, without any public authority at all, such as are the corporations of beggars, thieves and gipsies, the better to order their trade of begging and stealing, and the corporations of men, that by authority from any foreign person, unity themselves in another's dominion, for the easier propagation of doctrines, and for making a party, against the power of the commonwealth.[179]

Amongst private and irregular systems (leagues and crowds) some may exist so long as they are not explicitly forbidden, while others are unlawful if their purpose is 'evil', or potentially even if their purpose is unknown.[180]

There is thus no unaccounted for associational life within the commonwealth: if an association is to function lawfully within the commonwealth, it must have the consent of the sovereign, whether that consent takes the form of an express authorization, or it is merely tacit. However, as Gierke also observes, the fact that Hobbes does not allow associations to form without the consent of the sovereign does not mean that they are prevented from existing as such. In particular, Gierke suggests that it is clear that bodies politic do not lack the *capacity* to create their own personality; it is only the *authority* to do so that they do not have.[181] If they did not have this capacity, the "corporations of beggars, thieves and gipsies" which form "without any public authority at all" could never pose a threat to the state.[182] Even bodies politic that have been created by the direct authorization of the sovereign must also have this capacity, as they can come to threaten the state, should they grow too numerous. Hobbes catalogues among "the infirmit[ies] of a commonwealth...the great

[178] Ibid., 156.
[179] Ibid.
[180] Ibid., 149.
[181] Gierke, *Natural Law*, 81.
[182] Hobbes, *Leviathan*, 156.

number of corporations, which are as it were many lesser commonwealths in the bowels of a greater, like worms in the entrails of a natural man."[183] As David Runciman argues,

> [b]y allowing that illegal associations do exist, even if their existence is to be curtailed wherever possible, Hobbes seems to accept that subjects can replicate the conditions of group personality without invoking the mechanism of legal recognition. Moreover, his later identification of corporations as the 'wormes' of state presupposes just this possibility—after all, were all corporate activity strictly controlled by the terms of association drawn up by the sovereign, no corporation could ever constitute a threat to the state.[184]

Hobbes' claim is thus far narrower than it may first appear. The "life" of these associations, even though they are subordinate to the authority of the state, "is not a derivative life, which proceeds exclusively from the State."[185]

The fact that associations can create their own personality independently of the sovereign reveals not only the limitations of sovereign authority, but it also exposes a tension in the constitution of the commonwealth itself. This is the "threshold, and classic, problem," alluded to earlier, and it concerns how the commonwealth arises in the absence of civil law.[186] The unity of the commonwealth, as discussed above, is a derivative unity—it is a consequence of the unity of the sovereign representative. This distinct representational relationship is the central mechanism by which the commonwealth is created.[187] As Hobbes writes, the multitude

> are made *one* person, when they are by one man, or one person, represented; so that it be done with the consent of every one of that multitude in particular. For it is the *unity* of the representer, not the *unity* of the represented, that maketh the person *one.*[188]

[183] Ibid., 221.
[184] Runciman, *Pluralism and the Personality of the State*,, 30-31.
[185] Gierke, *Natural Law*, 80.
[186] Fitzpatrick, "Leveraging Leviathan," 15.
[187] According to Springborg, this maneuver is Hobbes precise contribution as the *universitas* did not need a representative (even as it relied on religious authority for its 'personality'). "Christian Commonwealth," 176.
[188] Ibid., 109. Emphasis in original.

And further we find that "the commonwealth is no person, nor has the capacity to do anything, but by the representative."[189] It is absolutely crucial for Hobbes that there can be no prior unity in the multitude before its representation by the sovereign, otherwise there would be no need for the sovereign at all, thereby precluding the entire argument.

This account of the creation of the commonwealth accords with Hobbes' broader theory of personation and representation, albeit with one crucial deviation. The theory, which comes at the very end of the first part of the *Leviathan*, concerning 'Man' and provides the fundamental link between the state of nature and the commonwealth, offers an account of the nature of persons and how they may be represented.[190] A person, for Hobbes, is defined as he "*whose words or actions are considered, either as his own, or as representing the words or actions of another man, or of any other thing to whom they are attributed, whether truly or by fiction.*"[191] This broad definition effectively counts as a person anything that is capable of being represented.[192] There are, as Hobbes writes, "few things, that are incapable of being represented by fiction."[193] And, as Skinner clarifies, Hobbes does not provide any ready examples of what could not be so represented. Thus, an inanimate object may be a person, as well as a multitude. Persons may be either natural—when their words or actions are their own—or, artificial—when they are not capable of immediately speaking for themselves.[194]

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[189] Ibid., 176.
[190] Runciman, *Pluralism*, 11.
[191] Hobbes, *Leviathan*, 106. Original emphasis.
[192] Skinner
[193] Hobbes, *Leviathan*, 108.
[194] These distinctions have been the subject of careful debate, most notably by Hanna Pitken, Patricia Springborg, David Runciman and Quentin Skinner. The reading of the text itself provided here largely coincides with that provided by Skinner's who attempts most directly to deal with the ambiguities in Hobbes formulation, often referring to Hobbes' translation of *Leviathan* into Latin. However, as I argue below, this greater clarity about what Hobbes intended to say does not ultimately resolve the ambiguities. Se Pitkin, *The Concept of Representation* (Berkeley: University of California Press, 1967), 14-37; Skinner, "Purely Artificial Person," 1-29; and "Hobbes on Persons, Authors and Representatives," in ed. Patricia Springborg, *The Cambridge Companion to Hobbes' Leviathan* (Cambridge: Cambridge University Press, 2007), 157–180; David Runciman,"Debate: What Kind of Person is Hobbes's State? A Reply to Skinner," *The Journal of Political Philosophy* 8, no. 2 (2000): 268-278; Springborg, "Christian Commonwealth," 171-183.

The relationship between persons and their representatives is described as one of authority and attribution. The person representing the inanimate object is an 'actor' and the one who owns the words and actions is the 'author' — thus "the actor acteth by authority."[195] Natural persons are capable of authorizing their own representatives. Artificial (or fictional) persons are not. While they may be personated, this authority must come from elsewhere. As Hobbes explains, "things inanimate, cannot be authors, nor therefore give authority to their actors: yet the actors may have authority to procure their maintenance, given them by those that are owners, or governors of those things."[196] It follows that this kind of personation can only happen when there are already civil laws that create a recognised system of ownership.[197] The laws supply the content of the personality that is created when the owner authorizes a representative to personate the object. In the case of a bridge, presuming that civil society has already been established, the bridge may have an owner—or someone with dominion over it—and that owner may authorise an artificial person to represent it. However, in so doing, a fictitious person is also created in the bridge. As Runciman explains, "because the act of personation is predicated on the personality of whatever is to be personated, this is not possible unless the bridge itself is concerned as a person. So it has become a person by fiction, assuming the guise of an author but represented by an actor whose authority is derived from elsewhere."[198] Skinner offers a slightly different interpretation and suggests that the relationship between the object personated and the actor is not one of fiction, although the person so created is artificial: assuming the act of authorisation is valid, then the words and actions of the actor must

[195] Hobbes, *Leviathan*, 107.
[196] Ibid., 108.
[197] Ibid.
[198] Runciman, *Pluralism*, 8.

"'truly' be attributed to them."[199] This would seem to hold even if such persons are not actually capable of taking responsibility for these actions.

The reason Skinner labours this distinction is because it is potentially consequential for Hobbes' account of how the commonwealth emerges from the multitude. Hobbes includes multitudes alongside bridges, children and madmen as something that is capable of being personated, but not capable of authorising its own personation. There is no prior unity, as noted above, that could be said to author the representation. Once the commonwealth has been established, this is not a problem—the bodies politic that exist within the commonwealth receive their authorisation directly from the sovereign. [200] But for the commonwealth itself, there is no such law, as it emerges directly from the state of nature. There is no 'owner' of the multitude that could grant this authority. Instead, this authority arises from the consent of each natural person who participates in it.

> And because the multitude naturally is not *one*, but *many*; they cannot be understood for one; but many authors, of every thing their representative saith, or doth in their name; every man giving their common representer, authority from himself in particular....[201]

They are in turn "made one person" through their representation by the sovereign.[202] The commonwealth is thus a unique case in which individuals who are otherwise a multitude may collectively, through their individual acts of authorisation, make one artificial person their representative.

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[199] Skinner, "Purely Artificial," 15.
[200] Daniel Lee, "Hobbes and the civil law: the use of Roman law in Hobbes's civil science" in eds. David Dyzenhaus and Thomas Poole, *Hobbes and the Law* (Cambridge: Cambridge University Press, 2012), 210-235. Hobbes, in his theory of representation and personation, draws heavily on elements of Roman private law. Lee claims that "despite Hobbes disavowal of Roman 'civil law' in his general philosophy of law, Roman law nevertheless functioned as a rich fund of concepts in framing aspects of his civil science" (212). This reliance on Roman law becomes important, particularly in light of trajectories on political theory drawn by Otto von Gierke, for whom the reception of Roman law in late medieval Europe signals the closure of possibilities for political community based on a conception of fellowship.
[201] Hobbes, *Leviathan*, 109.
[202] Ibid.

Notwithstanding Hobbes' explanation, there is a persistent ambiguity in the movement from multitude to unity in the absence of civil laws. As Runciman explains, "for though the sovereign is authorised by the multitude, he does not bear a multitude of persons but only one, a person distinct from his own and also from those of his many natural authors."[203] Precisely how many individuals can authorise one person as their representative remains obscure. The only answer for Runciman is that the commonwealth must be self-authorising: the act of representation itself, by the sovereign, is "sufficient to create of that group the supposition or presence of its own personality."[204] There is no other way to account for the moral personality of the commonwealth than that "it must arise out of the understanding that groups come to have of themselves."[205] This further reinforces the point that associations must be able to exist outside of the commonwealth, while also demonstrating that there is no inherent difference between the state and other associations. As Gierke suggests, "there is no intrinsic difference between the personality of the State and that of other groups except such that arises from the subjection of the latter to the power of the former."[206] On this account, the state is constituted *through* the regulation of other associations. The dominance that it has is not the result of any essential characteristic—it has dominance because it has asserted that dominance.[207] In this sense, the legal recognition of bodies politic by the sovereign acts as a form of "enforceable positive determination" for the state—it is an "appropriation" of law through which the state manifests itself.[208] It is also an act of negation through which the state constitutes itself, but

[203] Runciman, *Pluralism*, 13.
[204] Ibid., 11.
[205] Ibid., 32.
[206] Gierke, *Natural Law*, 82.
[207] As Runciman asserts elsewhere, "The state is authoritative for having authoritative representatives." David Runciman, "The concept of the state: the sovereignty of a fiction," in eds. Quentin Skinner and Bo Strath, *States and Citizens: Theory, History, Prospects* (Cambridge: Cambridge University Press, 2003), 35.
[208] Fitzpatrick, "Law and Society," 41, 38.

without needing to supply any positive content for itself: it is only that which is "absolute and independent," which in this context only means that it is not subordinate.[209]

Outside of such configurations of sovereignty, man is not isolated, but rather deeply embedded in relations of sociality. "[O]ne can find in Hobbes," as Fitzpatrick suggests, "forces formative of a people that connect generatively to, and qualify, the power of the sovereign Leviathan."[210] The capacity that associations have to form without the authorisation of the sovereign, according to Gierke, flows from a "natural power of association."[211] Their "*existence*," Gierke stresses, "proceed[s] from a force which is inherent in its members." [212] This force, or "sap of vitality," as Gierke refers to it, cannot be effaced by "positive law," as without it the state itself could not exist. [213] Like Derrida's "law of originary sociability," or Nancy's "law of community," this sociality both makes the state possible, while also undermining its claim to sovereignty.[214] Thus the Leviathan can be seen as constituting itself by drawing together the two dimensions of law described earlier: a determinate and subordinate law through which it recognises and regulates other associations, and thereby differentiates itself from them, but also an indeterminate law of sociality or sociability that makes this possible in the first place. The intersection of the two accounts for its now clearly tenuous, but "conspicuously enduring" existence.[215]

However, it is not simply through an act of self-authorisation that the sovereign is constituted. This would require a prior 'self' to issue the authorisation. As we have seen, for Hobbes there is no prior unity in the multitude that could authorise the sovereign in this way, nor is there a sovereign at all before the act of representation. This persistent

[209] Hobbes, *Leviathan,* 148.
[210] Fitzpatrick, "Leveraging Leviathan," 14-15.
[211] Gierke, *Natural Law*, 80.
[212] Ibid., 80-81.
[213] Ibid., 169.
[214] Derrida, *Politics of Friendship*, 231; Nancy, *Inoperative Community*, 28.
[215] Fitzpatrick, "Law and Society," 44.

ambiguity has led some scholars, with considerable justification, to argue that the method of representation that creates the sovereign is not "a controlled, economic exchange between author and actor" but rather one that derives from a kind of "theatrical force."[216] While Hobbes does not directly attribute the creation of the commonwealth to this theatrical force, his use of the concept *persona*, as well as his own account of theatre, demonstrate the link. In his introduction of the concept of the person, he draws on its Latin and Greek roots, and specifically its dual use in theatrical and juridical contexts.

> The word person is Latin: instead, whereof the Greeks have πρόσωπον [*prosopon*] which signifies the *face*, as *persona*, in Latin signifies the *disguise*, or *outward appearance*, of a man., counterfeited on the stage; and sometimes more particularly that part of it, which disguiseth the face, as a mask or vizard [visor]: and from the stage, hath been translated to any representer of speech and action, as well in tribunals, as theatres. So that a *person* is the same that an *actor* is, both on the stage and in common conversation; and to *personate*, is to *act*, or *represent* himself, or another....[217]

The theatrical connotations of *persona* suggest that the person, whether natural or artificial, is always a kind of performance. "The insight he evidently wished to capture" as Skinner explains, "is that there is a sense in which all the world is a stage."[218] And, as in the theatre, it is a "single performative gesture" by which the artificial person of the sovereign "leaps out of the state of nature."[219] The "virtue," as Pye argues, of using the theatrical metaphor "is that it allows Hobbes to transfer agency."[220] The representational relationship between sovereign and subject is not simply one in which the sovereign is bound to represent the interests of the subject as the author of its actions, but one which also gives the sovereign "the right to act."[221] However, in so doing, the individual who authorises the sovereign, by

[216] Christopher Pye, "The Sovereign, the Theatre, and the Kingdome of Darknesse: Hobbes and the Spectacle of Power," *Representations* 8 (1984): 93.
[217] Hobbes, *Leviathan*, 106-107. Emphasis in original..
[218] Skinner, "Purely Artificial Person," 12.
[219] Turner, *Corporate Commonwealth,* 221.
[220] Pye, "The Sovereign," 91.
[221] Ibid..

making him an actor, "also makes himself subject to the actor's words and actions."[222] The subject is bound to the sovereign after the initial performance of authorisation through a "coincidence of identity."[223] For Skinner, the category of the actor on the stage is ultimately a narrow one that is not to be taken as analogous to that of the state. In the instance of the stage actor, Skinner explains, the actor is both a purely artificial person and their words and actions are attributed to the character they represent by fiction.[224] While their actions will be attributed to the character, this attribution is fictional. There is no question for Skinner of where the authority for the actor's personation comes from: it comes from the state, through the compulsory licensing of theatres that would have been common when Hobbes wrote. Yet what Skinner seems to overlook is that the more important authority comes from the audience, who must believe the performance, or least suspend their disbelief.[225] As Runciman argues, "[t]he state can be a person, but only if its members are already prepared to believe in the personality of the state."[226] Crucially for Hobbes, it is only "*as if* every man should say to every man" that they give up their authority to that of the sovereign, suggesting that there is a fiction at the very heart of sovereignty.[227]

In the absence of civil authority and property, this "baffling exchange" happens through a form of representation "in which origin and agency are confounded."[228] As Pye demonstrates, the place where Hobbes elaborates this peculiar form of representation is in relation to theatrical performance. Specifically, Hobbes discusses a performance of *Andromeda* in which the audience, overtaken by an extreme heat, become feverish and

[222] Ibid., 92. Skinner also emphasizes this point. "The action counts as theirs, and is called their action, not because they actually perform it, but because they are under an obligation to take responsibility for its occurrence." Skinner, "Purely Artificial Person," 10.
[223] Turner, *Corporate Commonwealth*, 222.
[224] Skinner, "Purely Artificial Person," 15.
[225] Ibid..
[226] Runciman, *Pluralism*, 32.
[227] Hobbes, *Leviathan*, 114. Emphasis added.
[228] Pye, "The Sovereign," 92.

begin to believe that the play is real and begin to speak only in lines from the play.[229] Pye likens this account of the madness of the audience to Hobbes treatment of daemonology. The "pagan daemonologist" in Hobbes' account "mistook inward for outward forms."[230] They mistook the phantasms of their mind as having a corporeal presence. This belief in turn inspires a terror in the daemonologist, and ultimately a form of worship that amounts to idolatry. "Idolatry," as Martel explains, "is a misreading of representation, a practice of reading signs to literally, of assuming they have an actual meaning rather than a rhetorical one."[231] At the same time, the perception reoccupies the subject inwardly, as "he recognizes that the lingering and originless fantasms do indeed reflect him."[232] In relation to Hobbes account of sense perception, in which the image formed in the mind has no intrinsic connection to objects in the world, this highlights the necessary separation between such sense perceptions and outward forms, not only for phantasms, but also for sovereignty. Thus, as Pye argues, "Hobbes's godly sovereign is as much a threshold figure as the pagan's ghost."[233]

The sovereign's status as an image, and specifically as an image of God, is one that Martel also emphasizes.[234] The sovereign rules as a "visible power to keep them in awe," rather than a substantial presence.[235] The success of the sovereign is dependent on how well this image can be maintained. However, the relationship between the image of sovereignty and its 'reality' or its material manifestations is neither consistent, nor straightforward. While, as Turner suggests, the performance entails "the transformation of something unreal to something real" and it "creates a real relationship out of a purely imaginary idea,"

[229] Hobbes, *Leviathan*, 51.
[230] Pye, "The Sovereign," 93.
[231] Martel, *Subverting*, 107.
[232] Pye, "The Sovereign," 95.
[233] Ibid., 96.
[234] Martel, *Subverting*, 124.
[235] Hobbes, *Leviathan*, 111.

the means by which this is accomplished vary considerably, and success is hardly guaranteed.[236] To this end, as I will demonstrate in the next section, the state is constituted as much by explicit acts of recognition and subordination, as it is by not acting, in order to maintain the image of sovereignty.

*The Sovereign's Silence*

In Gierke's reading, Hobbes theory is mistaken and ultimately dangerous because he precludes the possibility that associations within the commonwealth could generate their own personality. However, there is at least one indication that the Leviathan may not have been as totalising as Gierke and the pluralists wanted to believe. While Hobbes very carefully circumscribes the creation of and powers afforded to bodies politic in the commonwealth, there remains ample space for other forms of association that do not seek to create their own personality. Most other forms of association in the commonwealth hardly warrant any notice from Hobbes. There is a potentially vast associational life beyond the forms prescribed by the state, which, so long as they do not attempt to create their own personality, do not immediately register in Hobbes scheme of organisation. These associations surely exist, yet they do not require any form of explicit authorisation from the sovereign. Focusing only on the dynamic between the state and those associations that create their own personality, with or without the authority of the sovereign, obscures an important gap between the rhetorical production of sovereignty and its material manifestation. This final section will consider the nature of the sovereign's silence, or the tacit consent that Hobbes affords to other forms of association in the commonwealth, and more specifically to the crowd or the riot.

[236] Turner, *Corporate Commonwealth*, 221.

Bodies politic, as described in the previous section, were considered by Hobbes to be "systems regular," and defined as those associations that appoint one person to be their representative. Most of these are public, and Hobbes spends the majority of this chapter discussing joint stock companies, that would have been authorised by Royal Charter. There is also a private version of the regular system, the family. All other forms of association thus figure within Hobbes' schema as "irregular systems."[237] "*Irregular* systems" as Hobbes understands them,

> are those which having no representative, consist only in concourse of people; which if not forbidden by the commonwealth, nor made on evil design, (such as are the conflux of people to markets, or shows, or any other harmless end,) are lawful. But when the intention is evil, or (if the number is considerable) unknown, they are unlawful. [238]

These associations may be "without union to any particular design" and "proceed only from a similitude of wills and inclinations."[239] They are allowed to exist by virtue of the sovereign's silence: they are lawful so long as they have not been made unlawful. Or, as Hobbes elaborates toward the end of the chapter, they "become lawful, or unlawful, according to the lawfulness, or unlawfulness of every particular man's design therein."[240] This design, rather than being an inward manifestation of intent, "is to be understood by the occasion." [241]

This approach to irregular associations is, in part, a continuation of the medieval tendency to treat such associations as just so long as their cause was just.[242] As Walter Ullman explains in his account of medieval approaches to illegal associations, they relied on "a metajuristic tenet, namely, that all law is the true manifestation, the concrete embodiment

[237] Hobbes, *Leviathan*, 149.
[238] Ibid.
[239] Ibid., 157.
[240] Ibid.
[241] Ibid.
[242] Walter Ullman, "The Mediaeval Theory of Legal and Illegal Organizations," *Law Quarterly Review* 60 (1944): 286.

and the external expression of the ethical virtue of justice.[243] As a result of this, medieval jurists "were driven to consider all human associations as legal, once the promotion of justice was shown to be the bond holding the members together. All human conduct bore the mark of legality, if it satisfied the demands made by the virtue of justice."[244] Even for Pope Innocent IV, who created the strict doctrine of *persona ficta* for corporate bodies—whereby corporations only obtain their personality from an explicitly authorised legal fiction—these other associations "derived their legal character directly from the law."[245] These *collegia* could also easily cross over into illegality, "as soon as its members engaged themselves in activities which did not conform to their professed aim."[246]

Hobbes' approach in the *Leviathan* shifts this dynamic only slightly, but nonetheless significantly, by making the source of lawfulness of these associations not law in general, or natural law as such, but the sovereign's tacit consent. This becomes apparent in part through his discussion of the liberty of subjects in the commonwealth. This liberty is based on the fact that they have already subjected themselves to the civil laws of the commonwealth. Aside from the limited natural rights or 'true liberties' that subjects *retain* even after the institution of the commonwealth, all liberties are to be understood as arising from the sovereign's silence, and to derive from "the absence of opposition."[247] Thus, the liberty enjoyed by a subject of the Leviathan is that which arises from the absence of specific laws:

> the liberty of a subject, lieth therefore only in those things, which in regulating their actions, the sovereign hath praetermitted: such as the liberty to buy, and sell, and otherwise contract with one another; to choose their own abode, their own diet, their own trade of life, and institute their children as they themselves think fit; and the like.[248]

[243] Ibid.
[244] Ibid.
[245] Ibid.
[246] Ibid.
[247] Hobbes, *Leviathan*, 139.
[248] Ibid., 141.

These liberties "depend on the silence of the law" and may be expanded or contracted "according as they that have the sovereignty shall think most convenient."[249] Hobbes is careful to ensure that this silence does not diminish the "power of life, and death," that the sovereign wields. The sovereign may intervene at any time.[250]

This conception of freedom in the commonwealth has often been read as a form of private liberty, and a negative freedom that accompanies modern liberal democracy.[251] However, Hobbes also remarks that "there is no commonwealth in the world, wherein there be rules enough set down, for the regulating of all the actions, and words of men; (as being a thing impossible)."[252] This reference to impossibility suggests that there may be more to Hobbes' conception of freedom than a limited form of negative liberty. The sovereign's silence may be indicative of a gap between the symbolic or rhetorical production of sovereignty—whereby all authority derives from the sovereign—and its material reality, in which it is not possible for the sovereign to exercise authority over all activity in the commonwealth. This is not just for lack of power, but a constitutive condition of sovereignty, which must always be undermined by a sociality that exceeds it. The silence and pretence of tacit consent enables the state to maintain a formal priority over the liberty of subjects, without needing to have established it in practice.

That the sovereign's silence functions as a means of negotiating an ultimately tenuous and impossible sovereignty plays out more specifically in Hobbes' approach to riots, as a form of association or 'system'. While the category of irregular systems functions as a catch-all for Hobbes, he devotes particular attention to the "concourse of people," which could be as innocuous as the crowd of people attending a market, or as potentially

[249] Ibid., 146.
[250] Ibid., 141.
[251] See for instance, Corey Robin, *The Reactionary Mind: Conservatism from Edmund Burke to Donald Trump* (NY: Oxford University Press, 2017) 100-103. See also John Ehrenberg, *Civil Society: The Critical History of an Idea* (London and New York: New York University Press, 1999), 75-76.
[252] Ibid. 141.

volatile as a riot.[253] While his approach initially appears strict, on closer examination it is strikingly ambivalent, and very closely reflects how riots were dealt with in practice in the early modern period. He illustrates his approach to riots in the commonwealth through the biblical story of St. Paul in Ephesus.[254] On the way to Jerusalem, St. Paul encountered "no little disturbance," a riot, in Ephesus.[255] There, a silversmith called Demetritus made figures of Artemis, as the city of Ephesius was a guardian of the temple to Artemis. On hearing of St. Paul, Demetritus called all of the other craftsmen together to warn them that he might be a threat to their city and to their industry. "And there is a danger not only that this trade of ours may come into disrepute but also that the temple of the great goddess Artemis will be scorned...."[256] These words incited the riot, and "[t]he city was filled with the confusion; and people rushed together to the theatre, dragging with them Gaius and Aristarchus, Macedonians who were Paul's travel companions."[257] The confusion was so great that "some were shouting one thing, some another...and most of them did not know why they had come together."[258] The city clerk eventually calmed the mob, advising them that since the law of the city was in their favour, they had no need to riot.

> If therefore Demetrius and the artisans with him have a complaint against anyone, the cours are open, and there are proconsuls; let them bring charges there against one another. If there is anything further you want to know, it must be settled in the regular assembly. For we are in danger of being charged with rioting today, since there is no cause we can give to justify this commotion.[259]

In his brief account of this story, Hobbes focuses on two elements in particular that would make such assemblies unlawful. Firstly, for Hobbes, the fact that they assembled in order to make an accusation, while there is already a law to this effect, constitutes a form of

[253] Ibid., 158.
[254] Acts 19:21-41 (New Revised Standard Version).
[255] Acts 19:23 (NRSV).
[256] Acts 19:27 (NRSV).
[257] Acts 19:29 (NRSV).
[258] Acts 19:32 (NRSV).
[259] Acts 19:38-41 (NRSV).

sedition. Thus, even though their cause might be just and lawful, the assembly was unlawful because it does not fall to the crowd to enforce the law. Second, and more importantly for my purposes, Hobbes focuses on the fact that many of the men could not give an account of why they were there. Thus Hobbes writes "[w]here he calleth an assembly, whereof men can give no just account, a sedition, and such as they could not answer for."[260]

If subjects are at liberty to do what they choose so long as it is not unlawful, then Hobbes account of riots is not as restrictive as it may first appear: although never officially sanctioned, there remains the possibility of a distinction between a lawful and an unlawful riot. While there may be some occasions of riot when "men can give no just account" of their participation, this implies that there may be instances when they can give this account.[261] Hobbes also suggests that "it is not a set number that makes the assembly unlawful, but such a number, as the present officers are not able to suppress, and bring to justice."[262] This implies that there is a moving threshold of legality for these assemblies, and the distinction between lawful and unlawful will greatly depend on the context.

This approach coincides with that taken to riots by authorities in the early modern period. It also reveals the tenuous limits of sovereignty—the impossibility that necessarily shapes the maintenance of state authority. Both food riots and enclosure riots were a relatively common occurrence in early modern England.[263] In spite of the existence of considerable penalties for sedition and riot, rioters were seldom punished, at least before the eighteenth century.[264] There would have been, at the time of Hobbes writing a "sliding

[260] Hobbes, *Leviathan*, 159.
[261] Ibid.
[262] Ibid., 158.
[263] According to John Bohstedt, the earliest recorded food riot in England happened in 1347. John Bohstedt, "The Moral Economy and the Discipline of Historical Context," *Journal of Social History* 26, no. 2 (1992): 276. For an account of the geographical distribution and frequency of these riots in the early modern period, see John Walter, *Crowds and Popular Politics in Early Modern England* (Manchester: Manchester University Press, 2006), 67-72.
[264] Andy Wood claims that it was only with the passage of the Riot Act in 1715 that "protracted crowd actions were likely to lead to heavy repression." Andy Wood, *Riot, Rebellion and Popular Politics in Early Modern England* (Basingstoke: Palgrave, 2002), 39.

scale of riot offences."[265] The "gravity" of riots would have been measured by how many participated, the intentions of those who participated, whether or not they had defied any direct order, as well as its duration and "seriousness."[266] The main statute governing riots offences in the early modern period was passed in 1549. Where a riot became a felony was determined by this act with incredible specificity: "if 40 or more people gathered to break enclosures for two or more hours in defiance of a magisterial order to depart, they were deemed guilty of treason."[267] Even though riot had been made a capital felony, "[t]he vast majority of cases of crowd disturbances that came before law courts were punished with financial penalties, brief imprisonment or with whipping."[268] The legislation, "allowed magistrates to discriminate between small-scale riots and more threatening disturbances."[269] After the statute lapsed, the common law approach was taken until the passage of the Riot Act 1715. As Wood explains , "[a]ccording to common law principles, a riot was considered to have occurred where three or more persons assembled in a violent and tumultuous fashion, under their own authority, with the mutual intent of committing a breach of the peace."[270] However, these terms were interpreted "loosely" and meant that many riots could be treated as simple misdemeanours.[271] Observing a similar leniency in the eighteenth century, Shelton suggests that this "was tantamount to sanction," given that mobs usually could have been contained in their earlier stages.[272]

This leniency reflects a more complex relationship between authority and popular disorder than the law itself suggests. With some exceptions, "early modern rulers could not

[265] Wood, Riot, 40.
[266] Ibid.
[267] Ibid.
[268] Ibid., 39.
[269] Ibid., 41.
[270] Ibid.
[271] Ibid.
[272] Ibid., 40.

simply string lower-class dissidents up from the nearest tree."[273] Enforcement of the laws, as flexible as they might be, nonetheless "risked local order."[274] As John Walter observes, the response of authorities to the relatively frequent popular riots of the time, "was more subtle and less clear-cut than might otherwise have been predicted."[275] It was important for authorities "to respond (and be seen to respond) to the popular grievances that had prompted the disorder."[276] The laws regarding riot and sedition, as Wood explains, coincided with the passage of a number of paternalistic statutes, which significantly regulated industry, restricted enclosures and protected the rights of cottagers, and provided for charity.

This combination of paternalism with a sparingly used repressive apparatus is a consequence, in part, of the limitations of the early modern state which lacked, amongst other things, a standing army until the 1640s. It also demonstrates how sovereignty was carefully negotiated with popular disorder. As Walter writes, "English monarchs and their councils, all too aware of the limited forces of repression at their disposal, sought to regulate social and economic change in order to minimize the threat of popular disorder."[277] It was important that the state be 'seen' to be exercising authority.[278] "The intention," as Wood explains, was "to prevent 'mutinies' amongst the poor by demonstrating an ostentatious, proactive concern for the supply of food."[279] Simultaneously this served as a means of garnering "popular consent to their rule."[280] In addition, rioters would carefully negotiate

[273] Ibid., 43
[274] John Walter, "Grain riots and popular attitudes to the law: Maldon and the crisis of 1629," in *An Ungovernable People: The English and their law in the seventeenth and eighteenth centuries*, eds. John Brewer and John Styles (New Brunswick: Rutgers University Press, 1980), 51.
[275] Ibid., 47. He further contends that "Maldon in 1629 appears to provide the only example in early seventeenth-century England of a food riot that ended on the gallows" (ibid., 49).
[276] Ibid., 50-51.
[277] John Walter, *Crowds and popular politics in early modern England* (Manchester: Manchester University Press, 2006), 19.
[278] Wood, *Riot*, 35.
[279] Ibid., 97.
[280] Walter, *Crowds*, 19.

the possibility of punishment, taking a strategic approach to law and using both publicity and discipline to evade repercussions.[281] Publicity, presumably, would help to establish that they had a just cause. They were careful not to commit theft and often inquired about the legality of their actions in advance. Thus, unlike the mob in Ephesus, early modern rioters likely could have accounted for their actions in precise terms that relied heavily on existing legal frameworks.[282]

Hobbes' approach to riots, particularly when considered in context, demonstrates that the sovereign's silence serves as a mechanism by which a tenuous claim to authority is maintained, as much as recognition does. The sovereign's silence is a manifestation of the impossibility of sovereignty, and it betrays an entirely negotiable threshold of state authority. Silence and a contrived tacit consent are the sovereign's response to the many forces that are beyond its control; and, as in the case of the riot, where attempting to control it would betray precisely a lack of authority. "The sovereign," recalling Martel's analysis above, "is a kind of image."[283] The image must be maintained, even—and especially—if it is not a reflection of life. As Douglas Hay writes about state authority in the eighteenth century,

> [t]he façade of power had to be kept undamaged. The gentry were acutely aware that their security depended on *belief*—belief in the justice of their rule, and in its adamantine strength. Hence, punishment at times had to be waived or mitigated to meet popular ideas of justice, and to prevent popular outrage from going too far and thereby realizing its own strength. The aim above all was to avoid exposing the law and authority either to ridicule or to too close scrutiny.[284]

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[281] As Bohstedt elaborates, "English rioters often tried to shield themselves from punishment, not only by publicity but also by discipline. For if rioters were guided by any overarching ideology it was the law, in which they were continually re-baptized. The rioters' oft-remarked discipline was one side of a reciprocal *protocol of riot* anchored in the law rather than in an alternative moral code." "The Moral Economy," 272. Emphasis in original.

[282] Walter, "Grain riots," 51. "For there is evidence to suggest that there was among the poor at Maldon, and elsewhere, a general awareness and even detailed knowledge of the body of law and administrative practice prescribed by the government to control the marketing of grain" (ibid.).

[283] Martel, *Subverting*, 124.

[284] Douglas Hay, "Property, Authority and the Criminal Law," in *Albion's Fatal Tree: Crime and Society in Eighteenth Century England*, eds. Douglas Hey et al. (London: Penguin Books, 1988), 51

The Commonwealth itself has no substantial person, only that which is borne figuratively by the sovereign as its representative ,and it "haunt[s] the pages of *Leviathan* like a ghost."[285] And, as Runciman aptly observes, "[l]ike a ghost, the person of the commonwealth disappears if approached too closely."[286] The only 'reality' of the state may be, as Turner describes, "that it creates a real relationship out of a purely imaginary idea."[287]

*Conclusion*

This chapter began with a consideration of the approach to the moral economy and co-operatives taken from the sociology of law and legal pluralism. The concept of legal pluralism offers an account of law as integral to social relations. However, the approach to the moral economy and to co-operatives that emerges from legal pluralism instrumentalises the law in a way not dissimilar from the discourse of political economy, as described in the first chapter. The moral economy and co-operatives, in this reading, have their own forms of law, which may compete or conflict with that of the state. However, this view takes for granted the ways in which both the moral economy and co-operatives are already shaped by particular relationships with the state. This is in part because of how such theories conceptualise both law and the state in the first place. Law is not simply the product of some determined entity, such as the state or society, or any other form of association—as set of rules or a form of ordering—but also the very fact of our sociality as such. Law as sociality serves as the condition of possibility for the state, or any form of association, for that matter. The state's inherently precarious existence emerges from the combination of determined law with this law of sociality that is always exceeding it and undermining its claim to presence. This was demonstrated through Hobbes' approach to associations in the commonwealth.

[285] Runciman, *Pluralism*, 18.
[286] Ibid., 19.
[287] Turner, *Corporate Commonwealth*, 221.

The problem of these approaches can be explained through Martel's reading of Hobbes. The spectacle of sovereignty, "take[s] something that belongs to the people…and give[s] it back to them in an altered and alienated form."[288] What is most commonly referred to as 'the state' is precisely this "altered and alienated form."[289] Yet "[t]he crux of authority," as Martel explains, "lies in our reading of it."[290] To this end, it is important not to take the alienated form of the state as a given, and participate in a form of idolatry that grants it a form a presence that it does not have, but instead to interrogate how this 'image' of presence is produced. The state "has no basis for authority other than its own act of symbolization," which is not to say that the effects of this act are not real, but that they are, precisely, effects.[291] To repeat Mitchell's argument, "we should examine it not as an actual structure but as the powerful, apparently metaphysical effect of practices that make such structures appear to exist.'[292]

This approach to law and the state provides for a much different reading of the moral economy and co-operatives. The moral economy and the co-operative, insofar as they are historically linked, appear, not as potentially competing legal orders that are autonomous from the state—whether that autonomy is located in 'tradition' or in an alternative normative order—but as particular forms of order that emerge already in relation to the state, not least because this relation is also constitutive of the state as such. The notion of customary law or right described in the beginning of this chapter, and used to interpret the moral economy of the crowd, implicitly presupposed both its autonomy from as well as its marginalisation to the state. In contrast, the approach outlined here attempts to contend with how even the moral economy is already implicated in a particular form of

[288] Martel, *Subverting*, 130.
[289] Ibid.
[290] Ibid., 128.
[291] Ibid.
[292] Mitchell, "Society", 180.

relation with the state. The expectations that structured the moral economy of the crowd and were often shared with authorities and drew on a more recent history of paternalistic forms of governance and intervention. "The moral economy of markets," as Hay reminds us, "was critically, if contentiously, dependent on state law."[293] Thus, while food riots might sometimes be violently repressed, they could also be tolerated and even quietly supported by the authorities, through a form of tacit consent. More specifically in the eighteenth century, the moral economy of the crowd was articulated in the midst of a discernible shift from the paternalism of the early modern state, characterised by the Elizabethan *Book of Orders*, to one that was increasingly influenced by political economy. The law oscillated between these two frameworks in the second half of the eighteenth century. Hay attributes the prevalence of food riots during this period to "the discrepancy between the unwillingness to enforce the law, and the continuing belief in the reasonableness of the law."[294]

From this perspective, the idea that the legal recognition of the co-operative is a question of 'bringing within' from 'outside' is completely incoherent, not least because the moral economy of the crowd, from which the co-operative derives, was dependent on and articulated in relation to state law. This dynamic reflects the predominance of a modality of power that Michel Foucault would characterise as 'sovereign', and primarily negative.[295] As Foucault writes, reflecting particularly on Hobbes, "[t]he sovereign is the person who can say no to any individual's desire, the problem being how to legitimize this 'no' opposed to individuals' desire and found it on the will of these same individuals."[296] Whether this

[293] Douglas C. Hay, "Moral Economy, Political Economy, and Law," in *Moral Economy and Popular Protest: Crowds, Conflict and Authority*, eds. Adrian Randall and Andrew Charlesworth (New York: St. Martin's Press, 2000), 93.
[294] Ibid., 112.
[295] Michel Foucault, "Two Lectures," in *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*, ed. Colin Gordon, trans., Colin Gordon *et al* (New York: Pantheon Books, 1980), 88.
[296] Michel Foucault, *Security, Territory, Population: Lectures at the College de France 1977-1978*, ed. Michael Sellenart, trans. Graham Burchell (Basingstoke: Palgrave Macmillan, 2008), 73.

was in the form of the many economic regulations of the Tudors, or the prosecution of rioters, the primary exercise of power was predominantly a negative one. While the relationship between state authority and the moral economy of the crowd is a complex one, particularly in the eighteenth century, but it can be seen as functioning broadly within this dynamic of tacit consent and repression. However, it also took place in a space that was not completely determined by or in relation to state law; state law did not, as Thompson explains "inform a view of life."[297]

In the nineteenth century, with the increasing influence of political economy, this dynamic shifted considerably, from a 'sovereign' and predominantly negative modality of power to one of biopolitics and discipline. For the purposes of this thesis, one of the most important expressions of this form of power was a shift from tacit consent and repression, to more explicit forms of recognition, such as that provided by the Industrial and Provident Societies Act 1852, reflecting what Nikolas Rose refers to as a "governmentalization of the state."[298] Eventually the co-operative was also given the form of the body corporate, and a legal personality of its own: the state, as Fitzpatrick argues, "transforms the elements...it appropriates into its own image and likeness."[299] The next chapter will explore this dynamic in more detail through an examination of how legal recognition, particularly through the form of the body corporate, functions constitutively in the context of biopolitical governmentality.

[297] Thompson, "Introduction," 9.
[298] Nikolas Rose, *Powers of Freedom: Reframing Political Thought* (Cambridge: Cambridge University Press, 2004), 149.
[299] Fitzpatrick, "Law and Societies," 122.

# Chapter 3: Co-operation and Incorporation

*For to understand and evaluate that part of law which serves to organize the life of associations one must attempt to discover what it really is that enters the realm of law at this point and gets its organization from law.*[1]

## *Introduction*

The previous chapter explored how legal recognition could be said to constitute the state, and in particular, how the state constitutes itself through a process of negation and differentiation from other associations. This chapter turns to how legal recognition constitutes that which it recognises. Legal recognition, as argued in the last chapter, entails that the co-operative is bound up with the creation and maintenance of the identity of the state; however, the mere fact of recognition does not, as Otto von Gierke puts it, tell us "what it really is that enters the realm of law at this point and gets its organization from law."[2] While there is much within the contemporary idea of the co-operative that is not immediately derived from law, it has been constituted by law in at least one particularly significant way. The specific form that co-operatives were given in the mid-nineteenth century was the body corporate.[3] As a legal form that has a long history deriving from Roman law and the medieval church, this is most certainly not "the working man's own creation," but instead reflects the particular manner in which the state sought to regulate co-operatives.[4] This chapter will claim that the corporate form, and its constitutive effects in relation to co-operatives, can only be understood in relation to its history, which reveals

[1] Otto von Gierke, "The Nature of Human Associations," in *The Genossenschaft-Theory of Otto von Gierke*, ed. John D. Lewis (Madison: University of Wisconsin Press, 1935), 140.
[2] Ibid.
[3] Industrial and Provident Societies Act 1862.
[4] J.M. Ludlow and Lloyd Jones, *Progress of the Working Class 1832-1867* (London: Alexander Strahan, 1867), 96.

not only its irrevocable connection to sovereignty, but also how the form comes to be 'normalised' in the mid-nineteenth century.

This chapter takes up the history of the body corporate as a legal form and situates this history in relation to Michel Foucault's genealogies of power in order to understand how, in spite of its history, it could be understood so unproblematically in the legal recognition of co-operatives. The body corporate is not an invention of the nineteenth century. The conception of corporate personhood adopted in English law derives from early interactions with church property, importing a metaphysical concept of fictitious personality from the medieval church. In the early modern period, incorporation was a narrow privilege available only by Royal Charter or, later, an Act of Parliament. Corporations served as a means of extending the state's reach into all manner of life, as creations and extensions of the state. This restrictive dynamic only shifted in the nineteenth century, with the introduction of incorporation by registration by the Joint Stock Companies Act of 1844. At this point, incorporation comes to be seen as a right and a form of commercial freedom.

Drawing on Foucault, I will argue that in the shift from incorporation by charter to incorporation by registration, the corporate form was *normalised*. In Foucault's broader genealogies of power, he suggests that in the transition from a predominantly sovereign modality of power based on prohibition and sanction, to one of discipline and biopolitics, law comes to function "more and more as a norm."[5] While this has been subject to different interpretations, in relation to the corporate form normalisation will be taken to mean that while legal recognition through the corporate form entails a subjection to the state, this is read as a right and a freedom, obscuring its function as a mode of subjugation.

[5] Foucault, *History of Sexuality, Volume 1: An Introduction*, trans. Robert Hurley (New York: Vintage Books, 1990), 144.

This allows the form to function in a way that is *disciplinary*, particularly for working class co-operative societies. In the context of political economy and liberal governmentality, the normalised form of the body corporate allows the government to meet the demands of 'laissez-faire', providing ways of 'facilitating' the market instead of intervening directly in it.[6] At the same time, however, the normalisation of incorporation 'immanentised' the transcendent metaphysical structure of the body corporate, imposing a form of unity that Jean-Luc Nancy would identify as essentialising and "totalitarian."[7] This transcendent unity is ultimately at odds with and serves to discipline the mutuality of co-operative societies, as will be discussed in the next chapter.

The first section of this chapter will review dominant jurisprudential debates on the nature of corporate personality and demonstrate how a lack of attention to the historicity of the legal form of the body corporate results in its *naturalisation*, or a collapse in the distinction between law and life. In different ways, the debates over whether incorporation reflects the reality of group life or imposes a fiction and attempts to transcend this debate have obscured the history of the legal form itself. In contrast to these approaches, I will argue for a constitutive theory of law, drawing primarily on Foucault, that pays attention to both the historicity of the legal form and the particular historical context in which it is being used. The next section of the chapter will introduce the early history of the body corporate, with a particular emphasis on the 'metaphysicalisation' of the corporate form in the medieval church and the integration of this form into English law. The chapter will then turn to how the corporate form has been used from the early modern period to the mid-nineteenth century, emphasizing its relationship to different forms of governmentality. Finally, the chapter will return to Foucault to argue that the body corporate form has been

[6] Michel Foucault, *The Birth of Biopolitics: Lectures at the College de France 1978-1979*, ed. Michael Sellenart, trans. Graham Burchell (Basingstoke: Palgrave Macmillan, 2008), 282.
[7] Jean-Luc Nancy, *Inoperative Community*, trans. Peter Connor, Lisa Garbus, Michael Holland and Simona Sawhney (Minneapolis: University of Minnesota Press, 1991), 3.

normalised, ultimately obscuring its connection to sovereignty through its conceptualisation as a right.

*Law, Life and Corporate Personality*

The history of the corporate form itself has often been overlooked in debates about the nature of corporate personality. The nineteenth century debate over the 'real' and 'fictitious' personality of groups, which has implicitly if not directly shaped most subsequent debates on the subject, was concerned with determining whether corporate legal personality reflects and gives form to life, or whether it is a pure fiction of law. As I will argue, both of these perspectives assume a problematic identity between law and life and obviate the question of the relation between the two. Further attempts to transcend the terms of this debate, by pragmatists as well as H.L.A. Hart, have only managed to reinscribe the 'reality' and 'fiction' divide, reproducing this identity between law and life, and obfuscating the effects of legal recognition. These accounts, as I will show, already participate in what Foucault calls the normalisation of law, precisely by removing both the historicity of the form itself and disregarding the particular historical context in which legal recognition occurs.

The nineteenth century debate over the real personality of groups has its origin in the work of Otto von Gierke and Friedrich Karl von Savigny.[8] They were both part of the German historical school of legal theory, which arose in opposition to efforts to codify the law in Germany, as had been done earlier in France. Law, according to those within the school, is not simply the product of reason, but is "determined by the whole past of the

[8] While varieties of the fiction theory exist in England from the 17th century, 'real entity theory' is a German import. See Ron Harris, "The Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British Political Pluralism and American Big Business," *Washington and Lee Law Review* 63, no. 4 (2006): 1421. In addition, while Gierke provides the most elaborate theory of real personality, he did not invent it as such. Harris cites Gierke's teacher and mentor, Georg Beseler (ibid., 1418).

nation, and therefore cannot be changed arbitrarily."[9] Law is derived from a particular *Volksgeist* [spirit of the people]. However, the school was divided in their views on which history should be the true source of law in Germany. The Romanists, and Savigny foremost, believed that Roman law was the true source. In contrast, for the Germanists who split from the Romanists in the 1840s, the true source of German law was German history.[10]

Their competing perspectives on the personality of groups derive from their readings of these historical sources. In his reading of Roman law, Savigny advocated the doctrine of *persona ficta,* or the idea that collective unity could only be a legal fiction.[11] The only naturally occurring jurally capable person is the "individual Man."[12] Under positive law, this inherent jural capacity can be denied for any number of reasons, and it may also be extended to "artificially created" persons.[13] This extension of personality is a "pure fiction" and the juridical person so created is "a Person who is assumed to be so for purely juristical purposes," having no personality other than that generated by the fiction.[14] Savigny also advocated the concession theory: not only was the legal personality of associations a fiction, it could also only be acquired when explicitly granted by a sovereign authority. While he distinguishes between associations which occur naturally and those which occur arbitrarily, no association can claim a unified, corporate personality without the authorisation of the sovereign. This was a particularly severe reading of Roman law that had been 'cleansed' of any compromises with other systems, and specifically irregularities arising under

[9] Hermann Kantorowicz, "Savigny and the Historical School of Law," *Law Quarterly Review* 53, no. 3 (1937): 332. The definitive statement or manifesto of the School appears in Savigny's 1814 pamphlet "On the vocation of our age for legislation and jurisprudence." See also Peter Stein, *Roman Law in European History* (Cambridge: Cambridge University Press, 1999), 116.
[10] Stein, *Roman Law*, 118. See also George Heiman, ed. and trans., introduction to *Otto Gierke Associations and Law: The Classical and Early Christian Stages* (Toronto: University of Toronto Press, 1977), 56-68.
[11] For an overview of Savigny's peculiar reading of Roman law, see Heiman, introduction, 27-33.
[12] Friedrich Carl von Savigny, *Jural Relations; or the Roman Law of Persons as Subjects of Jural Relations: Being a Translation of the Second Book of Savigny's System of Modern Roman Law*, ed. and trans. W.H. Rattigan (London: Wildy & Sons, 1884), 2.
[13] Ibid.
[14] Ibid., 176.

feudalism.[15] This theory and the principles of Roman law espoused more generally by Savigny supported the political purposes of centralisation by making legal recognised association dependent on the state. At the same time, this interpretation avoided purely formalistic codification by ostensibly rooting the law in a Roman past.

In his assertion of the real personality of groups, Gierke thoroughly rejected this position. While law may aid in social organisation, associations do not take their personality from law.[16] The personality of ancient German fellowships did not come from any sovereign, but in a decentralised fashion, reflected the fellowships' own sense of unity. Gierke claims that just as the individual is a person before legal recognition occurs, so too is the group; this personality arises organically. Gierke insists "that we recognize in the social body the unity of life of a whole arising out of separate parts,—such a unity as we do not find elsewhere except in natural living creatures."[17] As individuals associate, they do so by transferring part of their own living self to the group; it is from this transference of life that groups attain their own life.[18] This produces a real living unity in the association; it is a "spiritual unification."[19] There is, for Gierke, almost a second stratum of existence from which the collective derives its unity: "[a]bove the individual spirit, the individual will, the individual consciousness, we recognise in thousandfold expression of life the real existence of common spirit, common will, and common consciousness."[20] While invisible, this common spirit is no less real for Gierke than a visible, living organism. It follows for Gierke that if group personality is real and occurs naturally, then legal recognition is a process by

[15] Savigny's reading of the doctrine of *persona ficta* was far more stringent than Pope Innocent IV's original articulation of the idea, which most certainly did not also include the concession theory. For an overview of Savigny's peculiar reading of Roman law, see Heiman, introduction, 27-33. This will be dealt with in more detail later in the chapter.
[16] Gierke, "Human Associations," 140.
[17] Ibid., 145.
[18] Heiman, introduction, 9.
[19] Ibid., 146. The specific status of this 'reality' for Gierke is somewhat ambiguous. Gierke was strongly influenced by Hegel and thus it might be assumed that, like the Idealists in England, Gierke's idea of the real was a fundamentally Hegelian one.
[20] Quoted in David Nicholls, *The Pluralist State* (London: The Macmillan Press Ltd., 1975), 26.

which that personality is given its due effect in law, and not one which creates that personality and unity, as the fiction theory suggests. Thus, as regards legal recognition, Gierke asks, is it possible "that law, when it treats organized associations as persons, is not disregarding reality, but giving reality more adequate expression? Is it not possible that human associations are real unities which receive through legal recognition of their personality only what corresponds to their real nature?"[21]

At the heart of this debate is a question about the relationship between law, and specifically the law of the state, and associational life. Savigny denies that there is a "natural and fundamental right to associate without any previous consent" thus making all associational life dependent on the state.[22] The theory of real personality, in contrast, locates this personality in the association itself, effectively collapsing any distinction between law and life. While these theories may seem completely opposed, they are paradoxically similar in effect. In both theories, there is an identity between law and life. In the fiction theory, associational life is only possible by virtue of the law. Thus, if an association exists with a 'personality' of its own, this personality derives from and is identical to the law. The real personality theory imposes a legal personality on associations, whether they like it or not.

This much can be seen in how advocates of the real personality of groups have interpreted key instances of legal recognition in practice. In the early twentieth century, Gierke's ideas had considerable influence, particularly in England where some of his work had been translated by Frederic Maitland.[23] This, in turn, influenced the disparate group of

[21] Ibid.
[22] Heiman, introduction, 30.
[23] While Maitland was not as definitive in his statement of real corporate personality as Gierke, he also did not deny that this personality exists, as some claim, for instance Mack, J.A., "Group Personality--A Footnote to Maitland." *The Philosophical Quarterly* 2, no. 8 (1952): 249–52. H.L.A. Hart was also eager to absolve Maitland of any metaphysical leanings and to recuperate him for the positivist tradition. But Maitland is clear that it is "the morality of common sense" that makes the group a person. Frederic William Maitland, "Moral Personality and Legal Personality," in *The Collected Papers of Frederic William Maitland, Volume III,* ed. H.A.L. Fisher (Cambridge: Cambridge University Press, 1911), 314. While he refrains from delving too deeply into what he regards as the territory of philosophers, he suggests that group personality is "at least as 'real' as the man" (ibid., 319). See also Janet McLean, *Searching for the State in British Legal*

thinkers known as the English Pluralists.[24] In their reading, the theory of the real personality of groups appeared to find affirmation in the law's recognition of corporate groups that were not explicitly created by the state.[25] One commonly cited example is the controversial Taff Vale [1901] case, concerning the Amalgamated Society of Railway Servants, a registered trade union that had gone on strike.[26] Their employer, the Taff Vale Railway Company, sought to sue the union for damages, even though trade unions were unincorporated entities in law.[27] It was determined that they were in fact liable, because they were acting as a corporate group. The pluralists, including Gierke, heartily praised the

*Thought: Competing Conceptions of the Public Sphere* (Cambridge: Cambridge University Press, 2012),81. See also David Runciman, *Pluralism and the Personality of the State (Cambridge: Cambridge University Press: 1997)*, 108-112. Maitland himself was responding to John Austin's theory of an absolutist sovereignty and what he observed as a troubling centralising tendency in in Britain. Austin's theory of sovereignty, not unlike Hobbes, emphasized sovereignty as a "determinate superior authority" that makes commands, backed by sanctions. Janet McLean, *Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere* (Cambridge: Cambridge University Press: 2012), 57. As McLean notes, Maitland used Gierke's ideas to "oppose the centralizing trend in the UK domestic system of government and expressed a desire for more power to and trust in local government and officials" (ibid.,72).

[24] English pluralism refers to the ideas of a diverse set of thinkers and a current of thought which were prominent in the early 20th century, represented by writers such as G.D.H. Cole, John Neville Figgis Harold Laski, as well as Frederic Maitland, whose reading and translation of the work of German jurist Otto von Gierke were very influential for English pluralism. For overviews of English pluralism, see Paul Q. Hirst, ed. *The Pluralist Theory of the State: The Selected Writings of G.D.H. Cole, J.N. Figgis and H.J. Laski* (London: Routledge, 1989), David Nicholls, *The Pluralist State* (London: The Macmillan Press Ltd., 1975) and David Runciman, *Pluralism and the Personality of the State* (Cambridge: Cambridge University Press, 1997). The English pluralists were motivated in part by what was conceived of as an English cultural tradition of working class associationalism, focused on values of mutual aid. There is a romanticisation of 'voluntary association' found in the work of the pluralists, when they invoke the idea of the association, they have in mind the particular history of associational life in England, including friendly societies, co-operatives, and trade unions, as well as companies and trusts. For an overview of the "cultural tradition" of English pluralism, see Julia Stapleton, "English Pluralism as Cultural Definition: The Social and Political Thought of George Unwin," *Journal of the History of Ideas* 52, no. 4 (1991): 665-684.

[25] English law was consistently held to have avoided the harshest aspects of the doctrine of *persona ficta* because of the existence of the trust. See Frederic William Maitland, "Trust and Corporation," in *State, Trust and Corporation*, eds. David Runciman and Magnus Ryan (Cambridge: Cambridge University Press, 2003), 75-130; and Frederick Pollock, "Has the Common Law Received the Fiction Theory of Corporations?" *Law Quarterly Review* 27 (1911): 219–35.

[26] Taff Vale Railway Co v Amalgamated Society of Railway Servants [1901] UKHL 1.

[27] Following the Trade Union Act of 1875, trade unions were unincorporated entities and could sue and be sued, but this did not expressly extend to liability for torts. They present the somewhat perplexing circumstance in which associations can have certain corporate 'privileges' without being fully incorporated. Notably trade unions have never been considered as persons in law in the United Kingdom and remain unincorporated associations to the present day. The Trade Disputes Act of 1906 effectively reversed the Taff Vale decision.

decision, even though the union had explicitly *not* wanted this recognition.[28] The judgment "showed how real was its existence in despite of statute [sic]."[29]

Although the reasoning in the judgment was not about the ontological or moral existence of the corporation, J.N. Figgis suggests that "the judgment bears witness to the fact that corporate personality, this unity of life and action, is a thing which grows up naturally and inevitably in bodies of men united for a permanent end, and that it cannot in the long run be denied merely by the process of saying that it is not there."[30] It does not matter why the decision was made, only that the reality of the group was recognised by the court. Maitland triumphantly cites A.V. Dicey, who had finally admitted this real personality, writing that "when a body of twenty or two thousand or two hundred thousand men bind themselves together to act in a particular way for some common purpose, they create a body which, by no fiction of law but from the very nature of things, differs from the individuals of whom it is constituted."[31] This tendency to valorise the legal recognition of groups can also be seen in Maitland's praise of the Companies Act of 1862, which extended limited liability to joint stock companies. The Act was "splendidly courageous" for having recognised the reality of the groups in question.[32] In asserting the real personality of groups and then linking that personality to the particular form of recognition imposed or granted to the state, advocates of the 'real entity theory' elide a particular legal understanding of corporate personality with the identity of the group itself.

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[28] Indeed, trade unions were particularly sceptical of incorporation (and most forms of legal recognition). Although they weren't the only ones — many long-standing English associations, such as the Inns of Court, had no interest in taking on such a form, as it was understood to entail greater control by the state. See Pollock, "Has the Common Law," 224.

[29] Harold J. Laski, *Studies in the Problem of Sovereignty* (New Haven: Yale University Press, 1917), 272.

[30] J.N. Figgis, "The Great Leviathan," in *Churches in the Modern State* (London: Longmans, Green and Co., 1913), 64.

[31] A.V. Dicey, "The Combination Laws as Illustrating the Relation Between Law and Opinion in England During the Nineteenth Century," *Harvard Law Review* 17, no. 8 (1904): 513.

[32] Frederic William Maitland, introduction to *Political Theories of the Middle* Age, trans. Frederic William Maitland (Boston: Beacon Press, 1959), xxxviii.

The tensions inherent in the realist position, and its proximity to the fiction theory, were not lost on some of the critics of this debate. In particular, Gierke has been roundly critiqued and dismissed for this almost mystical conception of the reality of groups.[33] He and other pluralists were strongly rebuked by their American contemporaries, particularly Morris Cohen and John Dewey,[34] who were both wary of the metaphysical implications of the fiction theory and the real personality of groups, and of the seemingly intractable link these theories created between law and life. The only real difference between Savigny and Gierke was in where they would locate the 'spirit of the people'; in the state or in association. However, their attempt to move beyond the metaphysical question posed by 'real' and 'fictitious' personality only defers it, while also obfuscating the potential effects of legal recognition.

Cohen and Dewey turn to a more pragmatic understanding of corporate personality, arguing, as Dewey puts it, that the "'person' signifies what law makes it signify."[35] Corporate personality is just a "group-name" and a matter of convenience.[36] Their critiques focused on two main observations. Firstly, there is no necessary connection between legal personality and the presence of collective unity; instead, there are many ways of conceiving of collective existence, but not all of them are relevant for legal purposes. The 'team', for

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[33] See Gunther Teubner, "Enterprise Corporatism: New Industrial Policy and the 'Essence' of the Legal Person," *The American Journal of Comparative Law* 36, no. 1 (1988): 134. To his credit, Gierke was aware of the limits and dangers of the organic metaphor. See Heiman, introduction, 23. For its shortcomings, his idea of the unity of groups was an incredibly nuanced one, which allowed at the same time for plurality within groups, and for individuals to retain their individuality outside of the group. Moreover, not all associations had this organic personality; some, such as those created entirely by fiction, were devoid of life (the "dead fund"). Quoted in Teubner, "Enterprise Corporation," 134. (couldn't find the full reference) In addition, legal recognition is necessary for associations, not just because denying it would be unjust, but also for the sake of the *Rechtstaat*. When associations are entirely private, they do not participate in the public life of the state, and have no sense of obligation to a broader community. See Otto von Gierke, *Community in Historical Perspective*, ed. Antony Black, trans. Mary Fischer (Cambridge: Cambridge University Press, 1990), 11.

[34] John Dewey, "The Historical Background of Corporate Legal Personality," *Yale Law Journal* 35, no. 6 (1926): 655–73; Morris R. Cohen, "Communal Ghosts and Other Perils in Social Philosophy," *The Journal of Philosophy, Psychology and Scientific Methods* 16, no. 25 (1919): 673–90. See also Max Radin, "The Endless Problem of Corporate Personality," *Columbia Law Review* 32 (1932): 643-667.

[35] Dewey, "Historical Background," 655.

[36] Radin, "Endless," 650.

instance, is not a unit in law, but it may well be in other facets of life.[37] Secondly, the attribution of legal personality is a "practical question as to whether [certain groups] should be made collectively the subject of certain rights and duties."[38] Max Radin, furthering these arguments, suggests that legal personality is a convenience, and "an important mercantile device rendered necessary by a credit economy, that is, by a system of economic organization that involves speculation to any degree whatever."[39] The debates about the 'nature' of legal personality conflate and confuse these questions of responsibility with the existence of corporate personality as such. Thus, they advocate "eliminating the *idea* of personality," as though it should correspond to some entity in the world, and yet suggest that "retaining the *word* will then do no great harm."[40]

Their response to the problem of corporate personality was, as Barkan observes, "to write it out of existence."[41] The corporate person is instead reducible to its practical consequences. However, in reducing the corporate person in this way, they implicitly accept "certain assumptions about both the corporation and the relations between law and society."[42] They take the corporation to be a private entity, and suggest that the form merely responds to particular socio-economic needs and the practical concerns of lawyers and judges (who they believe are the real arbiters of what it means to be corporate). As Barkan argues, this position "implied that the problems with corporations were not problems in their legal definition, much less in the relation between law and right, but in the social relations that occurred under the guise of that legal name."[43] While rightly pointing out that there is no direct correspondence between the legal form and the world, their avoidance of

[37] Cohen, "Communal Ghosts, 684.
[38] Ibid., 680.
[39] Radin, "Endless," 653.
[40] Dewey, "Historical Background," 673. Emphasis in original.
[41] Joshua Barkan, *Corporate Sovereignty: Law and Government under Capitalism* (Minneapolis: University of Minnesota Press, 2013), 85.
[42] Ibid., 85.
[43] Ibid., 85-86.

the metaphysical question raised by notions of 'real' and 'fictitious' personality means that they overlook the importance of the form itself, which is not simply the outcome of a series of practical considerations about how to facilitate a credit economy. The end result of these critiques was that the metaphysical question was largely laid to rest in favour of the more pragmatic approach to collective personality. However, the pragmatic approach had only managed to defer the metaphysical problem rather than resolve it. The debate over corporate personality was quietly abandoned, with an undefined consensus seeming to form around the idea that corporate personality, for any relevant purpose, a legal fiction.

*Positivism and Naturalisation*

Some thirty years after the provisional conclusion of the debate over the nature of corporate personality, Hart, in his Inaugural Lecture at Oxford, "Definition and Theory in Jurisprudence," returns attention to the issue, claiming that "the juristic controversy over the nature of corporate personality is dead," and as such, "we have a corpse, and the opportunity to learn from its anatomy."[44] Hart's main innovation in relation to the old debates is to treat incorporation as a *right* and as an element of legal discourse, with no immediate correspondence to some entity in the world. As such, all of the previously held ideas about corporate personality—that it is a fiction, a reality, or simply standing in for a more complex reality—are misleading. For Hart, none of these ideas help to elucidate the specific *legal* meaning of the corporation. However, while claiming to provide a novel approach to the question of corporate legal personality, Hart curiously re-inscribes both fiction and reality through his particular approach to the way in which law constitutes social reality. Hart's position is worth reviewing in some detail, not least because his introduction of the conception of incorporation as a right takes for granted and reproduces the way in

[44] H.L.A. Hart, 'Definition and Theory in Jurisprudence' in *Essays in Jurisprudence and Philosophy* (Oxford: Oxford University Press, 1983), 21, n36. This was originally published in 1954.

which incorporation came to be understood in the mid-nineteenth century. This section will first outline Hart's general position, and then draw out the tensions that emerge from his conception of incorporation as a right.

The basis of Hart's intervention into the debate is ordinary language philosophy, and in his Oxford lecture, he develops many of the ideas that would form the basis of his seminal work, *The Concept of Law*.[45] He claims that the "three great theories of corporate personality" were so problematic, and ultimately defective, because they assumed that, like ordinary words, legal terms such as "corporate person" have a direct correspondence with the world.[46] For Hart, the irreconcilability of these theories demonstrates the difficulty in defining such words adequately, while ultimately failing to "throw light on the precise work they do."[47] This confusion "distort[s] the distinctive characteristics of legal language."[48] As Roger Cotterrell summarises: [t]he endless debate on the nature of corporate personality...sought to fix the meaning of the concept without adequate reference to the immense variability of the circumstance in which it could be invoked, and of the legal consequences which could follow from it.[49] For Hart, incorporation can only be understood by restricting its potential meaning to that which it is given by its articulation within legal discourse, and within particular statements. Unlike ordinary language, the use of corporate names "silently assumes a special and very complicated setting, namely the existence of a legal system with all that this implies by way of general obedience, the operation of the sanctions of the system, and the general likelihood that this will continue."[50] The statement will necessarily have some connection to a rule of the legal system itself, in which it takes

[45] H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 2012).
[46] Hart, "Definition and Theory," 24.
[47] Ibid., 25.
[48] Ibid., 26.
[49] Roger Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (Philadelphia: University of Pennsylvania Press, 1989), 88.
[50] Ibid., 28.

on a particular meaning.[51] A statement regarding a corporate person "is therefore the tail-end of a simple legal calculation: it records a result and may be well called a conclusion of law."[52]

Unlike Gierke and Savigny, who were concerned with the question of what the corporation 'is', and unlike the pragmatists who focused on the practical consequences of incorporation, Hart is only concerned with the circumstances under which the law will recognise an entity as corporate. He stresses the importance of the particular rules that must be followed in order to take advantage of the privileges and duties associated with corporate personality. As Hart writes:

> Here can be seen the essential elements of the language of legal corporations. For in law, the lives of ten men that overlap but do not coincide may fall under separate rules under which they have separate rights and duties, and then they are a collection of individuals for the law; but their actions may fall under rules of a different kind which make what is to be done by any one or more of them depend in complex ways on what was done or occurred earlier. And then we may speak in appropriately unified ways of the sequence so unified, using a terminology like that of corporation law which will show that it is this sort of rule we are applying to the facts.[53]

While we may be misled into thinking that the corporation reflects the presence of a "corporate spirit," as it did for Gierke, which may be "real enough," no such spirit is necessary for the operation of the legal rule, which is the true essence of the corporation.[54] Metaphysical readings of corporate personality "confuse the issue because they look like eternal truths about the nature of corporations given us by definitions; so it is made to appear that all legal statements about corporations *must* square with these if they are not to be logically inconsistent."[55] The corporation so-called is thus an outcome of a particular sequence wholly determined by the operation of a legal rule. This position may seem close

[51] Ibid.
[52] Ibid.
[53] Ibid., 30.
[54] Ibid.
[55] Ibid., 45.

to that held by the pragmatists, but Hart insists that "the fundamental point is that the primary function of these words is not to stand for or describe anything but a distinct function," or operation of law.[56] In ordinary interactions, one could determine the legal meaning of the corporation, which would not require "mentioning fiction, collective names, abbreviations, or brackets."[57] All of the relevant meaning would be exhausted by understanding the legal consequences of the terms.

Hart's account of incorporation brings some clarity to the old debates. By removing the assumption of any *essential* feature of the corporation, Hart, at first, avoids the problematic equation, given by the ideas of 'real' and 'fictitious' personality of groups, between the personality produced by law and groups' self-perception. There are, simply, "many varieties of widely different conditions (psychological and others) under which we talk in this unifying personal way. Some of these conditions will be shown to be significant for legal or political purposes; others will not."[58] Simultaneously, Hart's theory maintains the idea that incorporation is a product of law, like the fiction theory, but does so without itself becoming a form of absolutism in which associations can only exist by virtue of sovereignty authorisation. Instead, Hart relies on linguistic philosophy to produce a view of law as constitutive, in which the legal concept, by virtue of its status as law, creates a particular social reality. As Cotterrell writes, "Hart's form of linguistic philosophy does not necessarily claim to be concerned with words or statements as *representations* of a social reality. The statements *are*, in themselves, the social reality. They constitute it."[59] Unlike the earlier debates, Hart draws attention to the way in which law actively shapes social reality, instead of merely reflecting it. Law creates social realities, making certain relations possible

[56] Ibid., 31.
[57] Ibid., 36-37.
[58] Ibid., 43.
[59] Roger Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (Philadelphia: University of Pennsylvania Press, 1989), 91.

through the facilities it provides. However, despite these initial insights, Hart collapses the distinction between law and life, thereby naturalising law, precisely through his consideration of incorporation as a form of *right*.

As noted above, for Hart all that is needed to understand the meaning of incorporation is a reference to the legal system in which it takes on meaning. Any statement regarding the existence of a corporation, or indeed any legal right, presupposes that a legal system exists and that there is a relevant rule corresponding to the circumstances that will fall within the law. Finally, it presupposes that this right is invoked by choice.[60] The existence of a right means that "the obligation to perform the corresponding duty is made by law to depend on the choice of the individual who is said to have the right or the choice of some person authorized to act on his behalf."[61] This element of choice is a key part of the radical difference between power-conferring rules and commands from the sovereign that Hart elaborates in *The Concept of Law*. In a critique of earlier forms of legal positivism which 'reduce' law to coercion and commands of the sovereign, particularly those of Jeremy Bentham and John Austin, Hart attempts to rescue positivism by demonstrating a necessary social and normative dimension of law, and by removing the need for a sovereign at all. Certain types of law, which he will come to call "secondary rules" cannot be explained within the basic coercive model because they function to confer powers, private and public, rather than imposing obligations as such.[62] This form of power "is one of the great contributions of law to social life; and it is a feature of law obscured by representing all law as a matter of orders backed by threats."[63] Unlike commands, secondary rules, such as those of incorporation,

> do not impose duties or obligations. Instead they provide an individual with *facilities* for realizing their wishes, by conferring legal powers upon them to create, by certain

[60] Hart, "Definition and Theory," 35.
[61] Ibid.
[62] Hart, *Concept of Law*, 24, 28.
[63] Ibid., 28.

> specified procedures and subject to certain conditions, structures of rights and duties within the coercive framework of the law.[64]

Moreover, these laws are not simply useful facilities; they also constitute social reality. As he writes, such laws are essential to social life, because "if such rules of this distinctive kind did not exist we should lack some of the most familiar concepts of social life, since these logically presuppose the existence of such rules."[65]

At this point, a revealing tension emerges between the constitutive effects of Hart's conception of law and the element of choice that forms a necessary part of his conception of rights. Although such rules require an element of choice – an element that forms the basis of the assertion that they are fundamentally non-coercive – they also have an identity with social life. If we would not be able to recognise social life without these legal instruments, as Hart describes above, this begs the question of what it would mean to live without them and, in turn, whether or not foregoing the use of such instruments constitutes a meaningful 'choice' in such a society. This is not a problem that Hart addresses. While Hart specifically acknowledges that power-conferring rules such as incorporation function, like all law, as a mechanism of social control, that they are fundamentally non-coercive is a central presumption of his entire system in *The Concept of Law*. Their power is normative rather than derived from sovereignty.[66] The consequence of not following such rules is

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[64] Ibid., 27-28. Emphasis in original.
[65] Ibid., 32.
[66] See H.L.A. Hart, 'Legal Rights' in *Essays on Bentham: Jurisprudence and Political Philosophy* (Oxford: Oxford University Press, 1982), 163; and H.L.A. Hart, 'Legal Powers' in *Essays on Bentham*, 194. This movement from sovereignty to normativity is conveyed most clearly by Hart in his critique of Bentham on legal rights and powers (such powers are conceived as rights when possessed by a private citizen). Hart agrees with Bentham that 'a permission is simply the absence of legal prohibition and hence the absence of a legal duty not to do a certain act." H.L.A. Hart, "Legal Powers," 197. However, he differs fundamentally on how this power is to be understood. In Bentham's account, legal powers still derive from the imperative of the sovereign. "The sovereign," as Hart explains, '"allows" the mandate to be issued." (Ibid., 211). Absent this permission from the sovereign, "it is an illegal mandate and to issue it is an offence." Ibid. This is problematic for Hart, precisely because he wants to do away with the necessary role of the sovereign. Bentham's approach in this regard is a "mistake." (Ibid., 212). Turning to ordinary language philosophy to circumvent this reliance on the sovereign, Hart claims that acts that create powers will have certain "operative words" which, by virtue of their status as law, obtain a particular legal force to effect legal relationships. (Ibid., 217). However, Hart claims that these are "legal *normative* effects or consequences, not *natural* effects." (Ibid.) These, in turn, can be compared to non-legal cases where such powers are

merely invalidity, rather than illegality. The consequences of failing to comply with the stipulations of power-conferring rules, if not made criminal by some other provision, can only be a 'nullity', 'without legal "force" or "effect"'.[67] He contrasts these rules with those of criminal law.

> In the case of a rule of criminal law we can identify and distinguish two things: a certain type of conduct which the rule prohibits, and a sanction intended to discourage it. But how could we consider in this light such desirable social activities as men making each other promises which do not satisfy legal requirements as to form. This is not like the conduct discouraged by the criminal law, something which the legal rules stipulating legal forms for contracts are designed to suppress. The rules merely withhold legal recognition from them.[68]

The denial of legal recognition is thus relatively inconsequential for Hart. Indeed, he specifies that it would only matter "if we think of power-conferring rules as designed to make people behave in certain ways and as adding 'nullity' as a motive for obedience, can we assimilate such rules to orders backed by threats."[69] The power that is conferred by rights such as incorporation is one that allows the holder of the right to alter the freedom of another, but that does not appear to affect the freedom of the holder in any meaningful sense.[70]

However, as I will show later in this chapter, this ostensibly exceptional circumstance in which such rules would be designed to influence and control behaviour forms a particular historical reality that emerges in the nineteenth century. This is also the

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invoked, but with "no background of imperative laws." (Ibid.) The comparison allows Hart to conclude that "powers to change normative situations need not rest on a Sovereign's commands at all." (Ibid., 218.) As he explains "they are more like *instructions* how to bring about certain results than mandatory impositions of duty." (Ibid., 219. Emphasis in original). Hart thus replaces the sovereign with the normative concept of a rule. While the "effect is to bring individuals within the scope of existing commands or prohibitions or exceptions to them," these rules confer the power to "enter into legally effective transactions... [and] cannot be construed as commands or prohibitions." (Ibid., 213).

[67] Hart, *Concept of Law*, 28.

[68] Ibid., 31.

[69] Ibid., 34.

[70] This is further supported by Hart's contention that the only naturally occurring right is an equal right to freedom. It is this originary freedom that the bearers of Hart's legal powers appear to retain when they exercise legal powers. H.L.A. Hart, "Are There Any Natural Rights?" *The Philosophical Review* 62 no. 2 (1955): 175.

historical moment when incorporation, which had long been a narrow privilege available only by a grant from the sovereign, comes to be understood as a right. Unfortunately this history does not figure in Hart's account of incorporation, nor of law more generally. As Peter Fitzpatrick has argued, Hart's account of law is ultimately grounded in myth, not social fact.[71] As a consequence, Hart does not resolve the debate between the idea that corporate personality is a fiction and that it reflects the real personality of groups, but rather collapses the distinction between the two, entrenching them and the metaphysical problems they posed even more deeply. By insisting that the meaning of corporate personality cannot be understood outside of its relation to other legal rules, Hart maintains the idea of corporate personality as a legal fiction, albeit without naming it as such. He simultaneously claims there to be an identity between the law and the social reality it creates.

Despite their very different orientations, Hart's conclusions are not wildly different from Gierke's. Law—through secondary rules—functions for Hart, as it did for Gierke, "to recognize the sociologically real."[72] By maintaining that incorporation is a choice by virtue of its status as a right, Hart fails to appreciate the way in which incorporation constitutes social reality, not just as a 'facilitative' gesture, but one that is ultimately coercive and intimately connected to sovereignty. The end product of this is the perceived technical neutrality of law discussed in chapter 1. However, as I will show later in this chapter, the very idea of incorporation as a right obscures this element of choice.

### *The Political Theology of the Body Corporate*

The body corporate does not simply derive its meaning from the legal system in which it is given effect, as Hart suggested; nor is it simply a reflection of reality. And it is certainly far more than a mere practical device meant to simplify a complex set of relations.

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[71] Peter Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992) 183-210. See also Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge: Cambridge University Press, 2001), 97-99.
[72] McLean, *Searching for the State*, 82.

The body corporate has its own history, and this history affects how it shapes and ultimately constitutes social relations. The theories of corporate personality above neglect this history, or at least misconstrue its relevance, while also obscuring the constitutive effects of legal recognition, creating a problematic identity between law and life. In contrast to both the positivist view of the law, presented through the work of Hart, and the historical reading of the law, presented through Gierke and Savigny, a constitutive theory of law focuses on how law actively shapes material relations and perceptions of reality, while also being a kind of fiction connected to sovereignty. As Pierre Bourdieu describes, "[t]he law is the quintessential form of 'active' discourse, able by its own operation to produce its effects. It would not be excessive to say that it creates the social world, but only if we remember that it is this world which first creates the law."[73] This suggests a more complex dynamic between law and life than that indicated by the terms 'real' and 'fictitious' personality.

While there are many potential sources for a constitutive theory of law, I will primarily focus on the work of Foucault.[74] Foucault's genealogies of power in modernity help to contextualise this constitutive function of law historically. This allows for a consideration not only of the historicity of the body corporate in its integral connection to sovereignty and the juridical, but also the particular way in which it came to be used in the nineteenth century, in the context of the emergence of disciplinary power and biopolitics,

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[73] *Pierre Bourdieu, "The Force of Law*: Toward a Sociology of the Juridical Field," *The Hastings Law Journal* 38, no. 5 (1987): 839.

[74] See for instance, John Brigham, *The Constitution of Interests: Beyond the Politics of Rights* (New York: New York University Press, 1996), 1-28. Brigham provides a useful overview, situating a constitutive theory of law within the broader discipline of the sociology of law. See also Rosemary Coombe, "Critical Cultural Legal Studies," *Yale Journal of Law & the Humanities* 10, no. 2 (1998): 463-486. For Coombe, "constitutive theories of law recognize law's *productive* capacities, as well as its prohibitions and sanctions, shifting attention to the workings of law in ever more improbable settings" (ibid., 475). Among the many potential sources for a constitutive theory of law, Engle Merry provides perhaps the paradigmatic formulation, recounting that '[t]he focus of our work is not on law and society but on the ways in which law and society are mutually defining and inseparable. One fundamental point is that law is intimately involved in the constitution of social relations and the law itself is constituted through social relations. Sally Engle Merry, "Culture, Power and the Discourse of Law," *New York Law School Law Review* 37 (1992): 209. See also Michael McCann, "Causal versus Constitutive Explanations (or, On the Difficulty of Being so Positive...)," *Law and Social Inquiry* 21, no. 2 (1996): 459.

and the normalisation of law this entailed.[75] In relation to the foregoing discussion of corporate personality, a constitutive theory of law would suggest, in short, that incorporation functions constitutively, by *creating* the unity that it recognises, and supplanting alternative forms of relationality. This is particularly problematic for co-operatives and the ethos of mutuality that animates them, as the next chapter will show.

This section will take a more genealogical approach to the question of corporate personality, examining its development and metaphysicalisation in the medieval church, and its gradual integration into English law.[76] There are two key features of the corporation that emerge from this early history. Firstly, the corporate form, from the *universitas* of Roman law to the early modern body politic, has served as a means of extending the power of a centralised authority through the grant of exemptions and privileges; as such, the corporate form cannot be divorced from questions of sovereign power, and particularly modern configurations of sovereignty. Secondly, the specific form of the body corporate, which is also shared with the state, was constructed through a transcendent metaphysical structure that was then secularised through its integration into English law.

The conception of the body corporate that is found in English law derives primarily from the medieval church and the doctrine of *persona ficta*, by which ecclesiastical associations were attributed with a fictitious personality, as will be described in more detail below. There has been considerable debate over whether English law 'received' the fiction theory from canon law. Yet at the heart of these debates is a shared acknowledgement that

[75] Foucault, *History of Sexuality*, 144.

[76] There are, as Alberto Toscano has pointed out, significant tensions between the concept of genealogy and political theology as it is generally understood, particularly by Giorgio Agamben. A political theology of the body corporate arises from the genealogy pursued here because theology, while not the only aspect, is a key element of its historicity. The influence of theology arises not only as a general paradigm, but as the more or less direct influence of the medieval church on English law. This theological influence is not taken to be pernicious. Instead, it is a matter of historicising the concept which in turn, as an important aspect of any genealogy, helps to denaturalise or denormalise it in the present. See Alberto Toscano, "Divine Management," *Angelaki: Journal of the Theoretical Humanities* 16, no. 3 (2011): 125-136.

the fiction theory at the very least provided the notion of corporate personality as such, whether that personality is subsequently deemed to be fictitious or real.[77] As Harold Laski writes, "the phrase, whatever its author meant it to imply, gave exactly the impulse to the current of men's thoughts for which they had long been waiting. For immediately we have the acts of a person, the nature of that person may be matter of debate."[78] Frederick Pollock similarly observes that basic form of juristic personality, in which it is "distinct from that of its members, and is not associated with an individual body capable of suffering corporeal punishment...is allowed, and indeed required, by the realist no less than the fictionist doctrine. [79] It is this notion of corporate personhood that is eventually integrated into English law.

The corporation, understood as a discrete unity with legal personality, first appears in English law only in the fifteenth century.[80] While the common law had recognised various forms of association from before the Norman Conquest, as Pollock and Maitland explain, "[o]ur forefathers found it hard to conceive that one and the same community can continue to exist unless each new member steps into the place of some departed member."[81] These associations were largely considered to be "land communities," not corporate entities. They included larger entities such as cities, townships and boroughs, but also shires and hundreds.[82] Amongst these land communities, the borough—designated as the *liber burgus*

[77] Moreover, at least as far as the doctrine of persona ficta itself is concerned, it was not applied in an absolutist manner. While the collective person was a fiction, this fiction did not necessary emanate from the state. It was not, as Kantorowicz points out, used in a derogatory manner. The fiction was an *imitation* of nature and therefore must have an element of truth to it. Ernst H. Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (New Jersey: Princeton University Press, 1957), 306.
[78] Harold J. Laski, "The Early History of the Corporation in England," *Harvard Law Review* 30, no. 6 (1917): 575.
[79] Pollock, "Has English Law," 231.
[80] In examining the history of corporations in English law, Pollock and Maitland employ a very general definition of the corporation as "some organized group of men...treated as a unit which has rights and duties other than the rights and duties of all or any of its members," finding it otherwise impossible to generalize about other features that might be considered 'natural' elements of corporateness. Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I, Volume I* (Cambridge: Cambridge University Press, 1899), 488.
[81] Ibid. 677.
[82] Pollock and Maitland, *History of English Law*, 510.

[free borough]—came the closest to being a corporation, yet as John P. Davis explains, this was more "a medium through which the law viewed the burgess himself, rather than a legal entity."[83] The term *communitas*, which was most often used to describe these entities, did not offer any clear distinction between the group and the individuals that comprised it.[84] These entities, while often recognized through Royal Charters, were not *created* through them, being, as they were, pre-existing territorial groupings. As Pollock and Maitland explain, "[a]s yet the charters contain no creative words. Nothing is said, as in the charters of the fifteenth century, about the erection of a 'corporation' or 'body politic'; nothing, as in the charters of the fourteenth, about the formation or confirmation of a *communitas*. The *communitas* is already there; it may want privileges, but it exists."[85]

The conception of the corporation that English law would eventually adopt originates in the Roman law, but it comes to English law through the medieval church. This influence appears in early accounts of church property. In the Anglo-Saxon land books, Pollock and Maitland find that God and the saints are capable of owning land.[86] Similarly in the Doomsday Book, saints are frequently listed as the owners of various church lands.[87] Of this curious structure, Maitland suggests we imagine what the monks themselves would have said in answer to the question "who owns this land and the property of the house?"[88] They would say, according to Maitland, "[w]e monks are not owners, we are but caretakers, administrators, agents of another person. That person is assuredly no fiction of the mind. In one sense, it may be no natural person, for he is supernatural, but real he is; he is our

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[83] John P. Davis, *Corporations: A Study of the Origin and Development of Great Business Combinations and of Their Relation to the Authority of the State, Vol. II* (New York: Capricorn Books, 1961), 218.
[84] Pollock and Maitland, *History of English Law*, 531. The term *communitas* lacked any precise definition: "[i]t is a large, vague word" (ibid., 494). A *communitas* is not regarded as an entity apart from its members. That the common law did not use the term *universitas* is indication of the lack of direct influence of Roman law on these early conceptions of association.
[85] Ibid., 704.
[86] Quoted in ibid., 499.
[87] Ibid., 500.
[88] Maitland, "Corporation Aggregate: The History of a Legal Idea," Lecture, May 25, 1893, 11-12.

patron saint; he is owner; we do but administer his goods for him."[89] Maitland readily suggests that it is this idea, of God and the saints as owners, that comes to be translated in secular law to the idea of a fictitious corporate person. "It would be long," Maitland writes, "to tell how deeply our medieval law is permeated by this idea, that God and the saints are capable of owning land, how slowly the idea gives way to a theory which puts an admittedly fictitious person, a corporation aggregate, in the place of real though supernatural beings."[90]

Although written somewhat hyperbolically, Maitland's description of the monks' conception of ownership and early accounts of church property gestures toward the transcendent conception of unity that will ultimately make its way into early modern conceptions of the corporation through the notion of the *universitas*. While the concept of the *universitas* originates in Roman law, it is only in the medieval church that it comes to have a metaphysical dimension and to be conceived of as a person.[91] There were many forms of group or collective in Roman law, but initially none of them were 'corporate' except for the *universitas*, a term meaning 'the whole' which emerged toward the end of the Republic.[92] Other forms of association, such as the *collegia* and the *societas* could not hold property as a collective, but only jointly as individuals.[93] The category of *universitas*, as applied to groups, arose specifically as a way to signify the ownership of public property. Public property was not, under the *jus civile*, capable of being owned, "it was said to be *extra commercium*."[94] The *universitas* effectively served as a means of bridging private and

[89] Ibid., 11-12.
[90] Ibid., 12.
[91] For a concise and recent overview of this trajectory, see Edward Mussawir and Connal Parsley, "The law of persons today: at the margins of jurisprudence," *Law and Humanities* 11, no. 1 (2017): 45. For Mussawir and Parsley, the Roman conception of *persona* is a legal technique rather than a metaphysical concept.
[92] William L. Burdick, *The Principles of Roman Law and Their Relation to Modern Law* (Rochester: The Lawyers Co-operative Publishing Co., 1938), 282-283. Some of these other non-corporate categories include *collegia* (trade guilds) and *societas*, which are sometimes erroneously cited as having been corporate bodies, which has led in turn to an overemphasis on Roman law as the source for the modern notion of incorporation (ibid., 280).
[93] Ibid., 281. It was only in imperial Rome that corporate status, expressed as *habere corpus*, was extended to private associations (ibid., 284-285).
[94] Ibid., 283.

public by making the *jus publicum* subject to a form of ownership. *Universitates* were thus initially municipal or public corporations, and served as a vehicle by which public property could be owned by specific municipalities, as entities separate from their individual members. As Burdick explains,

> as a technical legal term it meant something different from all the members who comprised it. It did not mean that the property of a university...was owned by all the members jointly, for it was only private property that could be so owned, but it means that apart and distinct from the individual members there was an abstract something that had rights and liabilities.[95]

However, this "abstract something" was not explicitly a *persona*, even if it had acquired some of the characteristics of personhood by virtue of the rights of action it accrued in relation to the ownership of property.[96] While exceeding a mere collection of individuals, the *universitas* was not immortal, and would die whenever all of its members had died.[97] As Maitland writes, there was very little theorisation of the corporation as such in the Digest, and more generally, "[t]he admission must be made that there is no text which directly calls the *universitas* a *persona,* and still less any that calls it a *persona ficta.*"[98]

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[95] Ibid., 282-283.

[96] Geoffrey Samuel conceptualizes this 'indirect' personhood as follows: "Now, if a legal person is an entity capable of bringing or defending a legal *action* in its own right, then the moment that a person – or more importantly a group of persons (*Universitas*) – is granted the procedural power to bring an action in his, her or its own name, this will have the effect of turning that person or group into a legal person. In other words, a legal *persona* can be created indirectly simply through the rules attaching to the institution of the *action."* Geoffrey Samuel, *Epistemology and Method in Law* (London: Routledge, 2003), 130. However, he also writes that "the texts devoted to legal personality in the Roman sources are fragmented and there is no theory of legal personality as such" (ibid.). Moreover, as Harold J. Berman observes, Roman law did not provide any answers to some of the most central questions of corporate personhood. As he writes, "...many questions such as whether a corporation derives its existence and its powers from a grant by a public authority or from the will of its founders or from its own nature as an association, what powers are exercised by its officers and what cannot be done by them without the consent of the members, and how the officers are to be chosen and how and why they may be dismissed were not discussed by the Roman jurists. Even the phrases "legal person" and "legal personality" were rarely used by them, and were never analyzed. Only in retrospect can one discern several implicit principles of Roman corporation law that became explicit in Western legal thought in the twelfth century when corporation law first began to be systematized. Two of these were, first, the principle that a corporation has legal capacity to act through representatives, and second, the principle that the rights and duties of the corporation are distinct from those of its officers." Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983), 215.

[97] Burdick, *Principles of Roman Law*, 292.

[98] Maitland, introduction, xviii. That said, Kantotowicz suggests the connection is readily made in the *lex mortuo*, which directly referred to the municipality as a person.

The more systematic development of the corporation and its personification occurs in the medieval church. Ecclesiastical 'corporations' have a long history in the structure of the Church.[99] The life of such groups formed an important part of the early history of the Church. Dating back to at least the fourth century AD, churches were established in far-flung corners of the old empire, and monasteries housed zealous believers who separated themselves from the Church. These entities could not be effectively administered by any centralised church authority, and thus required structures of decentralised authority. As Davis summarizes,

> [a]s often happens in the development of corporate life, the superior organization of society proved unable to absorb into its own structure the inferior corporate life that it had called into being; it had to be content with annexing the subordinate structure; the Church was unable to comprehend the results of monastic activity within the hierarchy of pope, bishop, and priests, and had to make monasteries a part of its structure."[100]

In the tenth century, the monasteries were brought within the structure of the Church. Thus, in a manner not unlike that of Romans, the corporate form enabled the exercise of a form of public power or authority, derived from the papacy. "The Papacy," as Davis describes, "was the source from which the monasteries obtained exemptions and privileges: the monks in return became the standing army of the papacy."[101]

The canonists readily applied the notion of *universitas* to various forms of ecclesiastical associations, as well as to the church as a whole from a very early date: "being," as Kantorowicz explains, "the *universitas fidelium* according to oldest definitions, the universal Church was also legally *universitas* without restriction." [102] It is unclear when

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[99] This history, and the primacy of the ecclesiastical corporation, are given in some detail (and far more than can be dealt with here) by John P. Davis, *Corporations: A Study of the Origin and Development of Great Business Combinations and of Their Relation to the Authority of the State, Vol. I* (New York: Capricorn Books, 1961) 35-88. Davis specifically points to the regularity of visitation to churches as an important part of what gives the church its early unity and lends to the creation of a more centralized hierarchy.
[100] Ibid., 56.
[101] Ibid., 57.
[102] Kantorowicz, *The King's Two Bodies*, 305.

precisely the canonists began to ascribe personality to the *universitas*. There must, as Kantorowicz argues, have been a fairly widespread tendency to treat the *universitas* as a person by the time it was formally personified in law in 1245.[103] The legal personification of the corporation, when it is finally made explicit, is widely attributed to Sinibaldus Fliscus, who became Pope Innocent IV (1243-1254). In response to "the general tendency to treat the various ecclesiastical *collegia* as though they were real persons who could be punished and excommunicated," he declared the *universitas* to be a *persona ficta*.[104] The various "*universitates*...were 'names of Law' only and not of persons."[105] More specifically, as Kantorowicz describes, the

> *universitas* was a person without a body, a pure *nomen intellectual* and a thing incorporeal which, as later canonists were quick to point out, could not be condemned because it was lacking a soul, nor be decapitated because it was lacking a body. The personified *universitas*, therefore, was only an imaginary 'represented person' (*persona representata*) or a 'fictitious person' (*persona ficta*).[106]

This was a relatively limited intervention, intended to differentiate the corporate, fictional person from the natural one, by showing the limits of the analogy. Nonetheless, this proclamation had the more extensive effect of making it possible for all manner of *universitas* to be considered *persona ficta*, effectively formalising prior tendencies, while also clarifying their nature. As Kantorowicz suggests, this created "the possibility of treating every *Universitas* (that is, every plurality of men collected in one body) as a juristic person, of distinguishing that juristic person clearly from every natural person endowed with body and soul, and yet of treating a plurality of individuals juristically as one person."[107]

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[103] Ibid. J.P. Canning suggests that it can be found in the writings of the Decretalists, at least from Pope Innocent IV onward, and that it is further developed by the Commentators. J.P. Canning, "Law, sovereignty and corporation theory, 1300-1450," in ed. J.H. Burns, *The Cambridge History of Medieval Political Thought c. 350-1450* (Cambridge: Cambridge University Press, 1988), 474.
[104] Ibid.
[105] Ibid.
[106] Ibid., 306.
[107] Ibid. See also Maximilian Koessler, "The Person in Imagination or Persona Ficta of the Corporation," *Louisiana Law Review* 9, no. 4 (1949): 437. There were also significant differences with the Roman conception of the *universitas*. For instance, they did not require public authorisation in Canon law, they only needed to have the requisite structure. There was no need for "special permission." They would have

The metaphysical conception of the corporate person from canon law, as I have already elaborated to some extent as in chapter 2 a way of situating Hobbes' use of the fictitious person in the *Leviathan*, conceives of the unity of the person through a transcendent metaphysical structure. By way of review, this transcendence figures in two ways. First, the *corpus mysticum* [the mystical body of Christ] gives a kind of bodily unity by referring to the body of Christ in heaven to create an earthly unity in the Church. This is supplemented by the attribution of angelic temporality to the *universitas*, which allowed it to exist, like the angels, between the infinite time of God, and the finite time of man. It could have a moment of creation, like man, but exist immortally, like God. This transcendent metaphysical structure is shared by both the corporate group and the state, but it was applied to lesser associations long before it was ever applied to the state.

The notion of the corporate body adopted by English law is a more or less direct inheritance from the medieval church. It was not only motivated by the same concerns that prompted the church to recognise ecclesiastical corporations, but it drew directly on the structure that had been developed within the church for conceiving the corporate body as fictitious and immortal. "The question," as Pollock and Maitland recount, "[w]hen did our English borough become incorporate? Is one to which no precise answer can be given."[108] It is a gradual process that extends over several centuries. In the thirteenth century writings of Henri de Bracton, Pollock and Maitland can find no general theory corresponding to the corporation, even if some terminology, such as *universitas*, occasionally appears.[109] However, it was in part because the courts had to deal with ecclesiastical corporations that they came to acknowledge and integrate the concept into secular jurisprudence. Laski

jurisdiction over their members. The can act through an ensemble of the members instead of only representatives. They were severally liable for the debts of the corporation. See also Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983), 218.

[108] Pollock and Maitland, *History of English Law*, 687.

[109] Ibid., 496. Henri de Bracton [1210-1268] was an early English jurist.

suggests that the Statute of Mortmain (1279), which forbade the acquisition of property by churches, are an indication that they understood these entities to be immortal, hence the risk of their coming to own property, that the statutes sought to curtail.[110] These statutes were also eventually applied to the boroughs.[111]

By the fourteenth century, Pollock and Maitland observe that "the king had begun to interfere with the creation of new *communitates*, with the creation of voluntary associations or gilds."[112] The motivation for this was primarily "political expedience and financial needs."[113] The granting of such licences formed a source of income for the crown: gilds, wishing to exercise not merely a private power, but to share in the public exercise of sovereign authority, would readily pay for such privileges, as would boroughs, which were increasingly formed in the manner of gilds.[114] Yet, as Pollock and Maitland explain, "the charters contain no creative words."[115]

> The notion that there is some 'feigning' to be done, some artifice to be applied, has not yet been received from the canonists, and perhaps we ought to regret its reception.... The foundation, however, is being laid for a rule which will require a royal licence when a new corporation is to be formed.[116]

It was the length of the licences themselves, which necessarily entailed succession, that appears to have precipitated a juridical turn to corporate forms.

> In the great boroughs, large sums of money were subscribed in order that privileges might be bought from the king, and the subscribing townsfolk naturally conceived that they purchased those privileges for themselves. Some definition of the privileged, the franchised, body was necessary, and yet in the great boroughs that body could not assume any of the old accustomed forms.[117]

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[110] Laski, "Early History," 577. Mortmain translates as 'the dead hand'. The Statutes of Mortmain were a way for the newly consolidating secular state to prevent property transferring to the church indefinitely. See Sandra Raban, "Mortmain in Medieval England," *Past & Present*, no. 62 (1974): 3-26.
[111] Pollock and Maitland, *History of English Law*, 496.
[112] Ibid., 669.
[113] Ibid., 670.
[114] Ibid.
[115] Ibid., 669.
[116] Ibid.
[117] Ibid., 670.

The borough, with reference now not to the landed community, but to those who hold the licence or franchise from the king, takes on a kind of corporate identity. The borough is no longer a physical entity, but an ideal one, which individual burgesses become members of by taking vows, not unlike monks. However, the legal language of incorporation is still lacking, and the charters are granted to mere pluralities, to 'the burgesses' or 'the men', as Pollock and Maitland describe.[118] The burgesses are 'co-proprietors' rather than a corporate entity. In the year books of Edward IV [1461-1483], Pollock and Maitland find discussions of corporations, referred to as *corporacion* (used interchangeably with *corps corporat* and *corps politik*), which include "abbot and convent, dean and chapter, mayor and commonalty."[119] These are contrasted to "aggregates of men that are not incorporated, townships, parishes, gilds."[120] This corporation is a *persona ficta*, but it still has elements of an anthropomorphic and organological structure, as all such corporate entities must have heads. By the mid-fifteenth century, terms such as *corpus* had begun to enter the English law, indicative of the influence of the Church.[121] Then, in 1440, the phrase "one of perpetual and corporate commonalty" was used in a charter granted by Henry VI to Kingston-upon-Hull.[122]

The first clear articulation of the corporation in English law is widely regarded to have come from Sir Edward Coke in the *Sutton's Hospital* (1612) case. This definition clearly reflects the influence of the church. There he wrote that "...a corporation aggregate of many is invisible, immortal, and rests only in intendment and consideration of the law."[123] He also specified that corporations cannot commit treason, be outlawed or excommunicated, "for

[118] Ibid., 673
[119] Ibid., 490.
[120] Ibid.
[121] John P. Davis, *Corporations: A Study of the Origin and Development of Great Business Combinations and of Their Relation to the Authority of the State, Vol. II* (New York: Capricorn Books, 1961), 218.
[122] Ibid.
[123] Edward Coke, *The Reports of Sir Edward Coke, vol. 5,* ed. John Farquhar (John Butterworth and Son, 1826), 303.

they have no souls, neither can they appear in person, but by attorney."[124] These basic tenets of the corporation in English law were elaborated more fully by William Blackstone in his *Commentaries on the Laws of England*, where he wrote that "...it has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to constitute the artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality."[125] Corporations, as Blackstone indicates, were formed for the public benefit and had to be authorized by the Crown: "the King's consent is absolutely necessary."[126]

The historical integration of the idea of fictitious corporate personality from medieval canon law to secular English law makes the body corporate a form of theological inheritance. A transcendent metaphysical structure, a form of abstraction that relied on the unity of the body of Christ in heaven to establish a collective unity on earth, as well as the temporality of supernatural, angelic beings to conceive of immortality, is brought within the world through a juristic fiction, effectively reproducing this metaphysical structure.

*Incorporation and Governmentality*

While the corporate form took several centuries to find its way into English law, it subsequently served as a vital means by which the early modern state extended its authority. This section traces the movement from incorporation as a narrow privilege available as a mechanism of public law in the early modern period, to the introduction of incorporation by registration and the conceptualisation of incorporation as a private right in the nineteenth century. These are read alongside Foucault's conceptualisation of governmentality. Governmentality describes a certain "art of government" as it appears in the sixteenth and

[124] Ibid.
[125] William Blackstone, *Commentaries on the Laws of England: Book the First* (Oxford: Clarendon Press 1765), 476.
[126] Ibid., 472.

seventeenth centuries, in which the concern is no longer simply to establish the legitimacy of sovereignty and law, but with the articulation of a rationality of government.[127] In Foucault's work, he describes two forms of governmentality: one associated with 'police' and the other with biopolitics and liberalism.

From its roots in Roman law and medieval canon law, to its eventual integration in early modern English law, the body corporate became a central means by which the rapidly consolidating early modern state extended and reinforced its power and authority. While he does not explicitly mention them, chartered corporations formed important part of what Michel Foucault describes as "police power."[128] In the fifteenth and sixteenth centuries, police was understood to mean a public body, or some collective governed by public authority.[129] However, in the seventeenth century it came to indicate "the set of means by which the state's forces can be increased while preserving the state in good order."[130] Police power was primarily focused on commerce, "because at that time commerce is thought of as the main instrument of the state's power and thus as the privilege object of a police whose objective is the growth of the state's forces."[131] Police power was concerned, amongst other things, with the management and increase of the population, the management of resources, and the early use of statistics. The state also ensured what Foucault refers to as "the necessities of life."[132] This meant that the state took an active role in 'supervising' the price and quality of basic goods, as well as their circulation. [133] This includes the development of infrastructure—roads and railways—but also other forms of regulation that allow for the circulation of goods to proceed with as few hindrances as possible.

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[127] See Michel Foucault, *Security, Territory, Population: Lectures at the College de France 1977-1978*, ed. Michael Sellenart, trans. Graham Burchell (Basingstoke: Palgrave Macmillan, 2008).
[128] Ibid., 336.
[129] Ibid., 313.
[130] Ibid., 313.
[131] Ibid., 339.
[132] Ibid., 324.
[133] Ibid.

The means used by the state to pursue this mode of government were varied, but Foucault suggests that

> ...it will have to provide itself with whatever is necessary and sufficient for effectively integrating men's activity into the state, into its forces, and into the development of these forces, and it will have to ensure that the state, in turn, can stimulate, determine, and orientate this activity in such a way that it is in fact useful to the state.[134]

The state could do this through the use of corporations by giving them a share in its sovereignty, thereby extending its control over an array of activities that it would not have the capacity to manage directly. As Joshua Barkan suggests "...in seventeenth-century England, the corporate charter became a technique by which the Crown both recognized the autonomy of these groups and attempted to redirect their power toward the fiscal and physical health of the state."[135] There are numerous examples, from the early boroughs described in the preceding section which gave the state more control over the distribution of power domestically, to the imperial corporations of the seventeenth century.

This wide variety of functions taken on by corporations can be observed in the typology of corporations outlined by Blackstone. Corporations are first divided between ecclesiastical and lay. Lay corporations, in turn, are divided between civil and eleemosynary. Civil corporations are all those that have been established for temporal purposes such as those that have been "erected for the good government of a town or a particular district"—the mayor, the burgesses, and bailiffs. These also include trading companies, professional colleges and associations, for instance the Royal Society, and universities. Eleemosynary corporations, on the other hand, are those that fulfil the direction of a founder, such as alms houses and hospitals. Through all of these functions, as Barkan summarizes, "*...corporations became the very basis for regulating conduct*" in the early modern period.[136]

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[134] Ibid., 323.
[135] Barkan, *Corporate Sovereignty*, 20.
[136] Barkan, *Corporate Sovereignty*, 30. Emphasis in original.

Notwithstanding the increasing prevalence and importance of corporations, England maintained a notoriously strict approach to their creation all the way up to the mid-nineteenth century. Incorporation was a narrow public affair requiring either a Royal Charter or, later, an Act of Parliament. It could cost upward of £1000 to obtain corporate status.[137]

This restrictive and selective dynamic of incorporation changes significantly in the mid-nineteenth century, with the introduction of general incorporation laws, which made the corporate form available by a relatively simple process of registration. This occurred as part of a broader shift in the dominant modalities of power and governmentality, from police to biopolitics.[138] The eighteenth century saw a critique of police and the modes of intervention described above, and a turn to regime of biopolitics and liberal governmentality premised on the notion of limited intervention, articulated in part through a discourse of political economy. Despite this critique, as the epithet "make live and let die" neatly expresses, this modality of power functioned through creating and enabling particular forms of life in a far more expansive way then had been done under the auspices of police and *raison d'etat*.[139] While political economy initially developed as part of *raison d'etat*, it comes in the late eighteenth century, particularly with the work of Adam Smith in *The Wealth of Nations*, to specify a principle of limitation for government intervention, as a framework of evaluation intervention as such.[140] This principle is the market.

Police power had also been concerned with a conception of the market, but on mercantilist terms and always in service of the growth and expansion of the state.[141] In liberal governmentality, the market became a "site of truth," and the law had to function so as to

[137] Rob McQueen, *A Social History of Company Law: Great Britain and the Australian Colonies 1854-1920* (London: Routledge, 2009), 63.
[138] Joint Stock Companies Act 1844.
[139] Foucault, *Society Must Be Defended*, 241.
[140] Foucault, *Birth of Biopolitics*, 13.
[141] Foucault, *Security, Territory, Population*, 346.

allow that truth to express itself.[142] Government interventions could not be regarded as ends in themselves or, as was the case with the old power of police, the expansion of the state.[143] The forms of regulation and intervention associated with mercantilism ceased to have any direct purpose because in the market there was a natural equilibrium. In order to allow this equilibrium to emerge, competition must "be allowed to operate between private individuals," ostensibly without the state getting in the way.[144] Individuals, in the classic (and often abused) formulation of Adam Smith, must be allowed to pursue their own self-interest. As Foucault summarizes, "[t]he good of all will be assured by the behaviour of each when the state, the government, allows private interest to operate, which, through the phenomena of accumulation and regulation, will serve all."[145]

However, this does not mean that government no longer intervenes or that the level of intervention decreases; in other words, the limitation of government prescribed by political economy is not a "negative boundary."[146] Instead,

> [a]n entire domain of possible and necessary interventions appears within the field thus delimited, but these interventions will not necessarily, or not as a general rule, and very often not at all take the form of rules and regulations. It will be necessary to arouse, to facilitate, and to *laissez faire*, in other words to manage and no longer to control through rules and regulations. The essential objective of this management will be not so much to prevent things as to ensure that the necessary and natural regulations work, or even to create regulations that enable natural regulations to work.[147]

As far as liberal economic theory is concerned, the state simply cannot have knowledge of the market. As Foucault summarises, "the economic world is naturally opaque and naturally non-totalizable. It is originally and definitely constituted from a multiplicity of

[142] Foucault, *Birth of Biopolitics*, 38.
[143] Ibid., 203.
[144] Foucault, *Security, Territory, Population*, 346.
[145] Ibid.
[146] Ibid., 352.
[147] Ibid., 353.

points of view which is all the more irreducible as this same multiplicity assures their ultimate and spontaneous convergence."[148]

In relation to corporations, this shift manifested in relation to a particular form of organisation, the unincorporated joint stock company. As a model of business organization, the joint stock company had been around since at least the early sixteenth century. The earliest examples of this form of organisation operated without any formal legal status. However, by the sixteenth century, it had become a distinctive form of incorporated business organisation, alongside the regulated company. Joint stock companies would have been incorporated, usually with monopoly privileges, by Royal Charter. In the first two decades of the seventeenth century, chartered joint stock companies flourished, only to decline significantly and fall out of favour by the end of the century.[149] They began to come into use again with the success of the East India Company and the extension of incorporation powers to Parliament. Around the 1690s, the unincorporated joint stock company also appeared for the first time.[150]

As the story goes, these unincorporated joint stock companies and the unbridled speculation they enabled, proliferated to such an extent that they created the notorious 'South Sea Bubble', and subsequent crash, resulting in the passage of the Bubble Act of 1720, which prohibited unincorporated joint stock companies.[151] This, however, is not quite accurate. The Bubble Act was, as Harris clarifies, passed before the crash happened. Although the Act contained a clause which explicitly made unincorporated joint stock companies illegal, this was not the main focus of the Act and this provision was rarely enforced. While the Bubble Act of 1720 formally banned and created criminal sanctions

[148] Foucault, *Birth of Biopolitics*, 282.
[149] Ron Harris, *Industrializing English Law: Entrepreneurship and Business Organization 1720–1844* (Cambridge University Press 2000), 41 and 55.
[150] Harris, *Industrialising English Law,* 53.
[151] Royal Exchange and London Assurance Corporation Act 1719

for unincorporated joint stock companies, Harris suggests that from its inception the law was effectively a "dead letter."[152] There was only one criminal prosecution under the Act in nearly a century. After a period of relative inactivity, unincorporated joint stock companies began to flourish again in the early nineteenth century, prompting a new conversation around joint stock companies and, for a time, a revival of the Bubble Act.[153]

As unincorporated joint stock companies proliferated, they presented a problem for regulation as many companies were fraudulent. At the same time, investment in them was becoming increasingly widespread, leading to increased pressure to create a legal framework for them. Public opinion in general, however, was not in favour of joint stock companies. The speculation that drove joint stock investment was considered to be a particularly egregious sin. Those who petitioned on behalf of legal protection for joint stock companies put forward a variety of arguments which were not immediately influential, but nonetheless anticipated a logic that would eventually become dominant. In particular, in a way that lends credence to Foucault's description of political economy and biopolitical governmentality, they argued for corporate privileges through a claim to commercial *freedom* and a *right* to the privileges of corporate status. Company promoters, as James Taylor describes, "couched their arguments in the language of *laissez-faire* and freedom from judicial and legislative interference."[154] There was also an attempt to situate the joint stock company within a longer history of commercial association, implicitly suggesting that corporate status was itself something natural. One promoter, in an anonymous pamphlet, derided attempts "to mislead the Country, to suppose that an Association of Gentlemen for commercial purposes is illegal. Such Associations have existed for centuries past; and

[152] Harris, *Industrialising English Law,* 79.
[153] Ibid.
[154] James Taylor, *Creating Capitalism: Joint-Stock Enterprise in British Politics and Culture 1800–1870* (Woodbridge: Boydell Press, 2006), 97-99. According to Taylor, they cited Adam Smith even though he had been reticent, if not outright disapproving of the joint stock model outside of specific, capital intensive endeavours.

are we now, in this age of civil liberty, to be deprived of commercial freedom."[155] Finally, promoters tried to show that their activities were in the national interest, because they promoted competition and helped to break up monopolies.[156] In spite of these arguments, it was paradoxically a negative view of unincorporated companies that led to free incorporation, as there was a sense that fraud occurred *because* the joint stock companies were unincorporated.[157] The space of illegality in which the companies operated offered very little accountability: once a company had been deemed illegal, there was little that investors and creditors could do to retrieve their funds. Initial measures taken in 1834 and 1835 sought to extend some privileges, but also to maintain control over incorporation itself.[158] As a result, the prevailing regime in which incorporation was a selective grant or gift largely held during the first several decades of the nineteenth century.

The Joint Stock Companies Act of 1844 changed all of this, at least in law – the Act, as Taylor summarises, effectively "transform[ed] incorporation from a closely-guarded privilege into a freely-available right."[159] This was the first time in the history of incorporation that they "could be formed without explicit, deliberated, and specific State permission."[160] However, the intention of the act was not to create a freely available right, echoing Hart, but rather "to bring these companies within the law where they would cease to be such a disruptive influence on the economy, and to enable shareholders to perform their regulatory duties more effectively."[161] It represented a different way of regulating corporations, by removing the state from the role of deciding which associations and endeavours warranted protection. It replaced the old process of procuring Royal Charters

[155] Quoted in Taylor, *Creating Capitalism*, 99.
[156] Ibid., 100.
[157] Ibid., 137.
[158] Ibid., 93.
[159] Ibid., 135.
[160] Ibid., 284.
[161] Ibid., 135.

and Acts of Parliament "with a mechanical self-regulating system which would exclude government discretion altogether, and establishing a new authority at one remove from central government to oversee the operation of this system, the Join-Stock Companies Registrar."[162] In keeping with Foucault's understanding of liberal governmentality, it was thought that the government could not decide which corporations were legitimate and which would be fraudulent. As a result, they adopted free incorporation as "a blanket solution: security to the public was to be provided by applying the same rules to all companies, good, bad and fraudulent."[163]

The provision of incorporation by registration for joint stock companies highlights a key tension at the heart of liberal governmentality. While being depicted (mostly retrospectively, as highlighted above) as a retreat of the state motivated by a concern with how to govern less, it is demonstrates a concern to regulate more. Incorporation by registration was comprised of a set of interventions which increase rather than decrease the role of law in the constitution and maintenance of economic and social relations. Free incorporation was understood as a privatization of the corporation, yet "their formation relied on a State statute and was subject to State regulation."[164] However, the fact of this greater penetration is masked by the conception of incorporation as a right. This, as I will argue in the next section, is a consequence of the normalisation of law and the corporate form.

*The Normalisation of Incorporation*

This section will argue, drawing on Foucault, that the historical shift from incorporation as a "gift of sovereignty" to a private right constitutes a *normalisation* of law. Alongside the shift in forms of governmentality described above, from police to biopolitics,

[162] Ibid.,135
[163] Ibid., 139.
[164] Harris, *Industrialising English Law*, 284.

Foucault also describes a shift in the dominant modalities of power, or at least in their configuration. There is on the one hand, a sovereign or juridical form of power that comes from the Middle Ages. In the constitution of the monarchies, and eventually states, this form of power "functioned as a principle of right" through which the sovereign could transcend localised conflicts, "identifying its will with the law."[165] The law served as a mechanism of coordination and a force that could reconcile the interests of feudal lords in service of a nascent state.[166] This ascendancy of a discourse of right is historically tied for Foucault to the reception of Roman law in the twelfth century, and the form of royal power to which it corresponds "has provided the essential focus around which legal thought has been elaborated. It is in response to the demands of royal power, for its profit and to serve as its instrument or justification, that the juridical edifice of our own society has been developed. Right in the West is the King's right."[167] This form of power operates as "a subtraction mechanism, a right to appropriate a portion of the wealth, a tax of products, goods and services, labour and blood, levied on the subjects."[168] Sovereign or juridical power is primarily characterised by the sovereign's "right to decide life and death."[169] While not an unconditional right, it was allowable as a "defense of the sovereign" and in the name of "his own survival."[170]

While Foucault is clear that power was not simply or purely exercised in a juridical manner even in the Middle Ages, prohibition and right were nonetheless "the language of power" as well as its "mode of manifestation and the form of its acceptability."[171] The theory

[165] Foucault, *History of Sexuality*, 87.
[166] For an account of the coordinative function of juridical power see Victor Tadros, "Between Governance and Discipline: The Law and Michel Foucault," *Oxford Journal of Legal Studies* 18, no. 1 (1998): 87.
[167] Foucault, "Two Lectures," in *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*, ed. Colin Gordon, trans. Colin Gordon *et al* (New York: Pantheon Books, 1980), 94.
[168] Foucault, *History of Sexuality*, 136.
[169] Ibid., 135.
[170] Ibid.
[171] Ibid., 87.

of sovereignty served as a legitimation mechanism for a particular consolidation of power and a particular form of domination. The movements for popular sovereignty and parliamentary democracy in the seventeenth and eighteenth centuries maintained this focus on sovereignty, even as they struggled against the monarchies. As Foucault observes, "it is always the limits of this sovereign power that are put in question, its prerogatives that are challenged."[172] The theory of sovereignty becomes an instrument of opposition and critique, but one that does not challenge "the juridico-monarchic sphere as such."[173] Instead, this critique argued for "a pure and rigorous juridical system to which all the mechanisms of power could conform... it did not challenge the principle which held that law had to be the very form of power, and that power always had to be exercised in the form of law."[174]

However, alongside the demands for popular sovereignty and the rise of parliamentary democracy, Foucault also observes the emergence of another modality or "mechanism of power," one that is "absolutely incompatible with the relations of sovereignty."[175] This is disciplinary power. It is not found in or emanating from the state, but in heterogeneous sites like the factory, the barracks, the school, and the clinic. Discipline describes not a hierarchical exercise of power, but a form of power that manifests in "relations that go right down to the depths of society."[176] Disciplinary power is "diffuse, rarely formulated in continuous, systematic discourse; it is often made up of bits and pieces; it implements a disparate set of tools or methods."[177] These 'tools' or 'methods' operate in the realm of bodies and subjectivities, fashioning individuals for the extraction of productive value (time, labour) while also engendering their submission. "The historical moment of

[172] Foucault, "Two Lectures," 94.
[173] Foucault, *History of Sexuality*, 89.
[174] Ibid.
[175] Foucault, "Two Lectures," 104.
[176] Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage Books, 1995), 27.
[177] Ibid., 26.

the disciplines," he explains, "was the moment when an art of the human body was born, which was directed not only at the growth of its skills, nor at the intensification of its subjection, but at the formation of a relation that in the mechanism itself makes it more obedient as it becomes more useful, and conversely."[178] It is "centered on the body as a machine: its disciplining, the optimization of its capabilities, the extortion of its forces, the parallel increase of its usefulness and its docility, its integration into systems of efficient and economic controls...."[179]

While mechanisms of discipline had long been in existence, in monasteries, workshops and armies, Foucault suggests that it is only in the seventeenth and eighteenth centuries that they became "general formulas of domination."[180] Discipline's emergence at this level not only coincided with popular sovereignty, but also made it possible. As Foucault explains,

> The juridical systems--this applies both to their codification and to their theorization--have enabled sovereignty to be democratized through the constitution of a public right articulated upon collective sovereignty, while at the same time this democratization of sovereignty was fundamentally determined by and grounded in mechanisms of disciplinary coercion.[181]

Where sovereign power was exercised deductively, as a power to take life, disciplinary power is a power *over* life. "Discipline," as Foucault writes, "'makes' individuals; it is the specific technique of a power that regards individuals both as objects and as instruments of its exercise."[182] These individuals, the effects of disciplinary power, may then in turn be the subjects of popular sovereignty. To this end, the discourse of right that emerges from the French Revolution onward is the product of "a normalizing society" and "the historical

[178] Ibid., 137-138.
[179] Foucault, *History of Sexuality*, 139.
[180] Foucault, *Discipline and Punish*, 137.
[181] Foucault, "Two Lectures," 105.
[182] Foucault, *Discipline and Punish*, 170.

outcome of a technology of power centered on life."[183] These forms of right, as Foucault suggests, "made an essentially normalizing power acceptable."[184]

The emergence of disciplinary power on this level, while exceeding the confines of formal institutions, also had a profound effect on law and the mechanisms of justice. While the formal institutions remain, "other types of other types of assessment have slipped in, profoundly altering its rules of elaboration."[185] Alongside this, Foucault also observes that the function of judgement, usually confined to the juridical sphere, has become dispersed in society, through an array of "subsidiary authorities." [186] Yet discipline does not derive its rules from the juridical, but from a conception of nature, and reproduces itself through norms: "[t]he code they come to define is not that of law, but that of normalization."[187]

These two forms of power, disciplinary and juridical or sovereign power, remain absolutely heterogeneous, so much so "that they cannot possibly be reduced to each other."[188] However, law and sovereign power do not disappear with the emergence of disciplinary power; instead, they operate in tandem. "The powers of modern society," he writes, "are exercised through, on the basis of, and by virtue of, this very heterogeneity between a public right of sovereignty and a polymorphous disciplinary mechanism."[189] The shifts in governmentality from police to biopolitics described above configure these forms of power somewhat differently. Governmentality more broadly describes a certain art of government as it appears in the sixteenth and seventeenth centuries, in which the concern is no longer simply to establish the legitimacy of sovereignty and law, but with the articulation of a rationality of government. In particular, the art of government transfers a

[183] Foucault, *History of Sexuality*, 144.
[184] Ibid.
[185] Foucault, *Discipline and Punish*, 19.
[186] Ibid., 21.
[187] Foucault, "Two Lectures," 106-107.
[188] Ibid., 106.
[189] Ibid.

conception of economy previously located in the management of the family to the state. It is "the correct manner of managing individuals, goods and wealth within the family (which a good father is expected to do in relation to his wife, children and servants) and of making the family fortunes prosper—how to introduce this meticulous attention of the father towards his family into the management of the state."[190] It is this same notion of economy that, in the eighteenth century, comes to figure as "a level of reality, a field of intervention…" and that forms the basis of political economy in the nineteenth century.[191]

This conception of economy escapes the circularity of sovereign legitimacy, which is ultimately grounded in obedience to the law, and creates an end for government that is, in a sense, beyond itself. It is not for the sake of legitimacy that the state might intervene, but for a plural conception of utility. "Government," as Foucault explains, "is defined as a right manner of disposing things so as to lead not to the form of the common good, as the jurists' text would have said, but to an end which is 'convenient' for each of the things that are to be good."[192] The justification for government is no longer divine right, but a technical "knowledge of things."[193] In practical terms, it is connected to the specific practices of 'police' which accompanied mercantilism, but these, as noted above, were still focused on the expansion of the state as such, and thus still very much anchored in a theory of sovereignty. It is the development of the notion of economy, and with it the idea of the *population*, that takes governmentality thoroughly beyond the confines of sovereignty. The population has its own dynamics and tendencies that are understood as being intrinsic to the population, knowledge of which then determines appropriate techniques and ends of government. With the advent of population, police is supplanted by biopolitics, a form of governmentality that

[190] Michel Foucault, "Governmentality," in *The Foucault Effect: Studies in Governmentality*, eds. Graham Birchall, Colin Gordon, and Peter Miller (Chicago: University of Chicago Press, 1991), 92.
[191] Ibid., 93.
[192] Ibid., 95.
[193] Ibid., 96.

addresses itself to biological life and population-level phenomena, including "accidents, infirmities, and various anomalies," as well as "more subtle, rational mechanisms: insurance, individual and collective savings, safety measures, and so on."[194]

Biopolitics exceeds the bounds of the old right of sovereignty, which was "unable to govern the economic and political body of a society that was undergoing both a demographic explosion and industrialization."[195] However, sovereignty does not disappear with the advent of biopolitics, nor does disciplinary power. Biopolitics "penetrate" and "permeate" the sovereign's "old right—to take life or let live," infusing it with "the power to 'make' life and 'let' die."[196] Biopolitics also "embed[s] itself in existing disciplinary techniques," functioning not to individualise, as disciplinary power does, but to 'massify' and regularize the collective.[197] This becomes, as Foucault describes, a "power of regularization."[198]

In the context of this shift from a sovereign and juridical form of power to one of discipline and biopolitics, it has frequently been argued that Foucault 'expelled' law from modernity.[199] However, Foucault insists that sovereignty is an "absolutely integral" part of the "general mechanism of power in our society."[200] However, the particular manner in which sovereign and juridical power function changes, as do their articulation in relation to disciplinary power and biopolitics. To this end, a series of comments in *The History of Sexuality* have been particularly relevant. After elaborating the shift from a sovereign

[194] Michel Foucault, '*Society Must Be Defended': Lectures at the College de France 1975-76*, eds. Mauro Bertani and Alessandro Fontana, trans. David Macey (New York: Picador, 2003), 244.
[195] Ibid., 249.
[196] Ibid., 241.
[197] Ibid., 242-243.
[198] Ibid., 247.
[199] See Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (London: Pluto Press, 1994); Alan Hunt, "Foucault's Expulsion of Law: Toward a Retrieval," *Law & Social Inquiry* 17, no. 1(1992): 1-38. This thesis has been subsequently critiqued and revised. See Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Abingdon: Routledge, 2009); Alan Hunt, "Encounters with juridical assemblages: reflections on Foucault, law and the juridical," in *Re-reading Foucault: On Law, Power and Rights*, ed. Ben Golder (Abingdon: Routledge, 2013), 64-84 and Colin Gordon, "Expelled questions: Foucault, the Left and the law," in *Re-reading Foucault: On Law, Power and Rights*, ed. Ben Golder (Abingdon: Routledge, 2013), 13-38.
[200] Foucault, "Two Lectures," 108.

modality of power to one of biopolitics and discipline, Foucault suggests first that "law cannot help but be armed, and its arm par excellence, is death; to those who transgress it, it replies, at least as a last resort, with that absolute menace. The law always refers to the sword."[201] This is followed by a qualification in which Foucault explains that

> I do not mean to say that law fades into the background or that institutions of justice tend to disappear, but rather that the law operates more and more as a norm, and the judicial institution is increasingly incorporated into a continuum of apparatuses (medical, administrative, and so on) whose functions are for the most part regulatory.[202]

These comments have been interpreted in a variety of ways, from reinforcing the so-called expulsion of law from modernity to forging a split between juridical power and law. However, at a minimum, Foucault's insistence that law *always* refers to the sword suggests an enduring connection between law and sovereignty, even as law comes to function "more and more as a norm."[203] The challenge for political and legal theory is not to think of law without sovereignty, but to understand how sovereignty and law function as mechanisms of biopolitical and disciplinary power. Moreover, Foucault emphasises that "[t]he system of right, the domain of the law, are *permanent* agents of these relations of domination, these polymorphous techniques of subjugation," suggesting that even as the underlying form of domination changes, law and sovereignty persist.[204]

The history of incorporation demonstrates how law might retain a connection to sovereignty and also become normalised. The body corporate is a paradigmatic example of the sovereign or juridical mechanism of power. While it is not explicitly negative or deductive in the way that Foucault describes, it is intimately bound up with sovereignty, as a grant or 'gift' of sovereignty itself.[205] As Barkan argues, "...corporate power and state

[201] Foucault, *History of Sexuality*, 144.
[202] Ibid.
[203] Ibid.
[204] Foucault, "Two Lectures," 96.
[205] Joshua Barkan, for instance, argues that the corporation is the inverse of the sovereign ban, as Agamben understood it. See Barkan, *Corporate Sovereignty*, 6.

sovereignty depend on one another, each establishing the other's condition of possibility."[206] Corporations are amongst the many "subsidiary authorities" that proliferate as part of the coincidence of disciplinary and sovereign forms of power.[207] The early modern corporations provided numerous heterogeneous sites where a newly ascendant disciplinary power could take hold, implicitly and indirectly shaping the conduct of individuals, while simultaneously increasing the power of the state. However, while the early modern corporations help to facilitate the operation of disciplinary power, police more generally was still fundamentally rooted in sovereignty, justifying forms of direct intervention in, for instance, the creation of monopolies. The corporate charter is a limited, not to mention tightly controlled, form of sovereign power. Moreover, in this context, sovereignty does not function in a simply repressive manner. It always "oversteps" these boundaries.[208]

When incorporation was only available by Royal Charter or Act of Parliament, this integral connection to and limitation by state sovereignty was explicit, in part because it had to be. Recalling Thomas Hobbes' description of these "bodies politic," he emphasizes that "the power of the representative is always limited: and that which prescribeth the limits thereof, is the power of the sovereign. For power unlimited, is absolute sovereignty."[209] However, as argued in the last chapter, the state's supremacy is not inherent. As Paul Stern writes regarding the colonial corporations, they "exercised a great deal of autonomy, some were even literally self-constituting," even though they were "theoretically dependent on the Crown, in both principle and practice."[210] It is precisely the act of creating these corporations and giving them formal privileges, that helps to constitute the state. The state could produce

[206] Ibid., 6.
[207] Foucault, *Discipline and Punish*, 21.
[208] Michel Foucault, "Truth and Power," in Colin Gordon, ed. *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977* (New York: Pantheon Books, 1980), 121.
[209] Thomas Hobbes, *Leviathan* (Oxford: Oxford University Press, 2008), 149.
[210] Paul Stern, *The Company-State*. (Oxford: Oxford University Press, 2012), 10.

the appearance of an inherent supremacy by differentiating itself from these corporations, producing its identity as the state through a process of negation.

While the introduction of incorporation by registration made incorporation more readily available, it did not fundamentally change this dynamic. Incorporation is no less connected to sovereignty than it is in the early modern period. However, as Taylor writes, "[t]he reform was also facilitated by, and helped to perpetuate, a reconceptualisation of corporate privileges as private rights, and of joint-stock companies as private bodies."[211] The reconceptualization of incorporation as a right only obscures its enduring connection to sovereignty, making incorporation appear to be a form freedom. Not only that, but the corporate form appears to inhere or come from the group itself rather than a legal fiction, making it such that incorporation is an act of *recognition* rather than the grant of a privilege. Incorporation as a right, in other words, creates a form of disciplinary subjection, similar to that which enabled popular democracy, that normalises the law. This normalised form of incorporation conforms to the demands of liberal governmentality. As a right and a freedom, incorporation can be regarded as a merely 'facilitative' form of intervention, while the prior restrictive regime "became an unjustifiable interference" in private enterprise which had to be removed.[212]

However, the private sphere, as it comes to be constituted in the mid-nineteenth century is not beyond the control of the state, but rather "the effect of a multitude of state and other governmental interventions."[213] Rights may grant 'freedoms' but these freedoms are always also a form of subjection and ultimately domination. As Foucault suggests "right...transmits and puts in motion relations that are not relations of sovereignty, but of

[211] Taylor, *Creating Capitalism,* 136.
[212] Taylor, *Creating Capitalism,* 136.
[213] Mitchell Dean, Constitution of Poverty, Mitchell Dean, *The Constitution of Poverty: Toward a Genealogy of Liberal Governance* (Random House 1991) [ebook].

domination."[214] Thus, incorporation, as a right, should be viewed "not terms of a legitimacy to be established, but in terms of the methods of subjugation that it instigates."[215] Incorporation as right and norm instigates a much different form of subjugation from early modern forms of incorporation. Corporations become not just sites of discipline; the form itself takes on a disciplinary function, organising social life for the purposes of the market.

*Conclusion*

This form of discipline and its relationship to the market, and particularly co-operatives, will be discussed in more detail in the next chapter through the concept of enclosure. This chapter will conclude by returning to the debates over the nature of corporate personality introduced at the opening. Conceptions of incorporation as a right, a practical device, or a reflection of the real personality of associations participate in and reflect the normalisation of law described above. The body corporate, as shown above, imports a transcendent metaphysical structure into secular law. Thus, far from being a reflection of the 'real' personality of groups, as Gierke argues, the body corporate imports its own historicity in connection to a medieval political theology and imposes it on the groups that receive legal recognition. The pragmatists, by supposing that incorporation can be reduced to the specific rights and duties it imposes, neglect the potential effects of this form and its history. Finally, Hart's argument that incorporation is a right and a freedom normalises the form by disregarding the ways in which it remains connected to sovereignty and might coercively discipline social life. In contrast to these arguments, this chapter argues that legal recognition as a body corporate has a constitutive effect. In particular, the emergence of biopolitics forges a union between law and life, or "the inscription of natural life into the juridico-political order of the nation-state"—so much so that the distinction

[214] Ibid., "Two Lectures," 96.
[215] Foucault, "Two Lectures," 96.

between law and life would become at times indiscernible.[216] In this respect, law functions constitutively by *supplanting* other forms of relation. It does not matter if this status is freely given, a narrowly guarded privilege, or a practical device. Any identity with the world reflects not its ability to approximate or give form to what groups may perceive as their own unity, but the penetration of law in everyday life. In spite of these fundamental shifts, Foucault laments that political theory continues to operate as though sovereignty were the dominant modality of power, and the law the main mechanism through which it is exercised. "At bottom," he writes, "despite the differences in epochs and objectives, the representation of power has remained under the spell of monarchy. In political thought and analysis, we have not cut off the head of the king."[217]

Jean-Luc Nancy suggests that individual and collective unity must always be a kind of fiction, because any such unity is impossible. The pretence to unity is both predicated upon and simultaneously undermined by an inoperative (*dèsoeuvrement*) sociality. The specifically legal fiction of incorporation imports a transcendent metaphysical structure of the person from the medieval church. The normalisation of incorporation, when it is taken to be a right, or a reflection of a natural or real unity, as became the case in the mid-nineteenth century has the effect of *immanentizing* the transcendent reference, making the incorporated group appear to be an immanent totality.[218] The body corporate thus becomes a form of "deific substitute," like the state had a few centuries prior, albeit one that relies not on the perpetual generation of its identity through negation, but that continues to take its authority from law, even if it is no longer conceived of as doing so because the form has been normalised.[219] The next chapter will explore the specific consequences of this

[216] Giorgio Agamben, "Biopolitics and the Rights of Man," in *Biopolitics: A Reader*, eds. Timothy Campbell and Adam Sitze (Pittsburgh: Duke University Press, 2013), 153.
[217] Foucault, *History of Sexuality*, 88-89.
[218] Nancy, *Inoperative*, 32.
[219] Peter Fitzpatrick, "What are the Gods to Us Now?: Secular Theology and the Modernity of Law," *Theoretical Inquiries in Law* 8, no. 1 (2007): 162.

normalisation and immanentisation of the body corporate for the legal recognition of co-operatives

# Chapter 4: Constituting the Co-operative

*So common an object of the courts has the corporation aggregate become, that sometimes when one reads the law reports, one dreams of a time coming when natural persons will have ceased to exist, and the last man will have turned himself into a company with limited liability.*[1]

*Introduction*

This chapter finally turns to a more specific account of the legal recognition of the co-operative movement in mid-nineteenth century England, elaborating how incorporation served to both discipline and depoliticise the co-operative. In chapter 1, I began from an account of the history of the co-operative movement in which the law was afforded only a minor role. The law, if it mattered at all, was only an instrument of other, more dominant forces such as the economic; or simply an enabling participant in the growth and development of the movement. It also obscured an underlying political question to do with the transition between the practices associated with food riots and rebellions of the moral economy in the eighteenth century, to the co-operative as a distinct form of organization in the mid-nineteenth century. In the two intervening chapters, I suggested firstly that legal recognition is constitutive of the state, emphasising that the 'moral economy' and the 'co-operative' are not autonomous legal orders from that of the state, but reflect shifting forms of power and governmentality in the constitution of the modern state. Then, I suggested further that the law functions constitutively, imposing a particular form—the body corporate—onto the co-operative. This chapter argues that legal recognition functioned to discipline and depoliticise the co-operative, with the body corporate functioning as a form of metaphysical enclosure.

[1] Fredric William Maitland, "The Corporation Aggregate: The History of a Legal Idea (A Lecture Delivered at Liverpool under the Auspices of the Liverpool Board of Legal Studies and The Liverpool Law Students Association). Liverpool, 25 May 1893, 5.

The legal recognition of co-operatives, as recounted in earlier chapters, has generally been regarded as enabling or facilitative for the co-operative movement. G.D.H. Cole, for instance, suggests that legal recognition met specific 'needs' that co-operatives had, thereby allowing them to flourish. The co-operative societies, as Cole writes, were beset with legal "disabilities" – impediments to their operation that needed to be removed if they were to be successful.[2]

> The difficulty was not that Co-operative Societies were under the ban of the courts, but rather that no special provision had been made for them, so that they were unable to enlist the positive protection of the law when it was needed either to secure them against fraudulent or negligent officials or to enable them to carry on trade in such a way as to enter into firm contracts, to sue or be sued as collective bodies, or to enjoy any reasonable security of their funds.[3]

These impediments were not, Cole cautions, active restraints: "co-operation never suffered under legal disabilities as severe as those which beset the Trade Unions."[4] Moreover "[i]t must not be thought... that these disabilities were due in any considerable degree to a deliberate attempt to hamper the growth of the Movement."[5] Instead, the impediment is precisely the lack of an adequate legal structure and in particular legal personality. The opposition that Cole sets up between the overt repression experienced by the trade unions and the relatively benign neglect experienced by co-operative societies underscores the perception that legal recognition was simply enabling for the co-operative movement. However, as the last two chapters have suggested, the legal recognition of co-operatives involves more than just a 'bringing within' or the provision of useful facilities.

This chapter will provide a different narrative of the legal recognition of co-operatives and the debates that led up to it, situating them in relation to the emergence of liberal and biopolitical governmentality, and focusing particularly on the role played by the

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[2] G.D.H. Cole, *A Century of Co-operation* (Manchester: The Co-operative Union Ltd., 1944), 114.
[3] Ibid.
[4] Ibid.
[5] Ibid.

Christian Socialists. The Christian Socialists are so important in this genealogy, not because they have a monopoly on the meaning of co-operation, nor because their understanding is more truthful or accurate than others, but because they played such a central role in securing legal recognition for co-operatives and in the movement that grew thereafter. As this chapter will show, the Christian Socialists and other supporters of legal recognition for co-operatives saw them as a means of disciplining the working classes by exposing them to the market. This view is explored through a reading of the two parliamentary Select Committee reports that eventually led to the Industrial and Provident Societies Act of 1852.[6] These reports place co-operatives at the centre of shifting views about the relationship between morality and the market, and the role of government in facilitating its natural laws. These debates also helped to reopen a wider conversation about limited liability in the mid-nineteenth century. The pressure to provide limited liability for companies came, in the first instance, from the Christian Socialists themselves, who argued that this would enable the working and middle classes to participate in the market.

The chapter then turns to the relationship between incorporation and market discipline, arguing that incorporation functioned as a form of metaphysical enclosure that both disciplined and depoliticised the co-operative. While the corporate form and limited liability are generally regarded as a response to the needs of business or the consequence of shifting modes of production under capitalism, the inclusion of working class co-operatives as integral to the development of these forms helps to expose the disciplinary character of these forms. "Discipline," as Michel Foucault writes, "sometimes requires enclosure."[7] Continuing the discussion of the normalisation of the corporate form in the

[6] U.K. Parliament, Select Committee on Investments for the Savings of the Middle and Working Classes: Select Committee Report. Parliamentary Papers 18 (1850): sess. 508, and U.K. Parliament Select Committee on the Law of Partnership: Select Committee Report." Parliamentary Papers 18 (1851): sess. 509.

[7] Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage Books, 1995), 141.

nineteenth century from the previous chapter, I argue that functioning as a form of metaphysical enclosure, not unlike the physical barriers that enclosed the commons, or the subjectifying walls of the prison in the panopticon. The metaphor of enclosure links the specific history of the body corporate form and its metaphysicalisation in the medieval church with its use in the nineteenth century. As a form of transcendent unity, signified by the corporate person, it functions in an "immanentist" or "totalitarian" manner as described by Philippe Lacoue-Labarthe and Jean-Luc Nancy.[8]

*Legal Recognition and Market Discipline*

The legal recognition of co-operative societies is not the story of a social movement struggling for recognition by the state. Not only was there no widespread effort on the part of co-operative societies to reform the law in the mid-nineteenth century, as Phillip N. Backstrom writes, there was not much of a co-operative 'movement' at all.

> To say that Co-operation in England in the 1850s lacked definition is to understate the situation. While it is true that the work of the Equitable Pioneers had gained considerable attention, Rochdale was not viewed as the centre of a Co-operative Movement—indeed, no such centre existed, nor for that matter was there much of anything to be called a Movement.[9]

Instead, the legislation was in many respects the by-product of a much wider debate about social reform and the role of capital and the market in society. While it was intended to promote the development of co-operative societies, these were imagined not simply as a means of improving the condition of the working classes, but also facilitating their moral and political discipline by exposing them to the market.

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[8] Jean-Luc Nancy, *Inoperative Community* (Minneapolis: University of Minnesota Press, 1991), 3

[9] Philip N. Backstrom, *Christian Socialism and Co-operation in Victorian England: Edward Vansittart Neale and the Co-operative Movement* (London: Croom Helm, 1974), 41. For a concise overview of the passage of the Industrial and Provident Societies Act 1852, see See also David Lambourne, *Slaney's Act and the Christian Socialists: A Study of How the Industrial and Provident Societies Act, 1852 Was Passed* (Boston: David Lambourne, 2009).

The main proponents of legal recognition for co-operative societies were the Christian Socialists. In the late 1840s, the Christian Socialists were a relatively new and ultimately short-lived group of philanthropists and social reformers linked by their shared dismay at the miserable condition of working class labour and a vague "common desire to somehow Christianise socialism and to socialise Christianity."[10] Their group began to form on the day of the Chartist meeting at Kennington Common, partially motivated by an anxiety that disorder might ensue. While their views differed on whether or not working men should ever have the suffrage, they shared the notion that the capacity of the working classes must be improved for them to be capable of those rights. As one of their founders and arguably the most 'democratic' among them, John Malcom Ludlow writes in their first journal, *Politics for the People*,

> I long for Universal Suffrage. I long for the day when every man in England shall have a vote—ay, and more than a vote; that is to say, when every man in England shall enjoy a share in the government of his country, in the full proportion of his capacity and worth, and when every means shall be supplied by all his fellow men for the full development of his capacity—for the full perfecting of his worth....But I cannot claim the suffrage—I cannot claim any other privilege for those who are unworthy and incapable of exercising it, so long as they are thus unworthy or incapable.[11]

At first, they did not know how best to apply their principles and focused their efforts on sanitation projects. However, some in the group felt that this focus took them too far away from the working classes. It was then that James Ludlow, often cited as the founder of the Christian Socialists, returned from a trip to France, where he had observed the success of self-governing workshops (*associations ouvrieres).* He convinced the rest of the group of the virtue of such associations, which "were endeavouring to beat down competition by competition itself."[12]

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[10] Ibid., 29.
[11] John Townsend, "The Suffrage," *Politics for the People* 1 (1848): 11. John Townsend was a pseudonym for James Ludlow.
[12] James Ludlow, *The Autobiography of a Christian Socialist*, ed. A.D. Murray (London: Frank Cass and Company Limited, 1981), 156.

In 1850, the Christian Socialists constituted themselves as The Society for Promoting Working Men's Associations, tasked "[t]o carry out and extend the principles and practice of associated Labour."[13] None of the Christian Socialists had been involved in co-operative societies prior to this effort. As Cole writes, "[i]t is a curious fact that the Christian Socialists, when they first launched out on their attempt to foster Producers' Co-operative Societies of working men, seem to have known practically nothing about all the previous attempts that had been made in Great Britain to achieve this very thing."[14] The Christian Socialists did much to galvanize the co-operative movement, setting up offices in the North, organising conferences and touring local societies.

The Christian Socialists' legal reform efforts seem to have been motivated as much by a desire to protect their own investments in co-operative societies, which were prone to failure, as they were to provide a legal basis for co-operation more generally. As Rob McQueen explains, "[t]he more often co-operatives failed, the more strident became the voice of those in the Christian Socialist camp calling for the introduction of a measure that would allow such undertakings to assume corporate status *and* the cloak of limited liability."[15] There was some interest in legal reform from the 'Northern Societies', as indicated by a conference held in Manchester in December of 1850, organised by the Christian Socialists. At least forty-four societies were represented at a similar conference held the following year. However, by the time these conferences were held, the Christian Socialists had already started the process of lobbying parliament. This early focus on legal reform may derive from the fact that several of the Christian Socialists were lawyers, and Ludlow in particular specialised in company law. As Ludlow writes in his autobiography,

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[13] The Society for Promoting Working-Men's Associations, "Constitution," in eds. G.D.H. Cole and A.W. Wilson, *British Working Class Movements: Select Documents 1789-1875* (London: Palgrave Macmillan, 1965), 435.
[14] G.D.H. Cole, *A Century of Co-operation* (Manchester: The Co-operative Union Ltd., 1944), 97.
[15] Rob McQueen, *A Social History of Company Law: Great Britain and the Australian Colonies 1854-1920* (London: Routledge, 2009), 68.

> It is hard at the present day to realise the hindrances to almost every kind of commercial association that existed in 1850...All we lawyer members of the Council of Promoters were fully aware of this; none probably so much as myself. In advising working men to associate under such legal conditions, we were therefore morally bound to pledge our utmost energies [to reforming the law].[16]

That the Christian Socialists were working at a remove from the immediate concerns of co-operative societies is evidenced by the frequent admonitions of those societies in the pages of the *Journal of Association*, a periodical set up in part to chronicle their legal reform efforts. They begin by reassuring societies that the government is inclined to help them, so much so that the government "allowed this Bill to be prepared by a member of our Society, a lawyer, and a writer in this paper—one of *your own friends*, therefore."[17] However, when the request for petitions to support this bill only received twelve responses, the tone palpably shifts. "I tell you, that the only reason your Bill was not passed last Session was, because most of you didn't show that you cared a straw about the matter."[18] Working class co-operative societies are scolded for their lack of forethought.

> 'Well', you might say, 'he was right; we didn't mind waiting, and we don't mind waiting—our Associations and Stores are getting on well enough without the help of the Law.' Good; I admit it, so they are—and why—because they are not yet *worth* ruining—no man can make his fortune *yet* by breaking up or cheating an Association or Store; therefore very few rogues have joined you as yet. But just get on for another year or two as you are doing now—make your £10 notes in £100 or £1000 notes, and then see whether some Association-King won't arise, pocketing your property and setting you at defiance.[19]

That working class co-operative societies were initially uninterested in legal reform complicates Cole's suggestion that co-operatives suffered under particular "legal disabilities"[20] While the legal position of co-operative societies was indeed precarious in a formal sense, as will be described below, the suggestion that they required a legal form participates in the tendency to read the history of the co-operative movement in terms of

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[16] Ludlow, *Autobiography*, 197.
[17] Thomas Hughes, "Law for Associations," *Journal of Association* 1, no. 1 (1852): 1.
[18] Ibid., 2.
[19] Ibid.. Emphasis in original.
[20] Cole, *Century*, 114.

what it would become, and casts legal recognition as the progressive realisation of this outcome. This, in turn, obscures the ways in which legal recognition served to constitute the co-operative and the disciplinary logic that motivated legal recognition.

Further, the Christian Socialists' remonstrations underscore their belief that the working classes were not yet ready for political rights, nor would they be unless they committed to the legal reform process the Christian Socialists were leading.

> Then you'll all sing out loud enough, I'll warrant; you'll make your voices heard from John O'Groats to Land's End; there'll be public meetings, placards, and spouting matches, enough to deafen one, and your Ernest Jones's, and such like, who shirk and carp at the movement now, will be thundering out sonorous sentences on 'Class legislation', 'Association persecuted in Parliament', 'Co-operation not represented'—Humbug! I don't believe that you would have so good a chance of getting this Bill passed at once in a Universal Suffrage Parliament as you have in this present one—the Government is with you, and ready to do your work; influential men in every party (except the ultra Free-traders) have promised to support the Bill—Why, not a single member to whom we went last Session (and we saw between us 30 or 40) refused to support you. You *are* represented for *this* purpose and if you don't avail yourselves of this chance, I shall begin to think you don't deserve to be represented for any other.[21]

The legal position of co-operative societies was indeed 'precarious' prior to the passage of the Industrial and Provident Societies Act 1852, particularly for middle class reformers who wished to invest in them. However, this precarious position does not reflect an inherent need for legal forms, but a shifting terrain in which it became increasingly difficult to operate without one. Before the first IPS Act, many societies operated without any explicit legal form, falling instead under the general laws of partnership. This status was made problematic by the passage of the Joint Stock Companies Act 1844 which required partnerships with more than twenty-five people to register as companies. This was a problem for co-operative societies, not least because the shares in joint stock companies are transferable, meaning that a society could be potentially taken over by investors who did not share their values. Some societies had also registered as Friendly Societies, under the

[21] Hughes, "Law for Associations," 1.

auspices of what was known as the Frugal Investment Clause, which allowed friendly societies to engage in trade with their own members. However, this status only allowed them to hold property through trustees, and they fell outside the protection of the law as soon as they traded with non-members.

Moreover, none of these legal forms, at this time, offered limited liability. It was widely acknowledged that limited liability was of negligible importance to the working classes themselves. As Ludlow writes, "...the real safety of the members of our associations lay in this, that very few of them had anything to lose."[22] Nonetheless limited liability became a central aspect of the debates over the legal recognition of co-operatives. The Christian Socialists had what was then considered quite a radical position on limited liability, advocating that it should be available for all forms of enterprise and not just co-operative societies.[23] In this position, they found themselves in the company the staunchest supporters of political economy and *laissez-faire*.[24] Limited liability was a notoriously controversial issue. The same reluctance to grant corporate privileges to joint stock companies described in the last chapter persisted in debates about limited liability and reflect predominant views about the relationship between morality and the market. In the early nineteenth century, approaches to the morality of the market were dominated by evangelism, particularly associated with Thomas Chalmers. In the evangelical view, the market functioned in a retributive fashion: failure to conform to the demands of the market, which required particular forms of moral restraint, led to failure as a form of punishment.[25] In turn, hard

[22] Ludlow, *Autobiography*, 197.
[23] See McQueen, *Social History*, 72. As Ludlow writes, "Above all, I had formed a strong opinion on what was then a moot question, though now long since settled in the sense which I advocated, vis. that of limited liability in association trading." (Ludlow, *Autobiography*, 199).
[24] Jeremy Bentham, for instance, advocated limited liability, writing "[w]ere it lawful for every one to engage in commercial undertakings for a limited amount, how many facilities would be afforded to men of genius! All classes of society would furnish assistance to inventive industry.... The spirit of gaming, diverted from its pernicious direction, might serve to increase the productive energy of commerce" (Quoted in Hilton, *Age of Atonement*, 257).
[25] See Paul Johnson, "Market Disciplines," in ed. Peter Mandler, *Liberty and Authority in Victorian Britain* (Oxford: Oxford University Press, 2006), 203-223. Under the influence of evangelism, success or failure on

work was to be rewarded: "[e]ffort and enterprise were rewarded with high wages and profit; idleness and inattention punished with poverty and the bankruptcy court."[26] In order for this retributive mechanism to work, investors needed to bear the full responsibility of their actions. Consequently, there was a reluctance to adopt regulatory measures that would provide protection in the event of business failure, such as limited liability.

The shift in attitude away from the retributive, evangelical view was precipitated by a range of factors. Boyd Hilton suggests that one reason may be the new permissibility of economic growth.[27] Other countries in Europe had begun to industrialise, and Thomas Malthus's concerns about overpopulation were diminishing in their hold, as faith in the ability to produce to meet the demands of an increasing population grew. The fear of overpopulation was replaced by a concern with underinvestment: it was thought that the severe consequences of business failure would serve as a deterrent to investors. Alongside this, Hilton cites a new desire to maximize the public benefits associated with profit-seeking as particularly important.[28] In addition, as more people from the middle classes began to invest, it was difficult to justify holding them accountable for the sins and failures of more powerful businessmen over whom they had no control. These could be the elderly or widows, even servants, whose primary motivation for investment was not speculation, but security.[29] There needed to be some regard for the "innocence of the average investor."[30]

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the market was conceived of as reward or punishment. Unlimited liability was an important part of this dynamic, as in order to work investors needed to bear full responsibility for the risks they took. Extreme events, such as the Irish famine, were only taken as further proof of the retributive balancing mechanism of the market. For Malthusians, drawing on Malthus' own reflections "the famine was simply the inevitable physical check to population which resulted from the people's failure to adopt greater moral restrain over time" (ibid., 208). Chalmers, similarly thought that "it was the backward nature of the Irish economy as much as the backward nature of the people that was to blame" (ibid.). The short duration of the famine appeared to vindicate the free market view.

[26] Ibid., 210.

[27] Boyd Hilton, *The Age of Atonement: The Influence of Evangelism on Social and Economic Thought, 1785-1865* (Oxford: Clarendon Press, 1986), 265.

[28] Ibid.

[29] Ibid.

[30] Ibid.

The evangelical ideas of Chalmers gave way to the "more optimistic liberalism" of J.S. Mill.[31] Instead of retribution, he advocated the importance of a "reputation for honesty" in order to enable success on the market.[32] This reputation, along with a system of registration and accounting to foster transparency and public scrutiny, would determine whether or not a business could be successful. The political economists advocated limited liability as a way of creating opportunities and dismissed concerns by suggesting that "[l]imited companies are harmless since no man is obliged to trade with one, and none will do so unless the company enjoys a good reputation."[33] The market was still endowed with "providential design" but with greater protections in place, it would become a site for the development of good character.[34] Moreover these enduring links to Christianity were important as very few believed that "market principles would *automatically* produce a morally beneficial outcome."[35] In order to be successful, it was necessary to demonstrate integrity.

This new morality was most important for the working classes themselves, whom it was feared did not believe in the laws of political economy. They "have nothing in them of the timid, prudent, calculating spirit of the middle class."[36] In the early nineteenth century, it was thought that working classes should not be taught the laws of political economy, only that their characters might be improved in anticipation of their judgment by the market. However, the political success of Chartism precipitated a shift in this thinking: working men *should* learn the laws of the market, so that their characters might be shaped by it, and thus prevent seditious uprising. The sooner they could see that the workings of the market were beyond their control, the sooner they would abandon their revolutionary impulses. These

[31] Ibid., 259.
[32] Ibid.
[33] Ibid., 261.
[34] G.R. Searle, *Morality and the Market in Victorian Britain* (Oxford: Clarendon Press, 1998), 19.
[35] Ibid., 22. Emphasis in original.
[36] Ibid., 37.

aims are made plain in contemporaneous works such as John Lalor's *Money and Morals*.[37] Working men are impulsive, most evidently so in their politics, and socialism, as Lalor understood it, was delusional.[38] In light of this propensity toward socialism and intractable disdain for the middle and upper classes, it is necessary "to anticipate and prevent any such movement, by providing, if it be possible, channels into which the tendencies which would lead to Socialism may find outlets, not only safe but eminently beneficial."[39] In order to do this, it is necessary to generate empathy between the working man and the capitalist; he must be made to understand the capitalist's position "by practical experience."[40]

> Working men, once enabled to act together as the owners of a joint capital, will soon find their whole view of the relations between capital and labour undergo a radical alteration. They will learn what anxiety and toil it costs to hold even a small concern together in tolerable order; what amazing difficulties there are in the way of organizing, by voluntary consent, that industrial discipline which capital now enforces; and what losses, what cruel disappointments in markets, what trembling uncertainties, may carry off the mind of the owner of capital in painful abstraction when the children are on the knee at the fireside, or may whiten the hair on a sleepless pillow. Operatives who go through this experience will find not only their thoughts, but their sympathies enlarged. They will grow both in wisdom and clarity."[41]

Moreover, it is their "right" to have access to these legal instruments.[42] On this score he praises the Christian Socialists, who have caused "a numerous body of intelligent working men to feel that amongst the educated and aristocratic classes are many of their firmest and most zealous friends."[43]

The Christian Socialists were instrumental in opening a wider conversation about limited liability as a means of enabling the working and middle classes to participate in the market. While there had been several attempts throughout the early part of the nineteenth century to introduce legislation that would enable joint-stock companies to have easier

[37] John Lalor, *Money and Morals: A Book for the Times* (London: John Chapman, 1852), 194.
[38] Ibid.
[39] Ibid., 199.
[40] Ibid., 202.
[41] Ibid., 203.
[42] Ibid.
[43] Ibid., 197.

access to limited liability, all of them failed.[44] By the time it was taken up again in 1850, there had been no discussion of limited liability in Parliament for at least six years.[45] The Christian Socialists found support in Parliament from the Liberal Member of Parliament for Shropshire, R.A. Slaney. Slaney was first and foremost a Christian philanthropist who saw it as his Christian duty to "improve the lot of poor working men locked up in dark industrial towns."[46] However, he was also deeply influenced by an extensive reading of classical political economy, and he shared the Christian Socialists' disdain for Chartism. "His sincerity," as Richards writes, "his desire to better the lot of the labourer, is not in doubt. But once he assumed that the unfettered activities of the industrial capitalist were for the benefit of 'every class' he was bound to oppose the demands of working men for reform."[47] It was Slaney's view that "social disorder" was a consequence of parliamentary neglect of the working classes, and he thus advocated for a range of interventions, from infrastructure and housing, to welfare and education.[48] In 1850 Slaney presented a motion to appoint a Select Committee to "suggest means for giving facilities to safe investments for the middle and working classes; and affording them the means of forming societies to insure themselves against coming evils."[49] This provided "an unlooked for opening" for the Christian Socialists to make their case for legal reform to support co-operative societies.[50]

The proceedings of the *Select Committee on Investments for the Savings of Middle and Working Classes* (1850), followed the next year by the *Select Committee on the Laws of Partnership* (1851), help to situate the legal recognition of co-operatives within a wider

[44] See John Saville, "Sleeping Partnership and Limited Liability," *The Economic History Review* 8, no. 3 (1956): 418.
[45] Ibid.
[46] Paul Richards, "R.A. Slaney, the Industrial Town, and Early Victorian Social Policy," *Social History* 4, no. 1 (1979), 87.
[47] Ibid., 88.
[48] Ibid., 92.
[49] United Kingdom, *Hansard Parliamentary Debates*, Series 3, Volume 110 (1850). Cited in Lambourne, *Slaney's Act*, 17.
[50] Ludlow, *Autobiography*, 197.

context of shifting views about the market.[51] The reports of both committees are at the intersection of two problems: one, the unfair legal advantages accruing to "larger capital," which have the effect of excluding the working and middle classes from "fair competition;" and two, the "rapid increase in population and in wealth of middle and industrious classes," and the need to "improve their condition and contentment" in a way that would prevent "injury to any class" and provide "security to the welfare of all."[52] In effect, these committees were concerned to democratise the market and in so doing transcend class antagonisms and the social disorder they caused. As Donna Loftus observes, "capital was at the center of liberal visions of community in these debates. The social reform argument for limited liability imagined local communities tied together by capital investments, a potent example of mutual interests."[53] In practice, however, they were primarily concerned with how the working classes could be "initiated into the duties and responsibilities of citizenship through their engagement with the free market under the tutelage of more experienced men of capital."[54]

In this respect, the market was regarded as a site of discipline for the working classes. Limited liability and the legal recognition of co-operative societies were means of facilitating this discipline. The discipline of the market would be a moral one as well as a political one for the working classes, diverting their attention from dreams of revolution and shaping them into responsible subjects. Limited liability, as Loftus describes, "was mobilized as a strategy of ethical governance, capable of manufacturing character through the sharing of

[51] This chapter will focus primarily on the first of the two as this is where co-operatives are given the most attention. While Ludlow complains of "leading questions" in the committee, there is no reason to believe that the Christian Socialists misrepresented their views for the sake of appeasing the committee, or deliberately making co-operative associations more palatable to those who believed them to be too revolutionary (Ludlow, *Autobiography*, 199).
[52] U.K. Parliament, Investments, 1.
[53] Donna Loftus, "Limited Liability, Market Democracy, and the Social Organization of Production in Mid-Nineteenth Century Britain," in eds. Nancy Henry and Cannon Schmitt, *Victorian Investments: New Perspectives on Finance and Culture* (Bloomington: Indiana University Press, 2009), 85.
[54] Ibid.

capital in local communities."[55] As the select committee report on the Law of Partnerships states in summary,

> it would be desirable to remove any obstacles which may now prevent the middle and even the more thriving of the working classes from taking shares in such investments, under the sanction and conjointly with their richer neighbours; as thereby their self-respect is upheld, their industry and intelligence encouraged, and an additional motive is given to them to preserve order and respect the laws of property.[56]

These aims reappear frequently in the evidence presented to the select committees by the Christian Socialists and supporters of co-operation, which emphasize the benefits of enabling the working classes to associate with their 'richer neighbours'. As the Christian Socialist Thomas Hughes remarked, "the great difficulty that the working classes have to contend with now is the want of competent persons to assist them in managing their investments, and I think that with limited liability they would find persons to come forward and assist them."[57] At another stage, Ludlow is asked whether "limited liability would have the effect of inducing benevolent people who take an interest in the working classes to join them and lead them?" to which he responds, "I think decidedly it would."[58]

However, it was not just by virtue of the opportunity to associate with their social betters that the working classes would be improved. The *experience* of the market would both shape their characters and teach them the inviolable laws of political economy. Would "facilities," as Slaney asked, "given for such purposes, within the law...tend to foster habits of forethought and providence?"[59] To which Ludlow responded, "I cannot say that I know of any more powerful means of increasing the security of the country."[60] According to the evidence of John Stuart Mill, the experience of even a small number of co-operative

[55] Donna Loftus, "Capital and Community: Limited Liability and Attempts to Democratize the Market in Mid-Nineteenth-Century England," *Victorian Studies* 45, no. 1 (2002), 94.
[56] U.K. Parliament, Laws of Partnership, vii.
[57] U.K. Parliament, Investments, 42 at 428.
[58] Ibid., 11 at 116.
[59] Ibid., 10 at 101.
[60] Ibid., 10 at 101.

societies would show working classes that the laws of the market were natural and that they laboured by choice, not compulsion.

> [T]here would be this great advantage, that supposing those associations embrace only a small part of the working classes, they would have almost the same salutary effect on their minds as if they embraced the whole... the whole of the working classes would see that all such disadvantages arose not from the law, but from the nature of the case, or from the absence of the necessary qualities in them; therefore those who might continue to be receivers of wages in the service of individual capitalists, would then feel that they were not doing so from compulsion but from choice, and that taking all the circumstances into consideration their condition appeared to them preferable as receivers of wages."[61]

In addition, it was argued that the mere provision of such facilities would help to disabuse the working classes of any desire to overturn the government.

> I think it would enable them to ascertain by trial whether the ideas which they have, and I believe they are very extensively entertained, as the real means of bettering their condition, can be carried out, or whether they cannot be. At present they may fancy that there is a paradise which would be very delightful if they could get into it, and if they think that it can only be done by overturning the laws, they may be disposed to endeavour to do so.[62]

It was not just the success of these projects that would be so beneficial, but also their propensity for failure. When Slaney asked if their inevitable disappointment would "show that they were wrong in the idea that any injustice so far had been done to them?"[63] Ludlow responds, saying "yes; it would promote their submission to things as they are."[64] It would take nothing less than the tedium of a lived socialist experiment to reform the working classes. "Their enthusiasm," as Lalor writes, "would probably bear any trial better than the trial of a Socialist experiment itself, for it is very much easier to die on a barricade...than to work on for a twelvemonth side by side with a lazy co-operative colleague, and see him regularly swallowing the half of one's own earnings."[65]

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[61] Ibid., 80 at 854.
[62] Ibid., 20 at 200.
[63] Ibid., 10 at 105.
[64] Ibid., 10 at 105.
[65] Lalor, *Money and Morals*, 198.

*Incorporation and Enclosure*

The sense that the market would serve to discipline the working classes evidenced in debates over the legal recognition of co-operatives coincides more broadly with the emergence of a liberal and biopolitical form of governmentality in the nineteenth century, concerned with the management of populations and wealth, as described in the last chapter. These biopolitical concerns animate the debates over limited liability and the legal recognition of co-operative societies. The problem before the select committees is how to manage the wealth of an increasing population, and what the role of the state should be; or, more precisely, how the state can 'facilitate' the operation of the natural laws of the market. The market, in Foucault's terms, was no longer a "site of justice," as it had been in relation to older conceptions of moral economy, but a "site of veridiction."[66] That is, the market had become a site where truth would be produced, determining by its precepts not only the proper objects of government, but also, as the debates above demonstrate, exposing those who would participate in it to its inviolable truths.

This shift in conceptions of the market, for Foucault, is at once a "history of truth" and a "history of law."[67] The intersection of these two allows for a "connecting up of a regime of truth to governmental practice."[68] The emergence of the market as a site of veridiction within discourses of political economy is coupled with the question of what its corresponding public law should be. If the market is governed by its own natural laws, then the role of government is no longer to intervene directly, but to 'facilitate' the operation of these natural laws. In the last chapter, it was argued that incorporation was one way this could be done. In the early modern period, incorporation had been regarded as a narrow privilege and intimately connected to sovereignty; in the mid-nineteenth century, it was

[66] Michel Foucault, *The Birth of Biopolitics: Lectures at the College de France 1978-1979*, ed. Michael Sellenart, trans. Graham Burchell (Basingstoke: Palgrave Macmillan, 2008), 30 and 32.
[67] Ibid., 35.
[68] Ibid., 37.

recast and normalised as a private right through the introduction of incorporation by registration. Even though it involved an increase in regulation and subjection to the state, it could be regarded as a form of commercial freedom. This is a paradoxical form of freedom, at once a liberty and a limitation. As Foucault writes, "[l]iberalism must produce freedom, but this very act entails the establishment of limitations, controls, forms of coercion, and obligations relying on threats, etcetera."[69]

Incorporation, construed as a right and a freedom, also functions in a disciplinary capacity, such that "economic freedom...and disciplinary techniques are completely bound up with each other."[70] The desire for co-operative societies to be incorporated and given limited liability is an instantiation of this dynamic. The corporate form itself would 'facilitate' the discipline of the market that the Christian Socialists and other reformers envisioned by functioning, as I will argue, as a form of enclosure. "Discipline," as Foucault explains, "sometimes requires *enclosure*, the specification of a place heterogeneous to all others and closed in upon itself. It is the protected place of disciplinary monotony."[71] While Foucault was referring to the physical spaces of the prison, the school and the barracks, this section will argue that the body corporate may be seen analogously as a form of metaphysical enclosure that disciplines social life in order to facilitate the market and show how the legal form of the body corporate comes into tension and conflict with the ethos of mutuality that animates co-operative societies.

The modern corporate form has generally not been regarded as disciplinary.[72] This is not least because, as argued in the foregoing chapter, when incorporation by registration was made available in the mid-nineteenth century, it came to be articulated as a *right* and a

[69] Ibid., 64.
[70] Ibid., 67.
[71] Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage Books, 1995), 141.
[72] Joshua Barkan, *Corporate Sovereignty: Law and Government under Capitalism* (Minneapolis: University of Minnesota Press, 2013) is the major exception to this.

real freedom in relation to the state, obscuring both its historicity and its enduring connection to sovereignty. In commercialisation models of economic history, incorporation by registration, and later, the provision of limited liability for registered companies, have been regarded as a *removal* of barriers to the operation of the free market.[73] As James Taylor summarises, in these accounts, "prejudiced legislators and lawyers, demonstrating an extraordinary unresponsiveness to the needs of the business community, were slow to appreciate the necessity in a modern economy of removing all impediments to joint-stock enterprise."[74] Economic pressure and the demand for more efficient forms of business organisation are thought to have driven legal reform.

More nuanced and critical accounts of this transformation have emerged in recent years, but some, such as that of Ron Harris, seem to reproduce this dynamic. Given a range of historical alternatives, such as the partnership and the trust, Harris suggests that the incorporated joint stock company became the dominant form of industrial organisation from the mid-nineteenth century onward because of a sort of "path dependency."[75] This path is in part a matter of chance and circumstance, but in retrospect revolves around the integral connection between the interests of the state and the interests of investors in joint-stock companies, that led to the early development of the corporate form for business purposes. The corporate form was the most efficient for business purposes because it had already been tailored for this purpose in the early modern period. While the historical development of the form is undoubtedly important, Harris's argument reproduces the narrative that a demand for more economically efficient forms drove legal reform. Paddy

[73] See for instance Bishop Carleton Hunt, *The Development of the Business Corporation in England 1800-1867* (Cambridge: Harvard University Press. 1936). For an overview of the 'commercialisation model' of economic history, see Ellen Meiksins-Wood, *The Origin of Capitalism, A Longer View* (London: Verso, 2002), 11-33.
[74] James Taylor, *Creating Capitalism: Joint-Stock Enterprise in British Politics and Culture 1800–1870* (Woodbridge: Boydell Press, 2006), 9.
[75] Ron Harris, *Industrializing English Law: Entrepreneurship and Business Organization 1720–1844* (Cambridge University Press 2000), 290.

Ireland, in a critique of Harris, suggests in contrast that we must look to capitalism to understand the corporate form. Ireland looks not to a need for efficiency but to shifting modes of production in order to understand the rise of the incorporated joint stock company. In particular, the rise of production costs associated not only with capital-intensive projects like canals and railways, but the costs of disciplining labour, led to the "the rapid development of the credit system and the emergence of a range of new financial instruments in the form of titles to revenue – what Marx called money or interest-bearing capital. Prominent amongst these was the joint stock company share."[76] The incorporated form of joint-stock company allows the separation of ownership and control that characterises the modern corporate economy.[77] This argument fits with Ireland's broader claim about an emerging class of *rentier* investors ultimately driving legal reform.[78] Drawing on E.P. Thompson, Ireland suggests that we need to return to an understanding of capitalism, not just as an economic system, but as one that "has imposed itself on society in ever more intensive ways, increasingly penetrating every nook and cranny of existence."[79] Capitalism, Ireland stresses, "shapes all identities and social relations."[80] However, it is unclear how Ireland's arguments, while more nuanced, escape the economic determinism that he attributes to Harris. While introducing a conception of class power in connection with capitalism, legal reform is nonetheless driven by economic processes.

A range of recent scholarship on the history of the company has problematised any ready connection between specifically 'economic' developments and the introduction of the

[76] Paddy Ireland, "Critical Legal Studies and the Mysterious Disappearance of Capitalism," *Modern Law Review* 65, no.1 (2002): 120-140.
[77] Ibid., 134.
[78] In particular see Paddy Ireland, "Efficiency or Power? The Rise of the Shareholder-oriented Joint Stock Corporation," *Indiana Journal of Global Legal Studies* 25, no. 1 (2018): 291-330. Paddy Ireland, "Limited Liability, Shareholder Rights, and the Problem of Corporate Irresponsibility," *Cambridge Journal of Economics* 34 (2010), 837-856.
[79] Ireland, *Critical*, 129.
[80] Ibid., 130.

modern company form with limited liability. Not only was the introduction of the limited liability company "not directly referable to demands being made by those in key sectors of business," the form was not widely taken up until the late nineteenth century, several decades after it became available.[81] As Taylor argues, "far from responding to the needs of industry, the state, in allowing free incorporation between 1844 and 1862, was in fact acting in advance of economic developments."[82] In his own work, which focuses on popular conceptions of companies and financial speculation more generally, Taylor has shown how legal reform was a highly contested process, concerned much more with instituting a particular model of political economy than realising the natural order of the market or responding to economic pressure.[83] In addition, recent scholarship has also significantly broadened the terms of inquiry by taking account of the relationship between new regulatory forms and shifting social, political and religious attitudes about the market. As Loftus suggests, it is precisely the context described above, the concern over working class co-operatives and working and middle class participation in the market, that is often ignored. As she writes, "[t]he economic history of limited liability has unpacked the legal and financial complexities of reform, but the social and political aspects of the question—in particular, the vision of a market democracy composed of working-and middle-class men, have been marginalized or considered separately in the social history of English labor."[84]

The inclusion of these 'other' narratives suggests some of the difficulty in determining a specific cause for the increasing prominence of the body corporate form in the organisation of the market in the nineteenth century. In Foucault's work on biopolitics, he eschews the need for causal explanations more broadly, citing a confluence of multiple

[81] McQueen, *Social History*, 7. See also Paddy Ireland, "The Rise of the Limited Liability Company," *International Journal of the Sociology of Law* 12 (1984): 239-260.
[82] Taylor, *Creating Capitalism*, 10.
[83] Ibid.
[84] Donna Loftus, "Limited Liability," 80.

factors and saying that "...I do not think we need to look for—and consequently I do not think we can find—*the* cause of the constitution of the market as an agency of veridiction."[85] To this end, and in keeping with a more Foucauldian orientation, my concern is with what the body corporate form did in the context of this new form of governmental reason, why this decidedly 'unmodern' legal form was an appropriate response for the problems raised by political economy, and how this has shaped what we imagine the co-operative to be.[86] Incorporation and limited liability were not simply mechanisms for furthering the interests of business, but reflected a broader disciplinary logic through which the market and a corresponding 'economic society' were constituted in the nineteenth century.[87] These interventions reflected a new way of governing; one that, in its implementation, helped to manifest the division between the political and the economic that was required for the creation of the ostensibly free market.

In relation to working class associations, this new form of regulatory intervention had begun several decades earlier, with the passage of the *Friendly Societies Act* of 1793.[88] Friendly societies, as Alasdair Hudson notes, "were the first form of lawful structure permitted for working class people to form a common bond for their mutual welfare under English law."[89] Following the French Revolution the British state had grown increasingly wary of associations amongst lower and working classes. As a manifestation of this apprehension, the Combination Acts of 1799 and 1800 consolidated a range of prior acts "which were directed against any treasonable or seditious society."[90] While the focus of these acts was on trade associations (early unions), A.V. Dicey points out that the fact that these

[85] Foucault, *Birth of Biopolitics*, 33.
[86] See Timothy L. Alborn, *Conceiving Companies: Joint-stock Politics in Victorian England* (London: Routledge, 1998).
[87] Karl Polanyi, *The Great Transformation* (Boston: Beacon Press, 2001), 120.
[88] This is also known as Rose's Act.
[89] Alasdair Hudson, *Equity & Trusts* (London: Cavendish, 2004), 775.
[90] A.V. Dicey, "The Combination Laws as Illustrating the Relation Between Law and Opinion in England During the Nineteenth Century," *Harvard Law Review* 17, no. 8 (1904): 518.

acts included special provisions for societies such as the Freemasons and the Quakers, and for charities, "betrays the width of their operation and the fears of their authors. Clubs of all kinds were objects of terror."[91] Alongside this general ban and fear of conspiracy, the Friendly Societies acts created a narrow permissive framework for the recognition of certain kinds of associations that were deemed to be desirable. However, friendly societies, it should be noted, were virtually indistinguishable from trade unions at this time; friendly societies provided the social basis for many different kinds of organisation, including the early co-operative societies. The recognition of friendly societies as a form of welfare provision became a means of separating desirable activities from undesirable activities. Desirable activities included those that helped to reduce government expenditure on the poor rates and encouraged moral reform, while undesirable activities were strikes and other forms of political agitation. As Gosden summarises,

> Until about 1830 the idea of encouraging the friendly societies to develop under the supervision of the local justices with a view to relieving the demands of the poor rate can be seen in the legislation enacted. Proper supervision by the magistrates would eliminate any temptation to indulge in or to support illegal combinations or to help trade unions.[92]

In other words, the creation of a permissive or facilitative framework that was, paradoxically, intended as a deterrent. The passage of this act "was an example of the government identifying and classifying its allies to winnow out its enemies."[93]

The act effectively set up a scheme whereby in exchange for registration with a newly appointed registrar, the societies could enjoy some of the privileges usually associated with incorporation, including using courts to recover debts, the ability to sue and be sued, as well as getting some important tax exemptions. Registration, in turn, required societies to submit their rules to "the justices of the peace, who would verify that they did not violate the law

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[91] Ibid., 519.
[92] P.H.J.H. Gosden, *The Friendly Societies in England, 1815-1875* (Ann Arbor: University of Michigan Press, 1961), 173.
[93] Simon Cordery, *British Friendly Societies, 1750-1914* (Basingstoke: Palgrave Macmillan, 2003), 45.

and could alter them by adding or deleting clauses."[94] The Friendly Societies Acts, working in tandem with the Combination Acts, implicitly made unregistered associations illegal, creating a totalising effect, even though enrolment was not mandatory. However, these efforts were not terribly successful. Many friendly societies preferred to remain unregistered without any consequence.[95]

However, as the nineteenth century progresses, and the market comes to be an increasingly important determinant of regulation, the source of discipline is no longer accountability to a state selectively encouraging desirable activities while discouraging others, but the market. Even though Ludlow had identified the need for incorporation and limited liability early on, incorporation itself was not central to the debates on the legal recognition of co-operatives. The early debates on limited liability were focused on the *en commandite* partnership form rather than the incorporated joint stock company, while all that was sought for co-operatives was an extension of the Friendly Societies Acts. Even limited liability, as noted above, was not regarded as essential for working class co-operatives. It was nonetheless a disappointment when the Industrial and Provident Societies Partnership Act 1852 only offered a very partial limitation of liability to two years after a member had left the society. The Christian Socialists were prepared to soldier on without it.

> Some may say: But how are we to work under an unlimited liability clause? I would rather not have seen that clause in the Bill. But I can only say, that if its presence there prevents the working classes from co-operating, they never will be fit to co-operate, and don't deserve to enjoy the benefits of co-operation. What are all existing Working Associations now doing? Working under unlimited liability. What are all Registered Companies doing? Working under unlimited liability.[96]

[94] Ibid., 46.
[95] Ibid.,
[96] James Ludlow, "The Industrial and Provident Societies Bill," *Journal of Association* 1, no. 26 (1852), 203.

Notably, however, they accepted this less than satisfying outcome, not because they thought limited liability unimportant, but because registered companies also did not have limited liability. In other words, it was acceptable because they would be on more or less equal footing with registered companies. This same principle of equality underlies petitions for a reform of the legislation in 1862. In 1856, registered companies were granted limited liability.[97] This did not escape the attention of co-operative societies. As multiple petitions to parliament on behalf of co-operative societies make clear, co-operative societies registered under the 1852 Act "labour under serious disadvantages as compared with other trading bodies."[98] "Your Petitioners," they continue, "are held to be liable to an unlimited extent for the debts of their society, whereas members of joint stock companies are only liable to the amount of their shares in such companies. We therefore ask your honourable house to put us on the same footing in this respect as that whereon joint stock companies are now placed."[99] It was only fair that co-operative societies should also be bodies corporate with limited liability. This was remarkably uncontroversial. These requests were granted by an amendment to the Industrial and Provident Societies Act in 1862. Not long after, the absence of incorporation and limited liability could be regarded as mere "anomalies" in the original act and how it always ought to have been.[100] The law had now made it such that co-operative societies would have "a chance of fighting their way in the competitive market, with vizors up and the law to back them."[101]

Incorporation thus served as the form by which these entities could be regarded as equal for the purposes of the competitive market. However, the co-operative society and

[97] Joint Stock Companies Act 1856.
[98] "Petition of Heckmondwike Industrial Co-operative Society, App 873" petition, 1863. In contrast to the petitions for the first IPS Act, this petition attracted 24,283 signatures from 161 co-operative societies.
[99] Ibid.
[100] J.M. Ludlow and Lloyd Jones, *Progress of the Working Class 1832-1867* (London: Alexander Strahan, 1867), 49.
[101] Ludlow, "Industrial and Provident," 201.

the joint stock company are not equivalent. While there are significant differences in opinion about the principles and practices that should guide co-operation, at a minimum, it has historically been concerned with mutuality. Moreover, as argued in chapter 1, co-operation emerged as a 'self-help' dimension of the moral economy of the crowd, a form of co-operative direct action that sought to rectify unfair dealing and meet the basic needs of members through mutual support. In contrast, the joint stock company has primarily functioned to create profit for its shareholders. Prior to the mid-nineteenth century, they both existed largely 'outside' the law. Legal recognition and the body corporate status makes them subject to the law and gives them an equivalent status and form in order to facilitate the competitive market.

In creating a formal equality between these two forms with incorporation and limited liability, the legal form functions, as Isaac Balbus suggests, like the commodity form. The commodity form for Marx functions as an abstraction that makes otherwise incommensurable objects exchangeable.[102] Money, itself a commodity, functions as a "*universal economic equivalent*" that makes it possible for any given commodity to stand in for or represent another.[103] As Balbus summarises, "the fully developed commodity form, or the money form, thus entails a common form which is an abstraction from, and masking of, the qualitatively different *contents* of the objects and the concrete human needs to which they correspond."[104] The commodity fetishism that ensues completely obscures the concrete conditions in which the object was produced through a "double mystification."[105] Balbus argues, drawing on Marx's disparate writings on legal theory, that the bourgeois legal form functions similarly, with law operating as a "*universal political equivalent*" that makes it such

[102] See Karl Marx, *Capital, Vol. 1* (London: Penguin, 1990), 125-177.
[103] Isaac D. Balbus, "Commodity Form and Legal Form: An Essay on the 'Relative Autonomy' of the Law," *Law and Society Review* 11, no. 3 (1976-1977): 573.
[104] Ibid.
[105] Ibid.

that individual citizens can form contracts with one another. As he writes, "[t]he existence of political exchange or representation thus requires that qualitatively distinct individuals with otherwise incommensurable interests enter into a formal relationship of equivalence with one another, i.e., that the qualitatively different subjects become what they are not: *equal*."[106] Incorporation serves as the "common *form*" that makes the otherwise very different practices of the co-operative and the joint stock company equivalent for the purposes of the participation in the market.[107] It is, "an abstraction from, and masking of, the qualitatively different *contents* of the needs of subjects as well as the qualitatively different activities and structures of social relationships in which they participate."[108] And like the commodity form, the legal form also mystifies its own operation precisely through its status as law.

The analogy between legal form and commodity form captures an important aspect of the equalising and homogenising effects of legal recognition and incorporation. However, as I will argue below, metaphor of enclosure helps us to understand the particular ways in which incorporation disciplines and depoliticizes social life, especially in relation to the co-operative and the moral economy, drawing on the specific history of the body corporate elaborated in chapter 3. Enclosure is a term that in the context of the creation of the market usually refers to the enclosures of the commons that occurred primarily in the seventeenth and eighteenth centuries. It describes a process of removal of land from the commons, where it could be shared for activities such as grazing and foraging, and its placement within a regime of private property. For Karl Polanyi, the enclosures of land created a "fictitious commodity" from nature, which is itself emphatically not produced for sale on a market, unlike other commodities: "[w]hat we call land is an element of nature inextricably

[106] Ibid., 576. Emphasis in original.
[107] Ibid.
[108] Ibid.

interwoven with man's institutions."[109] The enclosure and commodification of land were part of a wider process in which the market was 'disembedded' from other forms of social relation, which were then in turn subordinated to the principle of the market. As Polanyi writes, "[n]ever before our own time were markets more than accessories of economic life. As a rule, the economic system was absorbed in the social system, and whatever principle of behaviour predominated in the economy, the presence of the market pattern was found to be compatible with it."[110] The creation of fictitious commodities, through processes such as the enclosures, helped to disembed the market by imposing a form through which not only land, but also labour and money in Polanyi's reading, could be exchanged and preventing other forms of social relation from inhibiting that exchange.[111]

The metaphor of enclosure is useful for understanding the legal recognition of co-operative societies, in part because it helps to capture the movement from the moral economy of the crowd to the co-operative as a process of disembedding. The moral economy of the crowd, as described in chapter 1, reflected a wider expectation of justice and fairness in the provision of basic goods. It emphasized and attempted to give effect to social obligations over marketized calculations designed to increase profit. Incorporation encloses this moral economy and subordinates it to the market, providing a way for it to persist in a limited form without undermining the operation of the market economy. However, as argued in chapter 2, The moral economy the crowd was not just an instantiation of 'tradition' or 'custom', but a form of resistance to the emerging market system that took place in the space of the sovereign's silence, navigating dynamics of tacit consent and repression that were characteristic of sovereign modalities of power. To this end, enclosure also helps to show how incorporation disciplined, and ultimately depoliticised, this

[109] Karl Polanyi, *The Great Transformation* (Boston: Beacon Press, 2001), 187.
[110] Ibid., 71.
[111] Ibid., 76.

resistance as well as social life more broadly, as part of the operation of disciplinary power and biopolitical or liberal governmentality.

Enclosure is an integral part of the operation of disciplinary power, as noted at the opening of this section. For Foucault, the paradigmatic example of this enclosure is the panopticon, at once an architectural design and "a figure of political technology."[112] In physical spaces such as the prison, the school or the hospital, the panoptic enclosure creates an order that allows for the efficient exercise of an individualising disciplinary power. More than this, Foucault argues that the panopticon "must be understood as a generalizable model of functioning; a way of defining power relations in terms of the everyday life of men" and not just as a particular institution.[113] The disciplinary techniques of the panopticon form "the very formula of liberal government."[114] As a disciplinary enclosure, the corporate form functions much like the prison cell. As Foucault describes, the prison cell limits lateral perception between inmates while also enabling a "compulsory visibility," by one who watches from an unseen position.[115] The corporate form, while an invisible, metaphysical enclosure similarly limits lateral perception, not by physically preventing sight, but by creating an entity that appears to exist completely unto itself, separable and separated from other such entities. It works precisely by making itself invisible. The invisibility of the corporate form is a consequence of its normalisation, which, as argued in chapter 3, made incorporation appear to be a right and a freedom, as opposed to a form of subjugation. Incorporation, in turn, enables compulsory visibility, which includes both regulatory *and* public scrutiny. Incorporation by registration as argued in the last chapter was designed to bring fraudulent companies within the scope of the law, but simultaneously put the state at a remove, allowing public opinion and the market to determine their integrity. So, too, with

[112] Foucault, *Discipline and Punish*, 205.
[113] Ibid., 205.
[114] Foucault, *Birth of Biopolitics*, 67.
[115] Foucault, *Discipline and Punish*, 187.

co-operatives, albeit with the more explicit purpose of subjecting them to the discipline of the market. The creation of the market, as Polanyi writes, "demands nothing less than the institutional separation of society into an economic sphere and a political sphere."[116]

The lack of lateral perception and the invisibility of authority function together as "a guarantee of order."[117] As Foucault explains,

> [i]f the inmates are convicts, there is no danger of a plot, an attempt at collective escape, the planning of new crimes for the future, bad reciprocal influences...if they are workers, there are no disorders, no theft, no coalitions, none of those distractions that slow down the rate of work, make it less perfect or cause accidents. The crowd, a compact mass, a locus of multiple exchanges, individualities merging together, a collective effect, is abolished and replaced by a collection of separated individualities.[118]

Incorporation constitutes the co-operative as an object of regulation, infinitely replicable, making them "interchangeable" as "elements of discipline."[119] This, as the Christian Socialists imagined, helps to prevent sedition and popular uprising, redirecting the energies of the working classes toward more desirable activities that ultimately contribute to the formation of an economic society. In the market as in the panopticon, "a real subjection is born mechanically from a fictitious relation. So it is not necessary to use force to constrain...."[120]

Incorporation is ultimately *depoliticising*, not just because it defers and deters demands for political rights, but because it encloses the 'ethos of mutuality' that animates co-operatives within a "totalitarian" or "immanentist" form, and in the same moment constitutes them within a system in which they will be read as economic.[121] In chapter 1 it was argued that the moral of economy of the crowd and the early co-operative societies

[116] Polanyi, *Great Transformation*, 74.
[117] Foucault, *Discipline and Punish*, 200.
[118] Ibid., 201.
[119] Foucault, *Discipline and Punish*, 145.
[120] Ibid., 202.
[121] Nancy, *Inoperative*, 3.

could be understood as a political gesture of "tying and enchainment of each to each."[122] The ethos of mutuality that comes from the moral economy of the crowd and crystallises in the early co-operative societies is, as argued in chapter 1, an example of a non-essentialising and non-sovereign form of politics imagined by Philippe Lacoue-Labarthe and Jean-Luc Nancy as part of the "retreat of the political."[123] The body corporate, in strong contrast to this, not only integrates the co-operative into the biopolitical and disciplinary order of political economy, but it also imposes an essentialising and immanentist unity. Enclosure links the specific historicity of the body corporate in the medieval church with its use in the nineteenth century, helping to articulate how this transcendent form of unity depoliticises the moral economy of the crowd in the very constitution of the co-operative. Nancy uses enclosure as a way of describing the persistence and effects of Christian metaphysics in the ordering of the world. As he writes, "...metaphysics sets a founding, warranting presence beyond the world. This setup stabilizes beings, enclosing them in their own being-ness.... Closure is the completion of this totality that conceives itself to be fulfilled in its self-referentiality."[124] The body corporate, as described in the last chapter, imports a transcendent metaphysical structure from the medieval church. This is a form of unity that is only possible because it is imagined as transcendent, located beyond the confines of the world. Unity of this kind, according to Nancy, is impossible. It is always undermined by a prior, inoperative sociality that exceeds its confines. However, in the nineteenth century, when the body corporate is normalised through its reconceptualization as a private right, this unity is *immanentized:* it no longer derives from somewhere 'beyond' the collective, in the state or the mystical body of Christ, but inheres in the collective itself. "Totalitarianism,"

[122] Jean-Luc Nancy, *Sense of the World* (Minneapolis: University of Minnesota Press, 1997), 112.
[123] Philippe Lacoue-Labarthe and Jean-Luc Nancy, "Opening Address to the Centre for Philosophical Research on the Political," in ed. Simon Sparks, *Retreating the Political* (London: Routledge, 1997), 112.
[124] Jean-Luc Nancy, *Dis-enclosure: The Deconstruction of Christianity*, trans. Bettina Bergo, Gebriel Melnfant, Michael B. Smith (New York: Fordham University Press, 2008), 6.

as Ian James describes, "would be predicated on a loss of the principle of transcendence and the attempt to overcome such a loss by seeking to realize this principle in a single figure, to realize this figure here and now within the totality of the social body or community to the exclusion of all other possibilities."[125] It is precisely these 'other possibilities' that are at stake in the legal recognition of co-operatives.

*Conclusion*

This chapter has argued that the legal recognition of co-operatives in the mid-nineteenth century was premised on a liberal and biopolitical concern to facilitate the operation of the natural laws of the market, so that they might discipline the working classes and make them more amenable to capitalism. This was evidenced primarily with reference to the Christian Socialists who were largely responsible for the legal reform effort. Their particular way of framing co-operatives as economic initiatives geared toward the improvement of the working classes coincided with these broader biopolitical concerns. The debates over the legal recognition of co-operatives were not simply "obscuring or legitimating" prior understandings of co-operation, "they actually constituted new sectors of reality, new problems and possibilities...."[126] In particular, it is the corporate form that helps to manifest the co-operative as an 'economic' rather than 'political' entity within the dichotomy of political economy—not specific practices such as the distribution of dividends, or a more 'pragmatic approach' amongst co-operative societies, but incorporation. This is when co-operation comes to be *seen* as economic, as something requiring the protection of laws to compete in the newly constructed sphere of the 'free' market. As Nikolas Rose writes, "[g]overning does not just act on a pre-existing thought world with its natural divisions. To govern is to cut experience in certain ways, to distribute actions and

[125] Ian James, *The Fragmentary Demand: An Introduction to the Philosophy of Jean-Luc Nancy* (Palo Alto: Stanford University Press, 2005), 164.
[126] Nikolas Rose, "Beyond the Public/Private Division: Law, Power and the Family," *Journal of Law and Society* 14, no. 1 (1987): 68.

repulsions, passions and fears across it, to bring new facets and forces, new intensities and relations into being."[127]

[127] Nikolas Rose, *Powers of Freedom: Reframing Political Thought* (Cambridge: Cambridge University Press, 2004), 149.

# Conclusion

This thesis has argued that the co-operative in England was constituted as a commercial and economic entity in the mid-nineteenth century through a process of legal recognition. Following a critique of dominant historiographical approaches to the co-operative movement, which situate its origins with the founding of the Rochdale Society of Equitable Pioneers in 1844, I argued that the 'beginnings' of the co-operative, from a genealogical perspective, should be located in the moral economy of the crowd in the eighteenth century. This historical reorientation, in turn, made it possible to construct a different historical narrative for the co-operative--one in which legal recognition could be seen to function constitutively, particularly in the context of nineteenth century political economy and biopolitical governmentality. The body corporate form was taken to be the most important aspect of this constitutive process, specifically because the transcendent form of unity that it imposes comes into conflict and tension with the ethos of mutuality that animates co-operatives and derives from the moral economy. Incorporation, as I argued in the final chapter, served as a form of enclosure that served to discipline and depoliticise the co-operative.

The notion that incorporation would have a disciplining effect on co-operatives is not merely speculative. In the early twentieth century, the incorporated status of co-operative societies would come explicitly into conflict with their commitment to mutuality. "The law," as Neil Killingback observes,

> concealed a contradiction. The Industrial and Provident Societies Acts incorporated societies, i.e. defined them as separate legal entities distinct from their members. Societies were to continue to function under the law independently of changes in leadership and membership. Members were grated limited liability in return. These were, already, limitations on, or particular definitions of, mutuality. In these respects,

> co-operative societies had the same legal status as joint-stock companies while not in fact being the same forms.[1]

From at least the 1890s, if not before, co-operative societies met resistance from private traders. Most notable amongst these was W.H. Lever (of what would become the company Unilever), who helped to organise associations of private traders in the North. The onset of economic depression in the late nineteenth century led to attempts to control the prices of goods domestically. Co-operative societies, as Killingback explains, "blocked the extension and easy establishment of resale price maintenance," which limited their ability to distribute dividends. Manufacturers, in turn, boycotted societies. In addition to the frequent boycotts, a political campaign led by associations of private traders pressed for co-operative societies to be "taxed to the full," or to the same extent as limited companies.[2] These campaigns were conducted with the more or less explicit intent that "co-ops would reduce their prices and so go bankrupt."[3] Since the passage of the Industrial and Provident Societies Act 1862, registered co-operative societies were only liable to pay tax on income from the ownership or occupation of land, in recognition of the fact that co-operative surpluses from trade with their own members are not, strictly speaking, profits. In addition, members of co-operative societies could be liable to pay tax on the interest they accrued from co-operative shares or loans made to a society, if their individual income was above the threshold. The 1862 Act exempted them from paying tax on their trading surpluses and any government securities, although this exemption was later restricted to only those societies that allowed for open membership.[4]

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[1] Neil Killingback, "Limits to Mutuality: Economic and Political Attacks on Co-operation During the 1920s and 1930s," in ed. Stephen Yeo, *New Views of Co-operation* (London: Routledge, 1988), 210.
[2] Ibid.
[3] Ibid., 213.
[4] Industrial and Provident Societies Act 1893.

This 'advantage' was deemed unfair by private traders, leading to a series of committees that considered whether "co-operative societies were favoured by any undue exemption," starting in 1905.[5] However, the view that co-operatives were "engaged in mutual exchange" prevailed for some time.[6] The logic was that individual members of co-operative societies, who were entitled to their share of the 'profits' through dividends, could only be liable for tax if their individual incomes were above the threshold. The society was not to be taxed as a unit. As Killingback summarises, "the implications of societies being seen as separate entities from their members were not pressed home."[7] In the meantime, the co-operative movement continued to grow, in part because of their ability to facilitate mass distribution during the First World War. Yet this growth only prompted further consternation amongst private traders.[8] The Royal Commission on Income Tax in 1920 revisited the question of taxation, determining that co-operatives should be taxed on any 'undivided' surplus—that is, on any surpluses that had not been distributed to members as dividends. The justification for this view, as Killingback explains, was that "[c]o-operative societies, then, were seen as dynamic and successful. The basis for this success, in the opinion of members of the Commission, was maximization of profit. Success in the economy must, they thought, indicate the existence of capitalist relations."[9] However, no additional tax was levied as a result of this report. It wasn't until the 1930s that private traders were finally successful. Yet another committee was set up to consider the tax position of co-operative societies. This committee confirmed the status of co-operative societies as incorporated entities, with the Chairman of the Inland Revenue later commenting that "the

[5] Killingback, "Limits to Mutuality," 211. These are the Ritchie Committee (1905), the Royal Commission on Income Tax (1919) and the Raeburn Committee (1932).
[6] Ibid., 212.
[7] Ibid.
[8] Ibid., 213. As Killingback reports, "in 1920 co-operative societies accounted for 18 to 20 per cent of the total national sales of groceries and provisions. Membership rose to 4.5 millions by 1920, but over 20 million consumers had been registered for sugar rations with the co-operative societies in 1919."
[9] Killingback 215.

pure doctrine of mutuality has no relevance in the case of *incorporated* trading concerns like Co-operative Societies."[10] While 'the divi' continued to be regarded as a trading expense for co-operative societies, the remainder of their income became taxable to the same extent as registered companies by virtue of legislation introduced as part of the 1933 Budget.[11] As Killingback summarises, "co-operative societies were made to accept capitalist definitions of economic activity, which in time thwarted their development. They remained, but the principle of mutuality weakened."[12]

While this thesis has pursued its analysis largely at the level of discourse, this story about taxation is one concrete and particularly salient example of how the mutuality of co-operatives has come into conflict and tension with their corporate status. Believe it or not, this was originally envisioned as an archival project—one that would have been based on a "vast accumulation of source material" that Foucault suggests is necessary for any thorough genealogy.[13] However, after a few attempts to make my way through the archives, I soon realised that I lacked the conceptual framework to make much sense of what I was reading. Not only were the archives incredibly dense and rich, but their answers were not immediately forthcoming. History doesn't readily tell itself. In many respects, this thesis has been an extended step back from that original project and an attempt to get to grips with what was at stake in the legal recognition of co-operatives. What began as a tension and a set of questions that emerged in relation to my own experience of participating in co-operatives, turned into a long meditation on law and its forms, and the ways in which they might shape our visions of alterity.

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[10] Quoted in Killingback, 220.
[11] Ibid., 225.
[12] Ibid., 209.
[13] Michel Foucault, "Nietzsche, Genealogy, History," in *Essential Works of Foucault, Volume 2: Aesthetics, Method and Epistemology*, ed. J.D. Faubion, trans. Robert Hurley and others (London: Penguin, 1994), 370.

As a consequence, this thesis does not offer much in the way of a solution to this problem beyond an adamant call to be mindful of the often subtle ways that law and history have determined how we imagine alterity. It is hardly useful advice to suggest that those who want to start co-operatives should avoid corporate forms, although there may be something to that argument. This is not least because it is indeed difficult to organise a co-operative without a corporate form. And, crucially, what the law says about co-operatives does not necessarily or entirely determine what they do. If depoliticisation is understood to occur in part because of the normalisation of the corporate form, as I have argued here, then half the work is simply putting the form in relief.

However, it remains the case, as a recent history of the co-operative movement observes, that "few co-operative leaders today would express an ambition to replace capitalism."[14] But must we accept that all co-operatives can hope to do is "...continue to influence, wider business practice"?[15] At this stage, one might be forgiven for thinking that I don't like co-operatives very much or that I believe that they don't have any real political potential. Or, as the co-operative movement often says of those who attempt critique it, I simply don't understand how co-operatives really work. I've taken an 'outside' perspective on co-operation and in so doing, the real value of co-operation has escaped notice. However, the metaphor of enclosure that I have used in this thesis also lends itself to a sense of possibility and opening. Walls, both physical and metaphysical, can be torn down or traversed in all manner of creative ways, and I believe the reality is that they are being negotiated and undermined all the time. One of the virtues of Jean Luc Nancy's ontology is its emphasis on the fact that our sociality is always exceeding constituted forms. As he writes, "[b]eing cannot *be* anything but being–with–one–another, circulating in the *with* and

[14] John F. Wilson, Anthony Webster and Rachel Vorberg-Rugh, *Building Co-operation: A Business History of The Co-operative Group, 1863-2013* (Oxford: Oxford University Press, 2013), 14.
[15] Ibid.

as the *with* of this singularly plural coexistence."[16] While legal forms such as the body corporate impose themselves as immanent totalities, this immanence is ultimately impossible. This emphasis on discourse and law in this thesis, while important as part of an effort to reframe how we think about co-operatives in the first place, does not do any justice to what actually takes place in co-operatives, and the ways in which the practices, hopes and visions of alterity brought to them exceed the confines of law and legal forms. Indeed, as suggested at the opening of this thesis, it is this sense of alterity that gives rise to the tensions in the meaning and purpose of co-operation in the first place.

[16] Jean-Luc Nancy, *Being Singular Plural* (Palo Alto: Stanford University Press, 2000), 3.

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