

Tolerated Illegality and Intolerable Legality: From Legal Philosophy to Critique

by

Kathryn Plyley

Master of Arts, Carleton University, 2011

Bachelor of Arts, University of Toronto, 2008

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Supervisory Committee

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Supervisory Committee

Dr. Rebecca Johnson (Faculty of Law)

Supervisor

Dr. Sara Ramshaw (Faculty of Law)

Departmental Member

Dr. Scott Woodcock (Department of Philosophy)

Outside Member

Abstract

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Dr. Rebecca Johnson (Faculty of Law)
Supervisor

Dr. Sara Ramshaw (Faculty of Law)
Departmental Member

Dr. Scott Woodcock (Department of Philosophy)
Outside Member

This project uses Michel Foucault's underdeveloped notion of "tolerated illegality" as a departure point for two converging inquiries. The first analyzes, and then critiques, dominant legal logics and values. This part argues that traditional legal philosophers exhibit a "disagreement without difference," generally concurring that legal certainty and predictability enhance agency. Subsequently, this section critiques "formal legal" logic by linking it to science envy (specifically the desire for certainty and predictability), and highlighting its agency-*limiting* effects (e.g. the violence of law *en-force-ment*). The second part examines multiple dimensions of tolerated illegality, exploring the permutations of this complex socio-legal phenomenon. Here the implications of tolerated illegality are mapped across different domains, ranging from the dispossession of Indigenous peoples of their lands, to the latent ideologies embedded in superhero shows. This section also examines the idea of liberal "tolerance," as well as the themes of power, domination, politics, bureaucracy, and authority. Ultimately, this project demonstrates that it is illuminating to study legality and (tolerated) illegality in tandem because although analyses of "formal legality" provide helpful analytical texture, the polymorphous and entangled nature of tolerated illegality makes clear just how restricted and artificial strict analyses of legality can be.

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INTRODUCTION: CONSTELLATING TOLERATED ILLEGALITY

...the task of philosophy as a critical analysis of our world is something that is more and more important. [...] Maybe the target nowadays is not to discover what we are but to refuse what we are. We have to imagine and to build up what we could be...”¹

Critique offers possibilities of analyzing existing discourses of power to understand how subjects are fabricated or positioned by them, what powers they secure (and disguise or veil), what assumptions they naturalize, what privileges they fix, what norms they mobilize, and what or whom these norms exclude.²

Michel Foucault once wrote that the best way to understand what people mean by “legality” is to study “illegality.”³ This project began as an exploration of the Foucauldian concept of “tolerated illegality,” but it became just as much about legality as illegality. As it turns out, examining both legality and illegality in tandem is mutually instructive. The chapters of this thesis take the reader through different ways of thinking, beginning with traditional legal philosophy and ending with popular culture and media studies. All the while the idea of “tolerated illegality”—and the legal values it is seen to challenge or threaten—help guide the analysis.

Tolerated illegality is topical, recurring in thought experiments, the daily news, and works of fiction too; from a Montreal borough’s real-life attempt to create a “zone of tolerance” for prostitution,⁴ to police “turning a blind eye” to marijuana use,⁵ to the designation of “legal

¹ Michel Foucault, “The Subject and Power,” in *Essential Works of Foucault 1954-1984, Volume III: Power*. Translated by Robert Huxley et al., ed. by James D. Faubion (New York: New York Press, 2000), 336.

² Wendy Brown and Janet E. Halley, “Introduction,” in *Left Legalism/Left Critique*, ed. by Wendy Brown and Janet E. Halley (Durham: Duke University Press, 2002), 26.

³ Foucault, “The Subject and Power,” 329.

⁴ CBC News, “Montreal Borough Wants a ‘Zone of Tolerance’ for Prostitution,” *CBC News Montreal, CBC*, June 17, 2012. <http://www.cbc.ca/news/canada/montreal/montreal-borough-wants-a-zone-of-tolerance-for-prostitution-1.1131089>.

graffiti walls,”⁶ to the “Hamsterdam” experiment in season 3 of the critically acclaimed television series *The Wire*,⁷ tolerated illegality rarely fails to capture the imagination and provoke widespread interest—and controversy. Accordingly, Foucault’s enticing and underexplored idea presents a rich opportunity for a research project.

Origin of the Idea – Foucault’s Discipline and Punish

Foucault’s project in *Discipline and Punish: The Birth of the Prison* is to uncover why, if prisons are not successful at achieving their stated goals, do they continue to proliferate? As Foucault suspects, and later goes on to argue, prisons are indeed successful at achieving a particular agenda—just not the one advertised. Moreover, the prison’s undisclosed goals, and the techniques used to achieve them, are not unique to the prison, but can be found “in the context of the school, the barracks, the hospital, or the workshop.”⁸ The disciplinary techniques used in these institutions and beyond train people to monitor and regulate their own behaviour, strive for constant productivity, and aspire to rise through the social ranks.

The phrase “tolerated illegality” appears in the section entitled, “Generalized Punishment.”⁹ The discussion begins in France in the eighteenth century. At the time, each “social strata” had its own margin of “tolerated illegality,” which Foucault describes as “the non-application of the rule, the non-observance of innumerable edicts or ordinances,” and also as a

⁵ Jesse Ferreras, “Marijuana Legalization in BC May Be Closer Than We Think,” *Huffpost British Columbia*, *Huffington Post*, May 10, 2013. https://www.huffingtonpost.ca/2013/05/10/marijuana-legalization-bc_n_3205944.html.

⁶ Graffiti Management Program (City of Ottawa), “Graffiti and Mural Program,” City of Ottawa, accessed October 2, 2015, <http://ottawa.ca/en/residents/water-and-environment/green-living/working-together-stop-graffiti>.

⁷ Although (then) Baltimore Mayor Clarence Royce finally shuts down Major “Bunny” Colvin’s “Hamsterdam” experiment in the Season 3 finale (“Mission Accomplished”), this experiment still has implications that reach into Season 4. For example, because of his actions, Bunny is denied a full Major’s pension upon retirement (he is demoted to Lieutenant), leading him to take a new job opportunity at Edward Tilghman Middle School (an engaging plot development throughout Season 4).

⁸ Michel Foucault, *Discipline & Punish: The Birth of the Prison*, 2nd ed. Translated by Alan Sheridan. (New York: Vintage Books, 1995), 140.

⁹ Foucault, *Discipline and Punish*, 73.

“regular exemption.”¹⁰ Foucault explains that tolerated illegalities arose for a number of different reasons: (1) sometimes there was a “massive general non-observance,” so “ordinances could be published and constantly renewed without ever being implemented;” (2) sometimes “it was a matter of laws gradually falling into abeyance;” (3) sometimes it was “silent consent on the part of the authorities” or “neglect;” and (4) sometimes it was “quite simply the actual impossibility of imposing laws and apprehending offenders.”¹¹ As Foucault recounts, tolerated illegalities were so ingrained in daily social life that they had their own “coherence and economy.”¹²

Significantly, Foucault describes how although those in the lowest socio-economic class had few privileges, they did benefit from a margin of tolerated illegality.¹³ This “space of tolerance,” which was gained “by force or obstinacy,” was so crucial to their existence that “they were often ready to rise up and defend it.”¹⁴ However, although property was held in common, there was little need to defend these spaces of tolerance because almost everyone profited from ongoing illegalities. Activities like “the right of free pasture, wood collecting,” and even smuggling formed part of “the political and economic life of society.”¹⁵ For a time, these ongoing illegalities had economic benefits for all groups alike, and so what was once tolerated actually became encouraged.¹⁶

However, in the second half of the eighteenth century there was a shift regarding tolerated illegality. Largely due to an increase in population size, and an increase in overall wealth (combined with a widening economic gap between social classes), the most popular form

¹⁰ Foucault, *Discipline and Punish*, 82

¹¹ Foucault, *Discipline and Punish*, 82.

¹² Foucault, *Discipline and Punish*, 82.

¹³ Foucault, *Discipline and Punish*, 82.

¹⁴ Foucault, *Discipline and Punish*, 82.

¹⁵ Foucault, *Discipline and Punish*, 84-85.

¹⁶ Foucault, *Discipline and Punish*, 84.

of tolerated illegality became “pilfering and theft.”¹⁷ At some point, what could be called a “crisis of illegality” arose; although the upper class accepted many prior tolerated illegals, when it came to infringements of their property rights, they did not.¹⁸ What was once perceived as a right of free pasture became trespassing, and wood collecting became outright theft.¹⁹ As the list of permissible illegals decreased, the illegals committed became increasingly violent, and started to include assaults, fire-starting, and even murders.²⁰

In addition, as Foucault explains, illegals became intolerable in the realm of “commercial and industrial ownership.”²¹ With the increasing development of ports came the creation of giant warehouses and workshops that housed expensive machinery and equipment. Furthermore, workers could not always be supervised effectively in these large settings. Wealthier entrepreneurs began to own and operate these businesses, and intolerance of illegals, “was obviously very evident where economic development was the most intense.”²² Reports were compiled, complete with data and statistics, about the “urgent need” to crack down on theft-related illegals at warehouses, workshops, and ports.^{23,24} After these reports described the complicity between personnel (“clerks, overseers, foremen and workers”) and the black-market network on the receiving end of the stolen goods, the conclusion was that it is “necessary, therefore, to control these illicit practices.”²⁵

¹⁷ Foucault, *Discipline and Punish*, 84.

¹⁸ Foucault, *Discipline and Punish*, 84-85.

¹⁹ Foucault, *Discipline and Punish*, 85.

²⁰ Foucault, *Discipline and Punish*, 85.

²¹ Foucault, *Discipline and Punish*, 85.

²² Foucault, *Discipline and Punish*, 85.

²³ Foucault, *Discipline and Punish*, 85.

²⁴ As pointed out to me by Dr. Scott Woodcock, this quotation, originally published in 1975, still resonates with readers today in the context of the present social, political, and economic landscape. The idea that there is an “urgent need” to crack down on the illegals of workers in lower socio-economic groups, but not a similar urgent need to crack down on the financial crimes (e.g. tax evasion) of the wealthy, is an asymmetry that persists today.

²⁵ Foucault, *Discipline and Punish*, 86.

Thus, the system of tolerated illegalities was restructured in the wake of the “development of capitalist society.”²⁶ The distinction between tolerable and intolerable crimes related directly to class differences. The illegality favoured by the lower classes—theft of goods—became understood as intolerable property crime. Conversely, the crimes favoured by the upper class—“getting round its own regulations”—not only continued to be tolerable but also opened up further spaces of tolerated illegalities for the elite.²⁷ Moreover, these different categories of illegalities corresponded to different punishments; illegalities regarding property theft were tried by “ordinary” courts, whereas financial crimes were tried in “special” courts with exclusive accommodations and reduced fines.^{28,29} At this point in the discussion Foucault connects tolerated illegality to his master project (investigating the birth and rise of the prison system): the illegalities of property necessitated constant policing and effective punishment, contributing to a widespread penal reform.³⁰ Ultimately, Foucault’s argument is that this prison reformation process had less to do with physical prisons, and more to do with the creation of institutional systems and techniques (e.g. evaluation methods, regimented training, perceived surveillance, etc.) that encourage people to police their own behaviour.

Tolerated Illegality in Scholarly Work

Although the Foucauldian notion of tolerated illegality is underexplored, some scholars certainly mention tolerated illegality in their work; however, they often do so askance, and this notion itself is not the primary object of inquiry in their projects (the topics of these works vary,

²⁶ Foucault, *Discipline and Punish*, 87.

²⁷ Foucault, *Discipline and Punish*, 87.

²⁸ Foucault, *Discipline and Punish*, 87.

²⁹ This logic prefigures the discrepancy between lenient punishments today for financial crimes (see the anecdote from David Gareber in chapter 4).

³⁰ Foucault, *Discipline and Punish*, 87-88.

ranging from, for example, the harms of palm oil to contemporary youth activism).³¹ Of the projects that explore tolerated illegality less directly, there is one in particular that I would like to discuss briefly before moving on, which is Ryan Brooks's chapter entitled "The Narrative Production of 'Real Police'" in an edited collection about the television series *The Wire*. Pausing to mention Brooks's chapter is worthwhile not only because this series advanced my own thinking about tolerated illegality, but also because *The Wire* is a shared popular cultural referent and useful point of entry into discussions about this notion and its complexities. Moreover, Brooks's treatment of tolerated illegality in his chapter both raises instances of tolerated illegality in the show that had not occurred to me, and also omits the example I had in mind, allowing me to build on Brooks's insights and develop my own analysis.

Brooks's chapter refers explicitly to "tolerated illegality" in regard to the police work in *The Wire*. Towards the end of the chapter, he discusses two instances of tolerated illegality in the first season. The first example involves (then) Deputy Commissioner Ervin Burrell. An investigative team of police officers has a wiretap on a network of drug dealers and is secretly listening to their every word. Although the investigative team wants to follow the money in the

³¹ Some fairly recent examples of scholarship that refers to tolerated illegality at some point within the work include: *The Architecture of Illegal Markets: Towards an Economic Sociology of Illegality in the Economy* edited by Jens Beckert and Matías Dewey (2017); *The Politics of Palm Oil Harm: A Green Criminological Perspective* by Hanneke Mol (2017); *Democracy at Large: NGOs, Political Foundations, Think Tanks and International Organizations* edited by Boris Petric (2012); *The Wire: Urban Decay and American Television* edited by Tiffany Potter and C. W. Marshall (2010); *Outcasts of Empire: Japan's Rule on Taiwan's "Savage Border," 1874-1945* by Paul D. Barclay (2017); *Rethinking Capitalist Development: Primitive Accumulation, Governmentality and Post-Colonial Capitalism* by Kalyan Sanyal (2014); *A Better Way to Zone: Ten Principles to Create More Livable Cities* by Donald L. Elliott (2012); *Terrorism, Rights and the Rule of Law: Negotiating Justice in Ireland* by Barry Vaughan and Shane Kilcommins (2013); *Sustainable Geography* by Roger Brunet (2013); *The Inspection House: An Impertinent Field Guide to Modern Surveillance* by Tim Maly and Emily Horne (2014); *The Committee to Destroy the World: Inside the Plot to Unleash a Super Crash on the Global Economy* by Michael E. Lewitt (2016); *Looking Forward: Prediction and Uncertainty in Modern America* by Jamie L. Pietruska (2017); *Contemporary Youth Activism: Advancing Social Justice in the United States* edited by Jerusha Conner and Sonia M. Rosen (2016); *The Black and Tans: British Police and Auxiliaries in the Irish War of Independence* by D. M. Leeson (2011); *The Oxford Handbook of Refugee and Forced Migration Studies* edited by Elena Fiddian-Qasmiyeh, Gil Loescher, and Katy Long (2014); and *The Wisdom of Syria's Waiting Game: Foreign Policy Under the Assads* by Bente Scheller (2014).

case, Burrell orders them to follow the drugs instead. Burrell knows that if the team sticks to the drugs, then only street-level drug dealers will be arrested. However, if the investigators start following the money trail, then a whole host of additional players (e.g. counsellors and politicians) will be implicated in the criminal network. As Brooks writes, “keeping certain things off the tape and following the drugs rather than the money is the condition of the functioning of the police administration.”³² Burrell wants the team to ignore the financial corruption and focus on the drug dealers instead, meaning that the financial crimes become tolerated illegalities in the ongoing drug investigation.

The second example of tolerated illegality that Brooks discusses is how the main characters in the Baltimore police department strategically allow certain illegalities to continue in order to construct a broader conspiracy case. While listening to the drug dealers on the wiretap, the officers hear about multiple crimes, and yet they sit on this information (thus permitting legal infractions). Their aim is to gather enough pieces of the puzzle to indict the whole network of drug dealers, including the bosses. This goal involves convincing the drug dealers that the police officers are not monitoring them, and so the officers cannot expose themselves too early in the case by acting on preliminary information. Thus, the investigative team “will decide when and why to arrest, creating long intervals of unpunished violation and effectively changing the meaning of certain criminal acts, even murders, making them merely the building blocks for the larger conspiracy case.”³³ In short, all of the crimes that constitute the “building blocks” of the case are ignored in pursuit of the end goal: catching the top players in the drug network (i.e. Avon Barksdale and Stringer Bell).

³² Ryan Brooks, “The Narrative Production of ‘Real Police,’” in *The Wire: Urban Decay and American Television*, ed. by Tiffany Potter and C.W. Marshall (New York: Continuum, 2009): 75.

³³ Brooks, “Narrative Production of ‘Real Police,’” 75.

Brooks's chapter mainly focuses on season one of *The Wire*, and, before moving on, I would like to briefly discuss a significant example of tolerated illegality that emerges in season three. Major Howard "Bunny" Colvin is near retirement and tired of the politics of the police department. Bunny believes that continuing to arrest youth for selling drugs on the street is not the best approach (especially when these youngsters are merely following orders from their bosses). He has his own unorthodox plan to reduce the drug-related violence in the community—eliminate the inter-gang competition to sell on the "best corners"—and he enacts it. Major Colvin creates a zone of toleration for street drugs. As long as the dealers sell drugs in the designated area, he guarantees that the police will not apprehend them. Here are three excerpts from season three in which the characters discuss the situation that Bunny has convened:

Episode 7:

DETECTIVE KIMA GREGGS:	And it's legal to sell drugs here?
MAJOR "BUNNY" COLVIN:	It's not legal...we just look the other way is all.
[...]	
DETECTIVE KIMA GREGGS:	You legalized drugs?!
MAJOR "BUNNY" COLVIN:	Look, this is a <i>tactical deployment</i> ... ³⁴

Episode 8:

PUBLIC HEALTH REPRESENTATIVE:	So you're saying that this is a sanctioned, open-air drug mart?
MAJOR "BUNNY" COLVIN:	No, it's not officially sanctioned; it's more like it's <i>tolerated</i> . ³⁵

Episode 10:

DEPUTY COMMISSIONER RAWLS:	Jesus Christ you 'nit,' don't you see what he's done? He's legalized drugs!
MAJOR "BUNNY" COLVIN:	Actually, I elected to ignore them.
DEPUTY COMMISSIONER RAWLS:	You lost your fucking mind. He's lost his fucking mind! ³⁶

³⁴ David Simon, "Back Burners," *The Wire Complete Series*: Season 3, episode 7, directed by Tim Van Patten (New York: HBO Video, 2008).

³⁵ David Simon, "Moral Midgetry," *The Wire Complete Series*: Season 3, episode 8, directed by Agnieszka Holland (New York: HBO Video, 2008).

In each of these three examples, Major Colvin uses language suggesting that he has orchestrated a tolerated illegality: “we just look the other way is all,” “it’s more like it’s tolerated,” and “I elected to ignore them.” Thus, *The Wire*, and scholarship discussing this acclaimed television series, should be acknowledged as texts that have explored the idea of tolerated illegality and have influenced the present work.

There are also a couple of scholars, Samuel S. Bauch and Chandra Sharma Poudyal, who have engaged more directly with tolerated illegality as their topic, foregrounding the idea in the titles of their works. Bauch wrote his undergraduate B.A. honours thesis on illegal immigration and tolerated illegality.³⁷ Poudyal recently authored an article entitled “Nepali Private Schools and Tolerated Illegality: A Foucauldian Analysis of Privatisation of Education in Nepal,” which was published in 2017.³⁸ Writing a policy discussion for the journal of *Policy Futures*, Poudyal traces the neoliberalization of education in Nepal through the rise of private schools. He remarks on how the goal of private school owners is to “maximize private profit,”³⁹ and notes that an increasing number of private schools are registering under the “Companies Act.”⁴⁰ This designation is contributing to their involvement in “business activities,” such as selling merchandise.⁴¹ Moreover, these private schools are hiring new and inexperienced teachers in order to justify paying them the minimum salary, and these schools consider staff “replaceable” if individuals prove troublesome.⁴²

³⁶ David Simon, “Slapstick,” *The Wire Complete Series*: Season 3, episode 9, directed by Alex Zakrzewski (New York: HBO Video, 2008).

³⁷ Samuel S. Bauch, “Illegal Immigration as Tolerated Illegality: A Foucauldian Approach to Undocumented Immigration in the Modern United States,” Honours B.A. thesis, Amherst College, 2010.

³⁸ Chandra Sharma Poudyal, “Nepali private schools and tolerated illegality: A Foucauldian analysis of privatisation of education in Nepal,” *Policy Futures in Education* 15, no. 4 (2017).

³⁹ Poudyal, “Nepali Private Schools,” 541.

⁴⁰ Poudyal, “Nepali Private Schools,” 542.

⁴¹ Poudyal, “Nepali Private Schools,” 542-43.

⁴² Poudyal, “Nepali Private Schools,” 543.

The connection that Poudyal makes between Nepali private schools and tolerated illegality is that the government has attempted to regulate private schools, but to no avail. As Poudyal reports, “[t]he government of Nepal has constantly been framing rules and regulations related to the private education sector without any success in implementing them.”⁴³ Part of the problem Poudyal identifies is that the government lacks a way to “enforce compliance” with the rules.⁴⁴ In fact, the District Education Office (DEO) even threatened to cancel the licenses of those schools that did not conform to regulations, but in reality no school’s licence has ever been revoked.⁴⁵

Poudyal’s article is not only a foray into the under-researched topic of tolerated illegality, but also an example of its malleability. Here, tolerated illegality usefully illuminates the troubling rise of privatized—and neoliberalized—education in Nepal. In my own work, the idea of tolerated illegality is instead mobilized to raise questions about, for example, the dispossession of Indigenous peoples of their lands by the Canadian government, and the implications of Superheroes’ *perceived* “extra-legal” approaches to resolving crises. Indeed, as the subsequent section will discuss, the flexibility built into the Foucauldian notion of tolerated illegality makes it a fluid and adaptable idea—one that researchers may redeploy to suit their respective projects.

Tolerated Illegality in the Present Project

Foucault’s approach animates my conception of tolerated illegality, but I also strive to give this underdeveloped notion a life of its own. As Foucault explains, sometimes the majority of people ignore a particular law, or a law becomes out-dated and out of touch with present

⁴³ Poudyal, “Nepali Private Schools,” 545.

⁴⁴ Poudyal, “Nepali Private Schools,” 545.

⁴⁵ Poudyal, “Nepali Private Schools,” 546.

realities, or law enforcement officials stop caring about a specific offense, or there is no way to catch all of the lawbreakers in a certain area. Ultimately, there is a variety of different and overlapping understandings of what constitutes tolerated illegality, as well as how and why these illegalities emerge. However, this flexibility is not an oversight on Foucault's part—it is arguably his intention.

One of Foucault's strategies is purposefully to give his key terms and phases abstract and flexible meanings. Mariana Valverde notes that Foucault's notions are commonly marked by “the absence of clear (fixed) definitions.”⁴⁶ Valverde argues that Foucault intentionally chooses not to give his terms fixed definitions because they are “tentative and always dynamic abstractions,” deployed “strategically” rather than “scientifically or philosophically.”⁴⁷ Furthermore, as Valverde explains, Foucault's notions are “tactical,” and as a result their meaning “can and does change.”⁴⁸ Accordingly, latching on to a “dynamic abstraction” like tolerated illegality and giving it a life of its own seems consistent with Foucault's own methodology.⁴⁹

⁴⁶ Mariana Valverde, “Specters of Foucault in Law and Society Scholarship,” *Annual Review of Law and Social Science* 6 (2010): 51.

⁴⁷ Valverde, “Spectres of Foucault,” 52.

⁴⁸ Valverde, “Spectres of Foucault,” 53.

⁴⁹ Consistent with my understanding of the notion of “tolerated illegality,” and inspired again by Foucault's approach (as explicated by Valverde), this project orients to the terms “law” and “politics” precisely as notions without fixed essences; they gain texture from the movement of the inquiry, rather than becoming more circumscribed from beginning to end. Theorists have disagreed profoundly on what law means, with the entire field of jurisprudence in some way trying to answer the (ultimately unanswerable) question “what is law?” The same can be said for political philosophy, with disagreement over such fundamental questions as what constitutes “politics,” whether it necessarily involves power, and so on. Nonetheless, in the interest of transparency about some of my working assumptions, a brief statement on each notion is possible.

For the purposes of my work, I think of law in a fairly abstract and diffuse way. For me, law includes not only “state-made, official” law and case law, but also informal rules, customs, and behavioural patterns. Indeed, law may be more productively seen as part of a larger process of social order, control, and regulation that includes norms of all sorts. Moreover, I also understand “law” to include what Michael M’Gonigle calls, “legal logics” in his paper “Logics as Law” (forthcoming, cited with permission from the author—see chapter 2). There is a type of legal “logic and reasoning” that, for me, is an important piece of thinking about law. In addition, although this project does not engage extensively with psychoanalysis, I am influenced by Butler's argument (building on Foucault) that people internalize laws, rules, and behavioural standards. In this sense, the “psychic” dimension of law is also significant (see chapter 4, thesis #9). (Michael R. M’Gonigle, “Logics as Law: Rethinking Social Regulation in the Precarious

Foucault's strategically open-ended deployment of concepts inspires my understanding of tolerated illegality, and also sets it apart from "civil disobedience." Although tolerated illegality and civil disobedience do overlap, tolerated illegality is a broader category. Civil disobedience generally connotes a conscious challenge to the law; it is usually characterized by acts of protest inspired to communicate disapproval of perceived injustices caused or reinforced by legislation. Such intentions may overlap with the idea of tolerated illegality or they may not. Tolerated illegality connotes a plethora of latent and diffuse acts that may be consciously or unconsciously executed. Sometimes the label "tolerated illegality" applies to deeds that are not considered conventionally reprehensible enough to be strictly illegal and not benign enough to be legal. Other times tolerated illegalities are behaviours that have, for better or worse, transformed into informal norms. Thus, the idea of tolerated illegality captures a multitude of unlawful deeds, which may overlap with civil disobedience, but which also include a significant variety of other situations and examples.

My Approach: This is not a Gap Study

This section will briefly outline the history of "gap studies" in socio-legal scholarship before differentiating my project from these studies.⁵⁰ Jon B. Gould and Scott Barclay compiled

Age of Liberal Modernity (Short Law Review Version)," *DRAFT: citable and quotable only with written permission of the author* (2016); Judith Butler, *The Psychic Life of Power: Theories in Subjection* (Stanford: Stanford University Press, 1997)).

It is also possible to say something in general about politics. Pierre Schlag jokes that critical legal scholars "have never quite agreed on what they mean by 'politics'." (1135) For this group, politics turns out to mean "a variety of different conceptions, including politics as value choice, power, ideology, interest group struggle, power/knowledge, and class warfare." (1136) At a minimum, for my project, politics involves the acknowledgement of disagreement over how to order collective life and of power differentials within any actual social ordering. Social positions and capacities are stratified, such that the same norms may have different and even opposed effects on varying groups of people. Politics is divisive and contestatory, with possible disagreement even over whether a power differential exists in a given context, whether it is relevant to following the norm, as well as additional implications (Pierre Schlag, "Politics and Denial," *Cardozo Law Review* 22 (2001)).

⁵⁰ At the 2013 *West Coast Law and Society Retreat* at the University of Washington (Seattle, WA), a senior male professor publicly—and aggressively—accused me of creating a project that was just another "gap study." To my

a comprehensive overview of the history of socio-legal gap studies in their article, “Mind the Gap: The Place of Gap Studies in Sociolegal Scholarship.” Although Gould and Barclay explain that gap studies were at their most popular in the 1960s-70s, they also note that variations on the gap study theme continued into the 1980s and 90s. They recount how gap studies in socio-legal scholarship aimed to provide quantitative proof that “law on books” differed from “law in action.”⁵¹ According to Gould and Barclay, upon realizing that such evidence existed, socio-legal scholars could have proceeded in “one of two directions:” (1) they could have explored the assumption that law is not all-powerful and is influenced by social, political, and economic forces; or (2) they could have used their findings to make concrete recommendations regarding policy changes and legal reform.⁵² Gould and Barclay report that, to the disappointment of many, gap studies proceeded in the latter direction, becoming a link between socio-legal scholars and policy-makers.⁵³

Gould and Barclay describe how, in its early years of popularity, a typical gap study would involve three major steps: (1) scholars would identify the supposed purpose of a particular law, (2) they would provide statistical data to support the claim that this goal was not being met, and (3) they would offer concrete suggestions for legal change.⁵⁴ As Gould and Barclay put it, “the impulse [was] to bridge, rather than accept, the gap...”⁵⁵ The aim of the majority of “classic” gap studies was to test law’s “efficacy” by looking at whether or not legislation and

horror and humiliation, I had to confess that I did not even know what I was being accused of; I had never heard of a gap study prior to this public assault. Although no one has so much as mentioned a gap study in relation to my project since this conference, the interaction left such a vivid and lasting impression that it caused me to include this section on gap studies in the introduction to my thesis. I take some comfort in the hope that perhaps this tale of academic embarrassment is relatable.

⁵¹ Jon B. Gould and Scott Barclay, “Mind the Gap: The Place of Gap Studies in Sociolegal Scholarship,” *Annual Review of Law and Social Science* 8, no. 1 (2012): 324.

⁵² Gould and Barclay, “Mind the Gap,” 325.

⁵³ Gould and Barclay, “Mind the Gap,” 325.

⁵⁴ Gould and Barclay, “Mind the Gap,” 324.

⁵⁵ Gould and Barclay, “Mind the Gap,” 325.

court decisions were being followed.⁵⁶ In essence, the goal of these gap studies was to render things “consistent;” if the identified legal aims were not being met, there was a call for legal reform to realign aims and outcomes.⁵⁷ However, whereas the goal of these classic gap studies was consistency and legal reform, Gould and Barclay note that there was also an “advanced” version of the gap study, which emerged primarily in the 1980s-1990s, and focused on investigating the emergence of these gaps rather than closing them.

Contrary to the classic gap studies, the “advanced” gap studies accepted that gaps were inevitable and to be expected. Gould and Barclay report that these advanced studies “provided a more nuanced picture of the power and limits of law.”⁵⁸ Even though these advanced gap studies asked more interesting questions than their predecessors, around the 1980s the most significant type of gap studies scholarship was work critiquing gap studies themselves. Some of the criticisms of gap studies included: questioning authors’ assumptions about a particular law’s alleged goal(s), suggesting that laws often had vague rather than specific intentions, challenging authors’ impartiality and claiming they imposed their own values on the study, condemning the lack of foundational questions about the law and legal structures, and failing sufficiently to consider the role of the social in laws and legal structures.⁵⁹ However, despite the flaws of many gap studies (both classic and advanced versions), these projects often have unrecognized influences on socio-legal scholarship today.

Gould and Barclay suggest that current scholars are engaging in research that is reminiscent of the era of gap studies, even if they are “not fully acknowledging the debt.”⁶⁰ For example, Gould and Barclay conclude by noting that some socio-legal scholars today might

⁵⁶ Gould and Barclay, “Mind the Gap,” 326.

⁵⁷ Gould and Barclay, “Mind the Gap,” 325.

⁵⁸ Gould and Barclay, “Mind the Gap,” 328.

⁵⁹ Gould and Barclay, “Mind the Gap,” 328-329.

⁶⁰ Gould and Barclay, “Mind the Gap,” 324.

investigate a “different kind of gap;” these different studies might involve “the tradition associated with Foucault,” and ask questions about the ways in which the gap can be understood as “evidence both of the oppression of a group as captured by law on books and of the liberation of that same group as captured by their social practices.”⁶¹ This updated approach is certainly closer to my research than the classic gap study outlined above. However, my project still differs from newer gap study approaches in four important ways, each of which I will discuss below.

First, I am not trying to make the gap “evidence” of anything in particular. Accordingly, for me, the gap does not *necessarily* mean that law’s aims are going unmet, or that legal reform should follow, or even that a particular social group is pushing back against an oppressive law. The gap could exist for any of these reasons, all of them, none of them, or it could mean something completely different. Trying to determine why a gap emerged and what it means is not my purpose. Like Foucault, I am assuming that tolerated illegality is pervasive, that this claim is uncontroversial, and that tolerated illegality exists in a variety of forms (e.g. out-dated laws, strategically ignored laws, etc.) for a multitude of reasons (e.g. neglect, no intention of implementation, etc.).⁶² I am using tolerated illegality tactically in my project to open up spaces for asking questions about the law, its authority, and the idea of the “rule of law” or “legality.”⁶³ Consequently, tolerated illegality itself is not always the subject of inquiry but rather a useful frame to interrogate certain legal problems.

Second, my project does not take a quantitative or case study-based approach. I do not select a particular illegality and trace it from legislation/case law through to its everyday operationalization in order to argue that there is a gap that needs to be addressed. Rather, my

⁶¹ Gould and Barclay, “Mind the Gap,” 334.

⁶² Foucault, *Discipline and Punish*, 82.

⁶³ In my project, some of the discussions are not directly about tolerated illegality, but rather about how thinking about tolerated illegality raises critical questions about law and legality, drawing out different logics embedded in particular types of thought.

project proceeds more in the mode of theory and critique. I look at the ways in which thinking about tolerated illegality reveals a great deal about conceptions of legality; this approach resonates with Foucault's suggestion (referenced at the outset of this introduction) that it is helpful to "analyz[e] power relations through the antagonism of strategies," meaning that, for example, "to find out what our society means [...] by 'legality'" we should investigate "the field of illegality."⁶⁴ Moreover, as my second opening epigraph indicates, my project draws inspiration from Wendy Brown and Janet Halley's approach in *Left Legalism/Left Critique*. Brown and Halley describe this book as "a case for the worth of critique."⁶⁵ For these two scholars, socio-legal critique includes:

- Refusing to "sap the political substance from a highly politicized issue;"⁶⁶
- Not automatically assuming the "Law and state" are "technically neutral;"⁶⁷
- Spotlighting "the social powers producing and stratifying subjects;"⁶⁸
- Grappling with "paradoxes;"⁶⁹
- Challenging the "promise to make justice happen by means of law;"⁷⁰
- Being aware that law has "a penchant for hiding itself in the background;"⁷¹
- Observing that a "formal" and "procedur[al]" law "nevertheless produces and orders subjectivities;"⁷²
- Noticing that law "translates wide-ranging political questions into more narrowly framed legal questions;"⁷³
- Acknowledging that law's "adversarial and *yes/no* structures can quash exploration;"⁷⁴
- Resisting the urge to eliminate "nuance, internal dissension, or differentiation of positions along a continuum;"⁷⁵
- Encouraging "open-ended" questions;⁷⁶
- Refusing the charge that critique is "impractical," "indulgent," or "without purchase on or in something called the Real World;"⁷⁷

⁶⁴ Foucault, "The Subject and Power," 329.

⁶⁵ Brown and Halley, "Introduction," 4.

⁶⁶ Brown and Halley, "Introduction," 4.

⁶⁷ Brown and Halley, "Introduction," 6.

⁶⁸ Brown and Halley, "Introduction," 6.

⁶⁹ Brown and Halley, "Introduction," 7.

⁷⁰ Brown and Halley, "Introduction," 7.

⁷¹ Brown and Halley, "Introduction," 11.

⁷² Brown and Halley, "Introduction," 18.

⁷³ Brown and Halley, "Introduction," 19.

⁷⁴ Brown and Halley, "Introduction," 19.

⁷⁵ Brown and Halley, "Introduction," 22.

⁷⁶ Brown and Halley, "Introduction," 23.

- Aiming to “reveal subterranean structures or aspects of a particular discourse,” not “the truth” about that discourse;⁷⁸
- Striving to provide “not objectivity, but perspective;”⁷⁹
- Recognizing that one can “care passionately” about an issue while still “subjecting to ruthless critique the institutional and discursive practices that have thus far organized that aim;”⁸⁰
- Accepting that critique can be “risky;”⁸¹
- Embracing the idea that critique not only “discard[s] ways of thinking and operating,” but also opens “new modalities of thought and political possibilities.”⁸²

Although these are lofty ambitions, these aspirations for “critique” in socio-legal scholarship both guide my work and also differentiate it from the gap study approach, which tends to be characterized by another set of assumptions (i.e. more quantitative, investigatory, case study focused, etc.) and operate in a different mode of intellectual inquiry (i.e. pinpointing *why* certain behaviours happen, seeking answers, suggesting interventions, etc.).

Third, my work transcends disciplinary boundaries more than the gap study method. To be sure, gap studies blend sociology and legal studies, and are therefore interdisciplinary. My work, however, takes a far more wide-ranging trans-disciplinary approach, exploring diverse literatures including legal philosophy, socio-legal critique, Indigenous thought, and cultural and film studies.⁸³ I formed these wide-ranging interests partially because of my own academic upbringing. During my undergraduate studies I majored in *Ethics, Society, and Law* and minored in both *Philosophy* and *Writing, Rhetoric, and Critical Analysis*. I almost completed a third minor in *Cinema Studies*. At the graduate level, I have taken courses in *Philosophy, Political Science, Sociology, Criminology, and Legal Studies*. Most of the time I consider myself some

⁷⁷ Brown and Halley, “Introduction,” 25.

⁷⁸ Brown and Halley, “Introduction,” 25.

⁷⁹ Brown and Halley, “Introduction,” 26.

⁸⁰ Brown and Halley, “Introduction,” 27-28.

⁸¹ Brown and Halley, “Introduction,” 28.

⁸² Brown and Halley, “Introduction,” 28.

⁸³ My father, who holds his doctorate in Biophysics, once wrote the following inscription on the inside of a book that he gave me as a gift: “In research, it’s always wise to know all sides, theories, and ideas in order to formulate your own beliefs.” This dissertation takes the aforementioned advice to heart.

kind of “mutant philosopher” (see chapter 5 on superheroes).⁸⁴ Given my academic background, and the infinite potential of the concept of “tolerated illegality,” I suppose that the final structure of this thesis makes sense. Perhaps my background also explains why I chose to explore a Foucauldian concept. Foucault “prided himself in belonging to no discipline;” his work transcends disciplinary boundaries, and, in the humanities and social sciences, “hardly a scholarly event is safe from Foucault’s haunting presence.”⁸⁵ By taking the notion of tolerated illegality and putting it in conversation with various literatures, I diverge from the bi-disciplinary gap study projects.

Fourth, rather than constructing one singular argument, my project creates a plurality of arguments about both legality and (tolerated) illegality. As discussed above, classic gap studies might build a three-step argument (the purpose of a particular law is X, evidence shows that noncompliance is causing X goal to remain unmet, and therefore Y reformist solution should be implemented). Even the more advanced gap studies also strove to construct a unified argument about the gap; for example, the disconnection between law Z on the books and in practice suggests that law Z is oppressive and the oppressed group is choosing to ignore it.⁸⁶ Whereas the latter argument is closer to my thinking than the former, my process still differs from it significantly. Because my approach assumes that multiple examples of tolerated illegalities exist (at various times, in disparate places, taking different forms, for numerous reasons, involving a variety of actors and changing circumstances), I do not attempt to construct a singular unified

⁸⁴ I have taken the different skills that I have learned from these disciplines and applied them to the present project. For example, my philosophy background has helped me to close read texts and write textual exegeses. My writing background has helped me become a clearer writer, as well as to structure and organize projects, provide helpful roadmaps and signposts along the way, and introduce and conclude ideas. My trans-disciplinary legal studies background has helped me to think about “law” in a diffuse way (reflecting on the roles of bureaucracies, institutions, power relations, mechanisms of social order and control, etc.), as well as to draw connections between disparate texts in order to bring different scholars into conversations with each other.

⁸⁵ Valverde, “Spectres of Foucault,” 57 and 46.

⁸⁶ Gould and Barclay, “Mind the Gap,” 334.

argument. Instead, I develop a converging set of interactive arguments, ranging from the argument that law values certainty and predictability because of its desire to emulate science, to the argument that popular superhero shows only appear to encourage tolerated illegality when in fact they reinforce dominant notions of law and order. The next and final section of the introduction, the chapter overview, will describe some of the additional arguments made throughout this work.

CHAPTER OVERVIEW

Chapter 1 examines the concept of “legality” (the rule of law) from the perspective of prominent legal philosophers. From a legal standpoint, illegality is a negative concept, constructed as legality’s opposite, and therefore understood as legality’s antagonist. But what are the legal values that illegality is seen to threaten? This chapter involves a significant literature review, compiling information from the works of legal philosophers about the perceived purpose of law and the rule of law. In particular, the chapter focuses on the work of mid-twentieth century scholar Lon Fuller, and those who draw on his work today. As others have previously observed, this chapter corroborates the argument that legal philosophers generally believe that the purpose of law is “to act as a guide to behaviour” and the rule of law facilitates this goal by making the law more “certain and predictable.” These aims are justified based on the following sequence of points: (a) if laws are certain and predictable, then (b) they can act as reliable guidelines for behaviour, and thus (c) legal subjects are able to exercise agency and plan their futures. The idea of tolerated illegality is contradictory to these aims; it makes laws uncertain and unpredictable, limits their ability to guide behaviour, and diminishes legal subjects’ agency because they become unsure about what behaviours are permissible or punishable. However, as

the conclusion of chapter 1 suggests (and chapter 2 goes on to elaborate), this linear logic has serious limitations, omits factors such as power and domination from the analysis, and falsely assumes that clear knowledge of existing laws necessarily tends toward increased human agency.

Chapter 2 troubles the trends summarized in Chapter 1. The formal legality framework outlined in the first chapter is problematically paradoxical in suggesting that predictable rules enhance people's agency. Although this argument is not without merit, and it emerged in part as a reaction to the atrocities of World War II, arguing that certain and predictable laws provide people with greater freedom to plan their futures raises some serious concerns. This chapter explores the ways in which the desire for legal certainty and predictability is influenced by the prestige of *scientific* discourses. In other words, scientific values (like certainty and predictability), which are important in domains like engineering and medicine, are transferred to domains of organic lived realities—with detrimental effects. This chapter also considers how, despite the claims that consistent law enforcement may contribute to legal predictability, all law *en-force-ment* entails some degree of violence. By exploring how law involves the use of force (which takes a variety of forms), the argument that formal legality enhances agency (from Chapter 1) becomes less persuasive. However, although Chapter 2 critiques the logic of formal legality, additional complications are discussed. Given the social, legal and political configuration of the neoliberal present, ideas like “flexibility” and “adaptability” raise concerns too. Moreover, adopting an idea like “polarity,” and trying to incorporate both schemas (certainty/predictability and flexibility/adaptability) into one framework presents its own problems. Chapter 2 concludes with a discussion of Sophocles' *Antigone* in an effort to bring together multiple conversations from the chapter, as well as return to the idea of tolerated

illegality. Adding complexity to the legal analysis makes the discussion messier, to be sure, but it also opens up better questions and new ways of thinking—including about tolerated illegality.

Chapter 3 shifts the legal framework and asks more foundational questions about legality and tolerated illegality. Up to this point in the project, the State has mostly been understood as the source of law and the ultimate legal authority. However, this chapter broadens the project’s understanding of legality by considering the dispossession of Indigenous peoples of their lands as Canada’s *origin-al* tolerated illegality. This chapter widens the analysis to include questions like: who dictates what is legal/illegal? Who gets to decide what is tolerable and what is not? Who has the luxury of tolerating and who is forced to tolerate? This chapter unfolds in four sections, each of which speaks to how and why the theft of Indigenous land by the Canadian State is a “tolerated illegality” and the implications of this argument. Part I frames the dispossession of Indigenous peoples of their lands as a “tolerated illegality,” and uses this notion as a way to think about the past and ongoing crimes committed against Indigenous peoples by the State and its beneficiaries. Part II considers the ways in which the Canadian State’s governing assumptions and actions were and are “illegal,” from the concept of *terra nullius* to treaty-making to conceptions of “natural law.” Part III discusses the ways in which the Canadian state’s crimes against Indigenous peoples continue to be “tolerated” (or perhaps, more accurately, are “made tolerable”), including reconciliation and recognition processes, as well as through the court system. Finally, Part IV looks at the concept of Indigenous *resurgence* and considers how resurgence movements, although not beyond critique, nonetheless offer ideas for resisting the State’s ongoing colonization.

Chapter 4 addresses multiple concerns that emerge from the first three chapters. These concerns pertain to understandings of what “tolerance” means and how it is deployed, power

dynamics between legal subjects and officials, and how identity differences affect legal treatment. In other words, much of this chapter relates to *whose* illegalities, and *what* illegalities, are tolerable or intolerable. Because of the numerous arguments in this chapter, the structure takes the form of “nine theses” on power, tolerance, and illegality. The advantage of this structure is that it allows for a plurality of intersecting arguments that would not be possible in a linear chapter. Among other ideas, this chapter discusses how “tolerance” is lauded as a virtue (but actually masks fears of those perceived as threatening), how bureaucracies manipulate rule-following and rule-breaking behaviour to their advantage, and how tolerating an illegality can be a strategy used to depoliticize controversial issues. This chapter ends by exploring how the ongoing process of subjectification begins long before the encounter between the legal official and purported law-breaker, (potentially) animating the interaction more than the particulars of the immediate situation. Overall, the aim of this chapter is to bring a range of insights into the conversation about tolerated illegality in an effort to embrace the nuances and complexities of this idea.

Chapter 5 explores a popular cultural site for enacting and observing tolerated illegality: superhero shows. Superhero series are proliferating on both the small and large screens, and because superheroes are often seen to operate “above” or “beyond” the law, their popularity is worth interrogating here. At first glance, superheroes seem to channel societal frustration regarding the law’s perceived inability to provide justice. However, upon closer examination, superhero shows engage in a series of manipulative moves that often conceal the underlying messages and ideologies embedded in these narratives. To begin, superhero series are often set in conditions described as the “Wild West”—failed or failing states in which law and order have disappeared. Accordingly, what passes as social change in these stories is actually restoration of

the status quo (i.e. the conditions of the neoliberal present). Moreover, even when superhero stories appear empowering, they are actually reinforcing docile subjectivity. By ultimately suggesting that superhuman individuals will save everyone from large scale problems, audiences are encouraged to sit back and remain politically uninvolved. Arguments such as these suggest that although superhero narratives seem revolutionary, they are in fact promoting the opposite: conformity. So, whereas superheroes initially seem to engage in tolerated illegality, what they do, in the end, is restore popular notions of legality and law and order. ★

CHAPTER 1: THE FORMAL LEGALITY FRAMEWORK

Contemporary life ensnares us in all sorts of little maze-games that seem to matter tremendously and yet ultimately do not—except in the negative sense that they distract our attention from what does or at least could matter.¹

...the aim of critique is to reveal subterranean structures or aspects of a particular discourse...²

At the foundation of questions about tolerated illegality lie questions about the nature of legality itself: who constructs this category, what does it entail, and what are its perceived values? This opening chapter turns to influential legal philosophers' writings on the topic of "legality," or "the rule of law." This chapter seeks to uncover what this concept means within the traditional legal philosophy literature and what values are attributed to it, as well as to learn what threats are seen to disrupt or challenge it. This chapter begins by discussing the work of Lon L. Fuller and his contemporary proponents. Fuller was critiqued during his lifetime for advancing a (then) novel connection between law and morality. He argued that formal legal principles could guide the lawmaking process and help safeguard against the threat of lawmakers abusing their powers, for the ultimate purpose of creating a system of rules that respects legal subjects as moral agents. What this chapter finds is that, despite the alleged differences between rival camps of legal philosophers (i.e. positivists versus natural law theorists), their disagreements about the rule of law tend to be more semantic than substantive, leading to a "disagreement without (much) difference." A common thread runs throughout the literature, and this common position is remarkably similar to Fuller's stance: the rule of law strives to provide formal rules and

¹ Pierre Schlag, "Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)," *Georgetown Law Journal* 97 (2009): 832.

² Wendy Brown and Janet E. Halley, "Introduction," in *Left Legalism/Left Critique*, ed. by Wendy Brown and Janet E. Halley (Durham: Duke University Press, 2002): 26.

constraints that make the law more predictable and also promote the moral concept of human agency.

The values of certainty and predictability recur throughout the literature as core tenants of the rule of law. The reason for this recurrence is that these two legal qualities are seen to assist in providing the necessary foundation for a system of rules that respects legal subjects as agents; by constructing dependable legal guidelines (outlining legally permissible and impermissible behaviour), people are then said to be free to live their lives, more or less, as they choose. This reasoning leaves little room for a phenomenon like tolerated illegality in a socio-legal system. Indeed, tolerated illegality threatens the very predictability upon which the rule of law depends. Tolerated illegality introduces uncertainty, irregular law enforcement, and inconsistent treatment of individuals by the law. Within the formal legality framework, there is essentially no space for nuance when it comes to tolerated illegality: it is a threat, and, in an ideal socio-legal system, it would not exist.

Chapters 1 and 2 of this dissertation are conjoined. This first chapter focuses on understanding arguments supporting formal legality, with a particular emphasis on the work of Fuller, and the recent “rediscovery” of his work (led by Kristen Rundle). This chapter also aims to demonstrate that there is a common logic that transcends Fuller’s work and is evident in many legal philosophy arguments supporting formal legality. Throughout this chapter, I hope to highlight this common logic in order to convince readers that it is indeed pervasive. Toward the end of the chapter, I begin to hint at the detrimental effects of this way of thinking. Chapter two picks up where chapter one leaves off and critiques the general argument of the legal philosophers reviewed in chapter one, which holds that a stable system of rules provides the conditions in which people are able to make their own choices and live their lives as they choose.

This chapter is composed of six parts, and each of the first five parts pertains to the logic of formal legality: (1) the internal morality of law, (2) the rule of law, (3) human agency, and (4) fidelity to law. As will be discussed, these four interlocking ideas privilege the qualities of legal *certainty* and *predictability*. From Fuller to Joseph Raz, jurisprudential scholars on both sides of the “legal positivist/natural law” divide argue that certain and predictable laws increase people’s agency and therefore allow them to plan their futures. Part 5 focuses on Fuller’s “congruence principle,” which is the principle of formal legality that most directly pertains to the challenges presented by tolerated illegality. This section also pinpoints how and why tolerated illegality disrupts the values of legality. Lastly, the chapter concludes with a final discussion (part 6), summarizing the commonalities traced across legal philosophies and outlining some of the oversights, contradictions, and limitations that will be developed in Chapter 2.

Although others have also reached the conclusions presented in this chapter, what it offers is a rigorous engagement with a literature that others might not have been motivated to sift through in detail. Indeed, this chapter goes to great lengths to understand the formal legality framework on its own terms, through the work of its proponents. The value in this approach is that advocates of formal legality cannot claim that their position was dismissed without proper engagement. Moreover, through the use of direct quotations, this chapter shows that positions cast as different (Hart, Fuller, Raz, etc.) share the same fundamental position on the rule of law—and generally miss the same important considerations too. Finally, a brief note to readers before proceeding: because this chapter canvasses the legal philosophy literature on formal legality, it is a bit of a slog; however, it is necessary to understand this logic and demonstrate a key pattern before proceeding to critique it.

I. THE INTERNAL MORALITY OF LAW (IML)

Lon Fuller's scholarship on the rule of law has recently made a comeback.³ Fuller's most famous argument is that law has its own "internal morality:" a set of eight necessary principles that rules must have in order to qualify as valid "law." Fuller's IML thesis emerged out of his reply to H.L.A. Hart (*Harvard Law Review*, 1958). The Hart-Fuller debate had a profound and lasting impact on the field of legal philosophy, with current legal scholars noting that few jurisprudence students "have not had some kind of encounter with the exchange,"⁴ and that the debate "continues to shape contemporary jurisprudence to quite a remarkable degree."⁵ In this exchange, Hart and Fuller presented their respective views on a variety of jurisprudential issues, but their views on whether or not the Nazi regime included "valid" laws was a focal point. The key question was: what does it mean to say that law actually exists?⁶

Each theorist had a different answer to this question. Essentially, Hart's argument was that, "laws may be law but too evil to be obeyed."⁷ Hart maintained that it is possible to have laws that are corrupt and immoral, in which case people should choose to disobey them. David Dyzenhaus summarizes Hart's position as follows: "Hart claims that when citizens are faced with the question of what they should do when confronted by unjust laws, candor requires that they recognize the laws as valid but then see that nothing follows—morally speaking—from that

³ See, for example: David Luban, "The Rule of Law and Human Dignity: Re-examining Fuller's Canons," *Hague Journal on the Rule of Law* 2 (2010): 31; Brian Tamanaha, *On The Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004), 93; Jeremy Waldron, "Is the Rule of Law an Essentially Contested Concept (In Florida)?" *Law and Philosophy* 21, no. 2 (March 2002): 154; Colleen Murphy, "Lon Fuller and the Moral Value of the Rule of Law," *Law and Philosophy* 24 (2005): 240; Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010), 28.

⁴ Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Oxford: Hart Publishing, 2012), 51.

⁵ Nicola Lacey, "Out of the 'Witches' Cauldron'? Reinterpreting the Context and Reassessing the Significance of the Hart-Fuller Debate," in *The Hart-Fuller Debate in the Twenty-First Century*, ed. by Peter Cane (Oxford; Portland, Oregon: Hart Publishing, 2010), 41.

⁶ Rundle, *Forms Liberate*, 77.

⁷ H. L. A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71 (1958): 620.

fact.”⁸ Citizens then have the choice whether or not to follow laws, based on their conscience, and unburdened by any moral requirement to follow them.⁹ Thus, Hart’s position was that although the Nazi’s laws were “evil” and should be disobeyed, they were laws nonetheless. He believed that wicked and corrupt rules could still be called “laws” despite their lack of morality or integrity, which was a point that Fuller disagreed with.

Fuller argued that there was no valid legal system in Nazi Germany. As Fuller stated: “there is nothing shocking in saying that a dictatorship which clothes itself with a tinsel of legal form can so far depart from the morality of order, from the inner morality of law itself, that it ceases to be a legal system.”¹⁰ Fuller’s position was that “valid” law must possess certain formal properties, which if not met disqualify a system of rules from being “law.” He encouraged people to consider whether laws that disrespect the dignity of legal subjects can still be considered laws at all, and what reasons people could possibly have for obeying such laws.¹¹ For Fuller, the reason that laws did not exist in Nazi Germany was because the “moral worth” of the people living under Nazi rule (i.e. their intrinsic value as human beings) was disregarded.

Prior to Fuller, most natural law theories addressed the substantive connections between law and morality. Essentially, natural law philosophers were concerned with whether legal content met acceptable moral standards.¹² At the time, Fuller’s core thesis advanced a novel connection between law and morality, which was that law’s connection to morality pertains to

⁸ David Dyzenhaus, “The Grudge Informer Case Revisited,” *New York University Law Review* 83 (2008): 1001.

⁹ Dyzenhaus, “Grudge Informer Case Revisited,” 1001.

¹⁰ Lon L. Fuller, “Positivism and Fidelity to Law – A Reply to Professor Hart,” *Harvard Law Review* 71 (1958): 660.

¹¹ As Rundle puts it, “the nub of [Fuller’s] challenge to Hart” can be framed through the following question: “Can drastically formally debased ‘law’, generating drastically debased possibilities for the exercise of the subject’s agency, be meaningfully regarded as law and capable of establishing and maintaining an attitude of fidelity towards it?” Hart never offered a satisfying answer to his question. Although few scholars think of this question as the pivotal question of the Hart-Fuller debate, Rundle argues that, if the debate is analyzed through the lens of Fuller’s perspective, then it should be (Rundle, *Forms Liberate*, 75).

¹² Kenneth I. Winston, *The Principles of Social Order – Selected Essays of Lon L. Fuller*, rev. ed. (Portland, Oregon: Hart Publishing, 2001), 8.

legal *form*, not substance.¹³ Fuller's brand of natural law theory has been called: "a modest 'secular natural law' theory"¹⁴, "a kind of 'procedural' rather than 'substantive' natural law,"¹⁵ and "a natural law theory [crafted] out of the unlikely material of certain formal precepts governing legal processes."¹⁶ For this reason, Fuller tried to avoid the label "natural law" because it led to misunderstandings about his argument.¹⁷ Fuller believed that the law-morality connection is rooted in the following insight: if lawmakers adhere to certain lawmaking standards, then the moral worth of the people within the legal system is respected. He called this argument: the "internal morality" of law.

Fuller developed his IML thesis in his 1964 book, *The Morality of Law*. In this book he argues that a system of rules must meet the following eight principles to become law: generality, publicity, non-retroactivity, clarity, non-contradiction, followability, consistency, and congruency (between written laws and official behaviour).¹⁸ He argued that a total failure in any one of the eight principles is unacceptable, but partial failures are to be expected.¹⁹ Fuller explains that the eight principles represent a type of "legal excellence toward which a system of rules may strive,"²⁰ but that this ideal "is not actually a useful target for guiding the impulse toward legality."^{21,22} Sometimes conflicts may arise between people and the law that require some flexibility (within the IML principles) in order to be resolved.

¹³ Kenneth Winston reported that he once found a sheet of paper in Fuller's home library, which read the following: "the really enduring part of political ethics is found, not in the substantive ends we pursue, but in sustaining the integrity of the forms of order by which we pursue them." (Winston, *The Principles of Social Order*, 8)

¹⁴ Winston, *The Principles of Social Order*, 25-26.

¹⁵ Rundle, *Forms Liberate*, 93.

¹⁶ Lacey, "'Witches' Cauldron," 31-32.

¹⁷ Rundle, *Forms Liberate*, 30-31 & 45-46.

¹⁸ Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven: Yale University Press, 1969), 39.

¹⁹ Fuller, *Morality of Law*, 39.

²⁰ Fuller, *Morality of Law*, 41.

²¹ Fuller, *Morality of Law*, 41.

²² Some scholars, like Kenneth Winston, have added that "cases may arise in which a violation of one or more of the canons is innocuous or actually beneficial." (Winston, *The Principles of Social Order*, 50)

Fuller's natural law theory was not well received by his peers. According to Kenneth Winston, Fuller "received a largely unsympathetic hearing from the scholarly community for his jurisprudential writings," and *The Morality of Law* "was severely attacked by many eminent lawyers and philosophers."²³ Nevertheless, Winston also states that Fuller's critics "failed [...] to touch his fundamental insight of the central place of moral theory in developing an adequate conception of law."^{24,25} I will now survey the two main criticisms levelled against Fuller's IML thesis, and some defenses offered by supporters.

The first criticism is that Fuller's eight principles are not "moral." Critics argue that Fuller's legal principles are "efficient" and beneficial, but do not establish a necessary connection between law and morality.²⁶ Hart explains that the IML principles "are essentially principles of good craftsmanship," not morality.²⁷ He offers an example to demonstrate how both poisoning and lawmaking have principles that make the activity more effective, but this does not mean that these principles are "moral." Hart invents a story about a poisoner who proposes principles in the art of poisoning, such as avoiding toxins with an odour or colour that will alert the victim to their presence. However, Hart claims that to call these principles "the morality of

²³ Winston, *The Principles of Social Order*, 25-26.

²⁴ Winston, *The Principles of Social Order*, 58.

²⁵ In 2008 the *New York University Law Review* published a special edition for the fiftieth anniversary of the Hart-Fuller debate ("Symposium: The Hart-Fuller Debate At Fifty," *NYU Law Journal* 83, no. 4 (2008)). In this issue, a number of prominent legal theorists recognized the merits of Fuller's work, and defended important aspects of his position in the debate. See examples from David Dyzenhaus, Leslie Green, and Jeremy Waldron below.

(i) Dyzenhaus argues not only that Fuller had a "better appreciation of the complexities" (1019) in the grudge informer case, but also explicitly states that, "Fuller, in my view, clearly had the better of the exchange with Hart." (David Dyzenhaus, "The Grudge Informer Case Revisited," *NYU Law Journal* 83, no. 4 (2008), 1020)

(ii) Green argues that "Hart sympathetically develops both the minimum content thesis and the germ-of-justice thesis and then stops just short [...] of concluding that these theses prove there to be necessary connections between law and morals." (Leslie Green, "Positivism and the Inseparability of Law and Morals," *NYU Law Journal* 83 no. 4 (2008), 1047)

(iii) Waldron argues that "Lon Fuller's 1958 response to H.L.A. Hart's Holmes Lecture remains importantly suggestive for modern jurisprudence. Hart may have tried to create the impression that Fuller's response and his later book were hopelessly confused, but Hart himself—when he thought that no one was looking—toyed with many of the positions that Fuller held." (Jeremy Waldron, "Positivism and Legality: Hart's Equivocal Response to Fuller," *NYU Law Journal* 83 no. 4 (2008), 1167)

²⁶ Luban, "Rule of Law and Human Dignity," 31.

²⁷ H. L. A. Hart, "Fuller: *The Morality of Law*" (Book Review), *Harvard Law Review* 78 (1965): 1284.

poisoning” would be a mischaracterization.²⁸ Ronald Dworkin echoes Hart’s criticism, and similarly notes that Fuller’s eight principles do not show a necessary connection between law and morality. As Dworkin asks: “I accept Fuller’s conclusion that some degree of compliance with his eight canons is necessary,” but “what does all this have to do with *morality*?” (original emphasis).²⁹ Fuller’s critics did not understand that the connection between law and morality that he was trying to advance was about form, not content, and the natural law label did not help his case.

In support of Fuller, Rundle argues that the majority of Fuller’s critics failed to recognize that the “moral” component of his argument pertains to the concept of “human agency” and that there is a link between legal form and agency.³⁰ In his reply to Hart, Fuller asks readers to think of the “mutilated” system under the Nazi regime and consider the implications for “the conscientious citizen forced to live under it.”³¹ Fuller’s point was that morality enters the law through considerations about the moral worth of the human beings affected. As Rundle explains, Fuller’s IML principles are moral because “they articulate an ethos of lawgiving,” which captures “the morally significant idea that distinguishes rule through law from rule by men: an internal, non-optional commitment to respecting the legal subject as an agent.”³² Fuller’s insight

²⁸ Hart, “Fuller: *Morality of Law*,” 1286.

²⁹ Ronald Dworkin, “Philosophy, Morality and Law – Observations Prompted by Professor Fuller’s Novel Claim,” *University of Pennsylvania Law Review* 113 (1965): 669.

³⁰ “Fuller’s jurisprudence is best reclaimed through the prism of his understanding of the connections between the distinctive form of law and human agency. As I explained there, when we read his claims about the internal morality of law through this prism, we come to see that Fuller’s jurisprudence is animated by an understanding of form that is inclusive of the legal subject’s presupposed status as a responsible agent. There is not a form called law that acts upon the legal subject, but rather, the form of law includes the legal subject’s capacity for agency within it.” (Rundle, *Forms Liberate*, 38)

³¹ Fuller, “Positivism and Fidelity to Law,” 646.

³² Rundle, *Forms Liberate*, 116.

was that legal form could promote or limit people's "agency," which Fuller understood as an innately moral concept.³³

Others have also suggested that "morality" enters Fuller's legal theory through considerations of the agency of legal subjects. Kenneth Winston notes that Fuller's legal theory "is adequately understood only as it relates to moral agency."³⁴ Jeremy Waldron argues that Fuller's eight IML principles relate to "the moral ideal of respecting the human capacity for responsible agency," which "is an idea of considerable moral significance."³⁵ Colleen Murphy explains that when Fuller's IML requirements are respected, a legal system upholds "the moral values of *reciprocity* and *respect for autonomy*" (original emphasis).³⁶ Jutta Brunnee and Stephen Toope argue that Fuller "insisted that his internal criteria were moral in part because they upheld and promoted agency."³⁷ So, one can see how Hart and Dworkin's criticism that Fuller's principles were merely principles of efficacy misses Fuller's point about how adherence to principles of legal form can enhance the moral concept of human agency.

The second criticism of Fuller's work is that he admits that adherence to the eight principles may still yield substantively immoral laws. As Hart frames the critique, Fuller's

³³ Here Fuller's position begins to somewhat resemble arguments put forward by Immanuel Kant, especially the second formulation of the categorical imperative (others are to be treated only as ends in themselves, and not as means to an end). Fuller seems to suggest that the law ought to reflect this way of thinking about legal subjects in its philosophy by treating people as "agents" with "moral worth." Fuller refers to Kant on a total of three pages in *The Morality of Law*. First, Fuller claims that society "is held together by a pervasive bond of reciprocity," and that "[t]races of this conception are to be found in every morality of duty," including "the lofty demands of the Categorical Imperative." (20) Second, Fuller argues that, "Kant's view that we should treat our fellow man [sic] as an end, and not merely as a means, is usually regarded as one of the noblest expressions of philosophy." (25) Finally, Fuller also uses a passage from Kant to open Chapter 4 of *The Morality of Law* (entitled "The Substantive Aims of Law") quoting: "We must not expect a good constitution because those who make it are moral men. Rather it is because of a good constitution that we may expect a society composed of moral men." (Fuller, *Morality of Law*, 152) Thanks to Dr. Scott Woodcock for drawing attention to this connection.

³⁴ Winston, *The Principles of Social Order*, 1-2. Winston carries on to explain that "for a legal order to endure, citizens must acknowledge and actively support the law's efforts to achieve what they regard as 'orderly, fair and decent' governance. Only in this way does the law engage citizens as moral agents." (Winston, *The Principles of Social Order*, 3)

³⁵ Waldron, "Positivism and Legality," at 1167.

³⁶ Colleen Murphy "Lon Fuller", 239.

³⁷ Jutta Brunnee and Stephen Toope, *Legitimacy and Legality*, 29-30.

principles are ultimately “neutral [...] between good and evil substantive aims.”³⁸ In other words, as Hart states, there is “no special incompatibility between clear laws and evil.”^{39,40} At the time, this criticism convinced many legal scholars that Fuller had not created a natural law theory that demonstrated a necessary connection between law and morality. However, legal philosophers have since pointed out that this criticism too fails to understand the nature of the relationship between law and morality that Fuller was trying to advance.

In Fuller’s defence, although his focus was on the morality of legal form, he still thought that form affected substance. In the Hart-Fuller debate, Fuller acknowledges Hart’s claim that “evil aims may have as much coherence and inner logic as good ones,” but goes on to state that, although he cannot prove it, he believes Hart’s claim is false.⁴¹ Fuller rests this refutation on “a belief that may seem naive, namely, that coherence and goodness have more affinity than coherence and evil.”^{42,43} Fuller argues that although his IML principles cannot guarantee substantively moral laws, they do tend toward the creation of such laws. As Rundle puts it, Fuller’s argument is “about how the form of law may temper its substance.”^{44,45} Thus, Fuller and Rundle concede that the IML principles cannot guarantee the moral content of laws, but argue

³⁸ Hart, “Fuller: *Morality of Law*,” 1287.

³⁹ Hart, “Fuller: *Morality of Law*,” 1287.

⁴⁰ As Colleen Murphy frames this objection: “even if we grant that the rule of law has non-instrumental moral value, the goodness of the rule of law is extremely thin, because respecting the rule of law is consistent with all kinds of terrible behavior.” (250) She also adds that, “[b]ad regimes can respect the rule of law and good regimes can violate it” (Murphy, “Lon Fuller,” 251).

⁴¹ Fuller, “Positivism and Fidelity to Law” at 636.

⁴² Fuller, “Positivism and Fidelity to Law” at 636.

⁴³ In reference to the aforementioned passage (from Fuller’s response to Hart) regarding the affinity between coherence and goodness, Kenneth Winston says the following: “Fuller was by no means indifferent to content, and he famously claimed, as an empirical matter, that respect for the integrity of legal processes will incline public officials toward substantively right conduct.” (Winston, *The Principles of Social Order*, 8)

⁴⁴ Rundle, *Forms Liberate*, 96.

⁴⁵ Rundle also emphasizes the point that proper legal form tempers substantive abuse in the following passage: “The main point that Fuller is keen to emphasize is one about how to observe the requirements of the internal morality of law is to find oneself limited in the ‘kinds’ of brutalities that might be pursued through law, as well as the ‘ways’ available to pursue them” (Rundle, *Forms Liberate*, 113).

that the principles make it difficult for lawmakers to abuse their positions and create “wicked” laws.

Fuller’s supporters suggest that although it is theoretically possible that the eight principles may lead to substantively immoral laws, the likelihood of this outcome is minimized by the fact that the principles restrict lawmakers’ ability to manipulate the lawmaking process. As Colleen Murphy explains, there is no dispute that Fuller’s IML principles could be “consistent with all kinds of terrible behaviour;”⁴⁶ however, Murphy does assert that the likelihood of a corrupt regime following all eight principles is not a realistic possibility.⁴⁷ As Murphy argues: “in practice there is a deep tension between ruling by law and systematically pursuing unjust ends.”^{48,49} Fuller’s defenders claim that history offers many examples of wicked regimes that broke Fuller’s eight IML principles, but virtually no examples where wicked regimes operated in accordance with all eight principles.⁵⁰

In short, Fuller’s IML thesis was labeled a “natural law theory,” which misled people into thinking that his argument pertains to the moral content of the law. This label was an obstacle that prevented his audience from understanding his argument: that adherence to formal legal principles promotes the moral worth of legal subjects. Fuller’s most famous argument is that law has its own “internal morality:” a set of eight necessary principles that a system of rules must possess in order to qualify as valid “law.” During Fuller’s lifetime his theory was criticized for lacking a connection to “morality;” although critics agreed that the eight principles were valuable

⁴⁶ Murphy, “Lon Fuller,” 251.

⁴⁷ Murphy, “Lon Fuller,” 252.

⁴⁸ Murphy, “Lon Fuller,” 260.

⁴⁹ Kristen Rundle concurs with Colleen Murphy on this point: “Fuller never argues that there is any ‘necessary’ incompatibility between observance of the principles of the internal morality of law and wicked legal ends. His claim, rather, is that there seems *in practice* to be an affinity between the pursuit of oppressive ends through law and a corresponding deterioration in observance of the principles of the internal morality of law” (Rundle, *Forms Liberate*, 104).

⁵⁰ Murphy, “Lon Fuller,” 259-260.

in that they made the law more “efficient,” they remained unsure about what the principles had to do with morality.⁵¹ Recently, however, scholars have rediscovered Fuller’s work and argued, perhaps more persuasively than Fuller did himself, that there is a significant connection between legal form and the *moral* concept of human agency. Fuller’s vision of legality was that the eight IML principles would improve the law by tempering its substance and respecting legal subjects’ agency. If the internal morality of law is ultimately oriented to enhancing subjects’ agency, then the rule of law is a related idea to the extent that it also constrains officials’ conduct in a way that might promote agency.

II. THE RULE OF LAW

The “rule of law” has been described as: “a site for never-ending argument and dispute,”⁵² “an exceedingly elusive notion,”⁵³ “mysteriously difficult to establish,”⁵⁴ “a loaded term,”⁵⁵ “uncertain and controversial,”⁵⁶ “a broad and nebulous concept,”⁵⁷ and “meaningless thanks to ideological abuse and general over-use.”⁵⁸ In addition, due to its “promiscuous use,”⁵⁹ the phrase the “rule of law” is deployed in a wide range of contexts by academics, politicians, journalists, and more, leading to disagreement “among casual users of the phrase, among government officials, and among theorists.”⁶⁰ The immense disagreement surrounding the rule of

⁵¹ See, for example: Luban, “Rule of Law and Human Dignity,” 31; Hart, “Fuller: *Morality of Law*,” 1284-1286; Ronald Dworkin, “Philosophy, Morality and Law,” 669.

⁵² Neil MacCormick, “Rhetoric and the Rule of Law,” in *Recrafting the Rule of Law: The Limits of Legal Order*, ed. by David Dyzenhaus (Oxford; Portland, Oregon: Hart Publishing, 1999): 163.

⁵³ Tamanaha, *On the Rule of Law*, 3.

⁵⁴ Tamanaha, *On the Rule of Law*, 4.

⁵⁵ Waldron, “Essentially Contested Concept,” 138.

⁵⁶ Waldron, “Essentially Contested Concept,” 140.

⁵⁷ Desmond Manderson, “Modernism, Polarity, and the Rule of Law,” *Yale Journal of Law and Humanities* 24, no. 2 (2012): 478.

⁵⁸ Judith N. Shklar, “Political Theory and the Rule of Law,” in *The Rule of Law: Ideal or Ideology*, ed. by Allan C. Hutcheson and Patrick Monahan (Toronto: Carswell, 1987): 1.

⁵⁹ Joseph Raz, *The Authority of Law – Essays on Law and Morality* (Oxford: Clarendon Press, 1979), 211.

⁶⁰ Tamanaha, *On the Rule of Law*, 114.

law has prompted Jeremy Waldron to label it an “essentially contested concept” (based on the work of linguistic philosopher W.B. Gallie).⁶¹ In short, the controversy surrounding the rule of law appears boundless, with so many parties using the phrase, and so little clarity about its meaning.⁶² With such widespread disagreements about the rule of law it might seem like there are no points of commonality. However, one theorist is repeatedly cited in the legal philosophy literature as providing a generally agreed upon list of requirements of the rule of law ideal. This oft-cited theorist is Lon Fuller, and the frequently referenced requirements are his eight IML principles.

The concept of the rule of law is a popular topic of discussion in legal philosophy.⁶³ Legal philosophers tend to prefer “formal” conceptions of the rule of law.⁶⁴ That is, they believe that procedural rules and constraints in the lawmaking process are central to creating a fair legal system. Of the existing formal theories of the rule of law, legal philosophers often refer to Fuller’s eight IML principles. Although Fuller does not explicitly use the phrase “rule of law” to describe his eight principles, they are nonetheless believed by many to constitute the requirements of the rule of law ideal.⁶⁵ For example, Brian Tamanaha describes Fuller as “a prominent legal theorist” who “presented a highly influential formulation of the rule of law.”⁶⁶ Jeremy Waldron explains that “the phrase ‘the Rule of Law’ is used to conjure up a sort of

⁶¹ Waldron, “Essentially Contested Concept,” 148-150.

⁶² This recurrent use of the term ‘the rule of law’ coupled with rampant disagreement about its meaning has lead theorists to caution that: “the rule of law might devolve to an empty phrase, so lacking in meaning that it can be proclaimed with impunity by malevolent governments” (Tamanaha, *On the Rule of Law*, 114); “there are bound to be alarm-bells ringing [...] when a term like ‘the Rule of Law’ is invoked so frequently on so many sides of so many issues in a fraught political debacle” (Waldron, “Essentially Contested Concept,” 138); and “[n]ot uncommonly when a political ideal captures the imagination of large numbers of people its name becomes a slogan used by supporters of ideals which bear little or no relation to the one it originally designated” (Raz, *The Authority of Law*, 210).

⁶³ Like many others, I use the terms “rule of law” and “legality” interchangeably.

⁶⁴ Tamanaha, *On The Rule of Law*, 119.

⁶⁵ David Luban: “Fuller argues that the enterprise succeeds only when the lawgiver respects eight ‘canons’ that govern the lawmaking enterprise. These constitute his analysis of the rule of law (although Fuller does not use the term ‘rule of law’ to describe them).” (Luban, “Rule of Law,” 31)

⁶⁶ Tamanaha, *On the Rule of Law*, 93.

laundry list of features that a healthy legal system should have,” and these lists are “mostly variations of the eight desiderata of Lon Fuller’s ‘internal morality of law’.”⁶⁷ David Luban notes that “commentators typically think that Fuller has indeed offered a satisfying analysis of the rule of law.”⁶⁸ Colleen Murphy states that it is “generally agreed that Lon Fuller’s eight principles of legality capture the essence of the rule of law.”⁶⁹ Jutta Brunnée and Stephen Toope argue that “[t]he criteria of legality suggested by Fuller are largely uncontroversial.”⁷⁰ Consequently, it is apparent that although Fuller’s IML thesis might have raised scepticism regarding its connection to morality, his principles are nonetheless believed by many to capture the essence of the rule of law.⁷¹

One of the main reasons Fuller’s eight IML principles are frequently referenced is that they aim to increase legal *certainty* and *predictability*. Beyond Fuller, legal philosophers in general tend to locate certainty and predictability among the greatest virtues of legality. Since F.A. Hayek stated that fixed rules allow people “to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan [their] individual affairs on the basis of this knowledge,”⁷² certainty and predictability have frequently been cited as goals of the rule of law. For example, Brian Tamanaha explains that, “the construal of the rule of law as formal legality” is “[a]bove all else it is about predictability.”⁷³ Jeremy Waldron states that “many conceptions of the Rule of Law place a great emphasis on legal certainty, predictability,

⁶⁷ Waldron, “Essentially Contested Concept,” 154.

⁶⁸ Luban, “Rule of Law,” 31.

⁶⁹ Murphy, “Lon Fuller,” 240.

⁷⁰ Brunnée and Toope, *Legitimacy and Legality*, 28.

⁷¹ David Luban: “Alongside the canons, Fuller announced several provocative theses about them, which have drawn far more criticism than the canons themselves. That is, although commentators typically think that Fuller has indeed offered a satisfying analysis of the rule of law, they object to his claims about what the rule of law amounts to. First, he labeled his canons the ‘inner morality of law’, suggesting that they are not simply conditions of efficacy of a legal system, but moral requirements. Second, he announced that the canons are conditions that make law possible—in other words, that enactments which deviate too much from the canons are not bad law, but rather no law at all.” (Luban, “Rule of Law,” 31)

⁷² Friedrich Hayek, *The Road to Serfdom* (Chicago: University of Chicago, 1944), 54.

⁷³ Tamanaha, *On the Rule of Law*, 119.

and settlement...”.⁷⁴ He goes on to remark that citizens “need predictability in the conduct of their lives and business,” and that “[k]nowing in advance how the law will operate enables one to plan around its requirements.”⁷⁵ Advocates of formal legality argue that legal certainty and predictability are desirable because they let people know where they stand in relation to the law, and provide them with the information they need for future planning.

Legal positivist Joseph Raz also suggests that legal stability is beneficial for legal subjects. Raz claims that people value the ability to plan their own lives, which “depends on the existence of stable, secure frameworks for one’s life and actions.”⁷⁶ The rule of law, Raz argues, is concerned with “mak[ing] the law itself a stable and safe basis for individual planning.”⁷⁷ Raz explains that the rule of law can break down in one of two ways: (1) “uncertainty,” or (2) “frustrated and disappointed expectations.”⁷⁸ Uncertainty occurs when “the law does not enable people to foresee future developments or to form definite expectations,” which impedes future planning.⁷⁹ Frustrated and disappointed expectations occur when “the appearance of stability and certainty which encourages people to rely and plan on the basis of the existing law is shattered.”⁸⁰ Raz explains that frustrated and disappointed expectations can occur due to retroactive laws, failure to enforce laws as advertised, and so on.⁸¹ For Raz, frustrated/disappointed expectations are particularly intolerable because they “offend dignity in expressing disrespect for people’s autonomy.”⁸² As he goes on to explain: a legal system that

⁷⁴ Jeremy Waldron, “The Concept and the Rule of Law,” *Georgia Law Review* 43, no. 1 (2008): 6.

⁷⁵ Waldron, “The Concept and the Rule of Law,” 6-7.

⁷⁶ Raz, *The Authority of Law*, at 226.

⁷⁷ Raz, *The Authority of Law*, at 220.

⁷⁸ Raz, *The Authority of Law*, 222.

⁷⁹ Raz, *The Authority of Law*, 222.

⁸⁰ Raz, *The Authority of Law*, 222.

⁸¹ Raz, *The Authority of Law*, 222.

⁸² Raz, *The Authority of Law*, 222.

adheres to the rule of law “treats people as persons,” which means that it “presupposes that they are rational autonomous creatures” capable of planning their futures.⁸³

Raz’s argument that the rule of law “treats people as persons” by assuming their rationality and autonomy is remarkably similar to Fuller’s IML thesis. Raz even echoes Fuller’s argument that the stability provided by the rule of law shows respect for people’s agency. Raz states that the rule of law is “virtually always of great moral value,”⁸⁴ and that “it is clear that deliberate disregard for the rule of law violates human dignity.”⁸⁵ Such statements by Raz have led Rundle to remark that Raz and Fuller share “a commitment to understanding law as a phenomenon that is fundamentally linked to respect for the legal subject as an agent,”⁸⁶ and Mark Bennett to note that “Raz saw the rule of law as a moral ideal that secures human dignity through respecting human autonomy.”⁸⁷ Both Raz and Fuller suggest that stable legal rules and predictable behaviour on the part of legal officials lets people know what to expect and allows them to plan accordingly, which ultimately transforms law into a reliable *guide to behaviour*.

Understanding law as a “guide to behaviour” proves to be another prominent idea in the literature on formal legality. Fuller believed that the purpose of law is to act as a guide to behaviour. In *The Morality of Law* he states that to pursue the art of lawmaking is to “embark on the enterprise of subjecting human conduct to the governance of rules,”^{88,89} but he is not alone. For example, Mary Liston notes that one of law’s central purposes is “to be capable of guiding

⁸³ Raz, *The Authority of Law*, 222.

⁸⁴ Raz, *The Authority of Law*, 226.

⁸⁵ Raz, *The Authority of Law*, 221.

⁸⁶ Rundle, *Forms Liberate*, 147.

⁸⁷ Mark J. Bennett, “Hart and Raz on the Non-Instrumental Moral Value of the Rule of Law: A Reconsideration,” *Law and Philosophy* 30, no. 5 (2011): 605.

⁸⁸ Fuller, *Morality of Law*, 162.

⁸⁹ Additionally, in *Anatomy of the Law* Fuller states that “[i]f a law is to guide the conduct of the citizen subject to it, then it must operate *prospectively*” (original emphasis). (Lon L. Fuller, *Anatomy of the Law* (New York: Encyclopaedia Britannica, 1968), 63)

the behavior of all legal subjects.”⁹⁰ Ratna Rueban Balasubramaniam explains that the rule of law “comprises a set of conditions that speak to law’s capacity to guide conduct.”⁹¹ Colleen Murphy maintains that “[f]or obedience to be possible, the law must be capable of guiding behaviour.”⁹² Joseph Raz states that “the law should be such that people will be able to be guided by it,” which means that “*it must be capable of guiding the behaviour of its subjects*” (original emphasis).⁹³ As Jeremy Waldron notes, “many positivists would agree [...] that law’s function is to guide action.”⁹⁴ The fact that numerous legal philosophers view law as a guide to behaviour explains why they privilege legal certainty and predictability; from this viewpoint, the law requires these two qualities in order to succeed in guiding the behaviour of legal subjects.

By interpreting the concept of law as “a guide to behaviour,” and the rule of law as increasing legal certainty and predictability, legal philosophers argue that stable rules enhance the agency of legal subjects. This argument can be summarized as follows:

Concept of Law:		Rule of Law:		Stated Outcome:
Law as a Guide to Behaviour	+	Aims to Enhance Certainty & Predictability	=	Respect for the Agency of Legal Subjects

As the argument goes, a system of rules that is certain and predictable provides an effective guide to behaviour by allowing people to exercise their agency and make future plans. If one argues that law should guide conduct (which many legal theorists do), and that laws must be reliable in order to provide effective guidelines (which many legal theorists do), then in essence one is arguing that legal form benefits human agency. Despite all the criticisms directed against Fuller, this argument (which is largely agreed upon by legal philosophers) was his basic point.

⁹⁰ Mary Liston, “The Rule of Law Through the Looking Glass,” *Law and Literature* 21, no. 1 (2009): 46.

⁹¹ R. Rueban Balasubramaniam, “Has Rule by Law Killed the Rule of Law in Malaysia?” *Oxford University Commonwealth Law Journal* 8, no. 2 (2008): 221.

⁹² Murphy, “Lon Fuller,” 246-247.

⁹³ Raz, *The Authority of Law*, 213-214.

⁹⁴ Waldron, “The Concept and the Rule of Law,” 28.

III. AGENCY

Discussions about the relationship between law and human agency prove to be prominent in the legal philosophy literature. Although these discussions extend beyond Fuller, we will begin by returning to his work. In *The Morality of Law* Fuller states that:

To embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, *a responsible agent*, capable of understanding and following rules, and answerable for his defaults” (emphasis added).⁹⁵

Fuller believed that there is a crucial link between legal form and human agency, and that clear, prescriptive, general laws respect people as agents by facilitating their capacity for future planning. In *Forms Liberate*, Kristen Rundle explains that Fuller’s scholarship “is animated by an understanding of form that is inclusive of the legal subject’s presupposed status as a responsible agent.”^{96,97} She describes Fuller’s understanding of what it means to respect a person “as an agent” as follows: someone “capable of purposive action;” “regarded as an end in herself;” and considered “a bearer of dignity, with a life to live of her own.”⁹⁸ For Fuller and his supporters, the law is capable of (to varying degrees) allowing people’s capacity for agency to flourish.

Fuller’s argument (as framed by Rundle) is that the more the law conforms to the eight IML principles, the more it enables people to exercise their agency. Beyond Fuller, additional scholars writing about formal legality also describe a link between the rule of law and agency. For example, Waldron states that the rule of law is founded on “respect for the freedom and

⁹⁵ Fuller, *Morality of Law*, 162.

⁹⁶ Rundle, *Forms Liberate*, 38.

⁹⁷ “Fuller’s jurisprudence is best reclaimed through the prism of his understanding of the connections between the distinctive form of law and human agency. As I explained there, when we read his claims about the internal morality of law through this prism, we come to see that Fuller’s jurisprudence is animated by an understanding of form that is inclusive of the legal subject’s presupposed status as a responsible agent. There is not a form called law that acts upon the legal subject, but rather, the form of law includes the legal subject’s capacity for agency within it.” (Rundle, *Forms*, 38)

⁹⁸ Rundle, *Forms Liberate*, 10.

dignity of each person as an active center of intelligence.”⁹⁹ Waldron continues by noting that formal conceptions of the rule of law condemn “official behavior [sic] that treats individual agency as something of no consequence.”¹⁰⁰ Perhaps more significant, given that he is a legal positivist, Joseph Raz shares the view that the rule of law promotes human dignity and agency. Raz claims that “observance of the rule of law is necessary if the law is to respect human dignity,” and also that “[r]especting human dignity entails treating humans as persons capable of planning and plotting their future.”¹⁰¹ In addition, while Raz warns that the rule of law alone cannot prevent violations of human dignity, he adds that “it is clear that deliberate disregard for the rule of law violates human dignity.”¹⁰² So, it appears there is a general agreement among legal philosophers that the principles of formal legality not only increase legal certainty and predictability, but also do so for the purpose of promoting the agency of legal subjects.

Proponents of formal legality argue that when there is a breakdown in the requirements of legality, laws become less certain and predictable, and consequently people have more difficulty using laws as guidelines for future planning. As Kenneth Winston explains, a failure to pass laws that meet the standards of formal legality “is a special affront to the dignity of citizens as autonomous agents.”¹⁰³ Brian Tamanaha conveys this point when he explains that, without some kind of predictability, people will not know how governments will react to their behaviour, which means that they are “perpetually insecure.”¹⁰⁴ Moreover, “[s]ocieties that implement formal legality should be lauded for reducing this unpleasant state of uncertainty.”^{105,106} The

⁹⁹ Waldron, “The Concept and the Rule of Law,” 60.

¹⁰⁰ Waldron, “The Concept and the Rule of Law,” 9.

¹⁰¹ Raz, *The Authority of Law*, 221.

¹⁰² Raz, *The Authority of Law*, 221.

¹⁰³ Winston, *The Principles of Social Order*, 175.

¹⁰⁴ Tamanaha, *On The Rule of Law*, 122.

¹⁰⁵ As Dr. Scott Woodcock pointed out, Brian Tamanaha’s formulation of the importance of formal legality sounds like an amusingly understated version of Thomas Hobbes’ justification in *Leviathan* for the social contract (i.e. to escape from a hypothetical future where people’s lives are “solitary, poor, nasty, brutish, and short”).

argument is that if people are subjected to frequently changing laws, or laws that are applied retroactively, or contradictory laws that cannot all be followed, then their capacity for agency is diminished.

This argument that the agency of legal subjects should be central to the project of creating laws can be seen as a type of moral argument that is pervasive across theories of formal legality. Balasubramaniam articulates this point in a way that transcends Fuller's work, claiming that law, as a "framework for the guidance of conduct," cannot exist unless those in power care about people as "rational self-directing agents bearing moral interests."¹⁰⁷ He goes on to add that once this point has been established, "one also has to acknowledge that attention to the moral interests of the legal subject is material to law's claim to respect and the successful creation of legal order."¹⁰⁸ Some of the most renowned legal positivists seem to concede that legality is connected to morality through the idea of the "agency" of legal subjects.¹⁰⁹ Multiple scholars have recently drawn attention to the fact that notable legal positivists Raz and Hart actually held similar views to Fuller. Raz comes as close as possible to concurring with Fuller's position (without granting that a necessary connection between law and morality exists) when he states that the rule of law is "*virtually always* of great moral value" (emphasis added).¹¹⁰ Rundle has noted that Raz and Fuller share "a commitment to understanding law as a phenomenon that is fundamentally linked to respect for the legal subject as an agent."¹¹¹ Moreover, Waldron has claimed that "Hart himself—when he thought that no one was looking—toyed with many of the

¹⁰⁶ Tamanaha, *On The Rule of Law*, 122.

¹⁰⁷ Balasubramaniam, "Rule of Law in Malaysia?," 223.

¹⁰⁸ Balasubramaniam, "Rule of Law in Malaysia?," 223.

¹⁰⁹ See also, for example: Andrei Marmor, "The Rule of Law and Its Limits," *Law and Philosophy* 23, no. 1 (2004): 39.

¹¹⁰ Raz, *The Authority of Law*, 226.

¹¹¹ Rundle, *Forms Liberate*, 147.

positions that Fuller held.”¹¹² Despite the so-called disagreement between Fuller and his colleagues, some of those who criticized him argued nearly identical positions.

In his paper on the moral value of the rule of law, Mark Bennett systematically analyzes the texts and compiles evidence that shows that Hart and Raz essentially agree with Fuller. Regarding Hart, Bennett argues that whenever “Hart discussed conformity with the rule of law, he argued that it did have morally valuable results.”¹¹³ Regarding Raz, Bennett argues that “Raz saw the rule of law as a moral ideal that secures human dignity through respecting human autonomy....”¹¹⁴ Ultimately, Bennett concludes that “Hart and Raz substantially agree with Fuller on the rule of law’s moral value, both in terms of the existence of that moral value and in terms of its basis in human autonomy.”¹¹⁵ Thus, this section shows that Fuller is not alone in maintaining that there is indeed a connection between law and morality; critics and supporters alike suggest that preserving legal subjects’ capacity for agency is an idea of considerable moral significance.

IV. FIDELITY TO LAW

Understanding Fuller’s idea of “fidelity to law” contributes to a deeper understanding of his vision of the relationship between law and morality.¹¹⁶ The title of Fuller’s written reply to Hart in their 1958 debate was “Positivism and *Fidelity to Law*—A Reply to Professor Hart” (emphasis added). In this article, Fuller describes fidelity to law as follows:

Law, as something deserving loyalty, must represent a human achievement; it cannot be a simple fiat of power or a repetitive pattern discernible in the behavior of state officials.

¹¹² Waldron, “Positivism & Legality,” 1167.

¹¹³ Bennett, “Hart and Raz,” 604-605.

¹¹⁴ Bennett, “Hart and Raz,” 605.

¹¹⁵ Bennett, “Hart and Raz,” 604.

¹¹⁶ Rundle, *Forms Liberate*, 58.

The respect we owe to human laws must surely be something different from the respect we accord to the law of gravitation.¹¹⁷

In other words, as Rundle puts it, Fuller is interested in understanding how laws are able to obtain and sustain authority, “*unless* there is some reason, other than coercion, for those participants to accept authority.”¹¹⁸ Fuller’s critique of Hart was that unless laws meet certain requirements of integrity people have no reason other than fear or oppression to follow them.

Although Fuller never explicitly articulated the connection himself, Waldron suggests that Fuller envisioned an important link between the eight IML principles and the goal of fostering legal fidelity. Waldron suggests that Fuller had a “hunch” that the IML principles connected law to legal fidelity because laws that meet these criteria have “a claim on our allegiance, independent of whatever claim is generated by our enthusiasm for substantive ends.”¹¹⁹ As the argument goes, the eight IML principles foster fidelity to law from legal subjects because people have greater trust in laws that are created through a principled lawmaking process.¹²⁰ In addition to Waldron, other scholars have recently taken up the argument that Fuller’s eight principles aim to foster legal fidelity. For example, Jutta Brunnée and Stephen Toope, who write on legality in international law, explain that “[f]idelity is generated, and in our terminology obligation is felt, because adherence to the eight criteria of legality (a ‘practice of legality’) produces law that is legitimate in the eyes of the persons to whom it is addressed.”¹²¹ In other words, Fuller’s IML principles are seen to add integrity and legitimacy to the laws produced, making citizens more likely to respect and follow them.

¹¹⁷ Fuller, “Positivism and Fidelity to Law,” 632.

¹¹⁸ Rundle, *Forms Liberate*, 61.

¹¹⁹ Jeremy Waldron, “Why Law – Efficacy, Freedom or Fidelity?” *Law and Philosophy* 13 (1994): 277.

¹²⁰ Waldron, “Why Law?” 277.

¹²¹ Brunnée and Toope, *Legitimacy and Legality*, 27.

In Fuller's work, the argument that formal legality can inspire fidelity is related to the idea of reciprocity between legal officials and legal subjects. In *The Morality of Law*, Fuller frames the relationship of reciprocity between lawgivers and citizens as follows:

...there is a kind of reciprocity between government and the citizen with respect to the observance of rules. Government says to the citizen in effect, "These are the rules we expect you to follow. If you follow them, you have our assurance that they are the rules that will be applied to your conduct." When this bond of reciprocity is finally and completely ruptured by government, nothing is left on which to ground the citizen's duty to observe the rules.¹²²

For Fuller, the relationship between people and the law must be two-directional, so that respect flows both ways; the law upholds the eight principles, and people give their fidelity to law in return.¹²³ Winston, Rundle, Brunnée and Toope have all drawn attention to this idea of reciprocity within Fuller's work. Kenneth Winston notes that there is a sense of "reciprocity between a citizen's obligation to obey laws and a legislator's obligation to adhere to the eight canons."¹²⁴ Similarly, as Rundle explains, "the legal subject's moral obligation to obey law only arises in the first place in response to [...] the lawgiver's corresponding effort to create and maintain a workable legal order within which she might be able to live her life."¹²⁵ Brunnée and Toope suggest that "[f]idelity to law depends upon the reciprocal fulfillment of duties," whereby lawmakers "adhere to the criteria of legality," and "in so doing they give citizens the opportunity to reason with rules."¹²⁶ Furthermore, they ask the question: "Why should a person feel obligated to act in certain ways if no similar expectations apply with respect to those judging that person's behaviour?"¹²⁷ In short, Fuller and his supporters argue reciprocity is achieved via

¹²² Fuller, *Morality of Law*, 39-40.

¹²³ Waldron, "Why Law?," 277-278.

¹²⁴ Winston, *The Principles of Social Order*, 49.

¹²⁵ Rundle, *Forms Liberate*, 89-90.

¹²⁶ Brunnée and Toope, *Legitimacy and Legality*, 39.

¹²⁷ Brunnée and Toope, *Legitimacy and Legality*, 39.

mutual respect when lawmakers adhere to the criteria of legality and citizens follow laws in return.

Although Raz argues that there is “no absolute or conclusive obligation to obey the law,”¹²⁸ he does note that people have more reason to obey the laws of a just system than an unjust one. As he explains: “the fact that a legal system is in general good and just is a reason to trust its law-making and judicial institutions.”¹²⁹ Raz proceeds to conclude the following: “Thus the general moral quality of the system encourages conformity by being a reason to believe and trust the moral value of each individual law.”¹³⁰ Fuller and Raz’s theories of legality share the argument that citizens’ trust in lawmaking institutions fosters legal fidelity (Fuller’s language) or legal obedience (Raz’s language). From Fuller’s perspective, when legal officials adhere to the formal requirements of legality (i.e. the eight IML principles) in the creation and administration of laws, they gain legal subjects’ trust. From Raz’s perspective, when a legal system is “good and just,” people “trust its law-making [...] institutions,” and the “general *moral quality* of the system” gives people a reason to “trust the *moral value* of each individual law” (emphasis added).¹³¹ Importantly, Raz does not mention the moral content of the laws created, but rather refers to the “moral quality of the system” and the “moral value of the laws produced” as reasons that “[encourage] conformity.” Here, again, Fuller and Raz’s arguments are quite similar; both scholars appear to agree that trust in the integrity of laws and lawmaking institutions is a convincing reason for people to obey the law. Furthermore, both scholars associate formal legality with a non-substantive morality.

¹²⁸ Raz, *The Authority of Law*, 234.

¹²⁹ Raz, *The Authority of Law*, 245.

¹³⁰ Raz, *The Authority of Law*, 245.

¹³¹ Raz, *The Authority of Law*, 245.

V. TOLERATED ILLEGALITY AND THE CONGRUENCE PRINCIPLE

Of Fuller's eight IML principles, the final principle is importantly different from the first seven. Fuller's eighth principle—the “congruence principle”—maintains that there must be a congruency between written laws and law enforcement. Fuller calls the congruence principle “the most complex of all of the desiderata that make up the internal morality of law.”¹³² Andrei Marmor takes up this point as well, stating that the congruence principle is quite possibly “the most complicated and intricate requirement of the rule of law.”¹³³ Although the first seven principles all relate to the creation of new laws, the eighth principle pertains to legal administration. As David Luban explains, “the eighth canon—congruence between law and its enforcement—is of a different kind from all the others” because it “focuses on the administration of law, not the making of law.”¹³⁴ Luban also observes that the congruence principle is directed at a different group of people from the others. Whereas the first seven principles “set standards for a law-drafter,” the congruence principle “is a standard for the officials charged with enforcing the law and putting its directives into action.”¹³⁵ The congruence principle is Fuller's only rule of law requirement that speaks to those entrusted with enforcing laws, not making them.¹³⁶

For Fuller, the strength of fidelity to law in a given legal system is strongly connected to the congruence principle. This argument is central to Brunnée and Toope's book, *Legitimacy and Legality in International Law: An Interactional Account*. Writing in the context of international

¹³² Fuller, *Morality of Law*, 81.

¹³³ Marmor, “The Rule of Law and Its Limits,” 34.

¹³⁴ Luban, “The Rule of Law,” 33.

¹³⁵ Luban, “The Rule of Law,” 33.

¹³⁶ Luban on the role of lawyers, in particular, in maintaining congruency between laws and action, states: “Writers on the rule of law often view congruence as principally a requirement on judges, police, and other enforcement officials. But in a modern industrial society, officials cannot and should not monitor everything. Congruence between, say, business practices in a large corporation and spottily-enforced regulatory requirements will be accomplished only if lawyers, in their roles as compliance counselors, fill the gap.” (Luban, “The Rule of Law,” 46)

law, Brunnée and Toope argue that a key reason why states often lack fidelity to international law is because laws are ignored and little attempt is made to enforce them. As they explain, “[e]nforcement, or its lack, is especially relevant to one of the criteria of legality: the congruence of rules and [...] practice.”¹³⁷ They go on to state that when laws “are consistently evaded or undermined without legal consequence, the rules themselves are compromised...”^{138,139} In short, when a gap grows between laws in books and laws in action, people’s fidelity to law weakens.

The “lesson” of Fuller’s congruence principle, according to Brunnée and Toope, is that when congruency dissolves, fidelity dissolves along with it. As they explain:

...fidelity is damaged when law is seen to have no possibility of effect. This is the lesson of Fuller’s eighth criterion of legality: congruence between law and official action [...]. When explicit rules are unrelated to how [...] actors behave, fidelity is destroyed.¹⁴⁰

This quotation speaks to the concern that people lose respect for laws when laws are not enforced as expected. Thus, as people observe the routine toleration of illegal deeds, they are more inclined to disobey laws. The existence of widespread tolerated illegality conveys that laws have lost their authority.

In the 1958 Hart-Fuller debate, Fuller argued that laws will fail if written rules do not match officials’ behaviour. As Rundle explains, through Fuller’s reply to Hart, “we learn that the enterprise of lawgiving may lapse in the face of a flagrant failure in congruence between official action and declared rule...”¹⁴¹ Additionally, she notes that “the commitment by government to

¹³⁷ Brunnée and Toope, *Legitimacy and Legality*, 355.

¹³⁸ Brunnée and Toope, *Legitimacy and Legality*, 355.

¹³⁹ See also: (1) “If such a practice has not taken hold, then an individual state party is likely to conclude that there is no congruence between the requirements of the treaty and the application of the treaty. It will be ignored because it will have inspired no fidelity” (Brunnée and Toope, *Legitimacy and Legality*, 48-49); (2) “Similarly, inconsistent or selective application or interpretation of existing customary rules, notably by more powerful states, undercuts the very practice of legality that is needed to sustain international law. [...] The past and potential selectivity of application of the emerging norm of the responsibility to protect generates a sense of hypocrisy that undermines fidelity to the law” (Brunnée and Toope, *Legitimacy and Legality*, 74-75).

¹⁴⁰ Brunnée and Toope, *Legitimacy and Legality*, 35.

¹⁴¹ Rundle, *Forms Liberate*, 85.

faithfully apply those rules that it has previously declared [...] captures the very idea of the ‘rule of law.’”¹⁴² As the definition of tolerated illegality suggests, it necessarily only exists when laws are not being enforced as advertised. Once illegality becomes selectively tolerated, law enforcement becomes unpredictable; sometimes illegal behaviour is ignored, but other times it is punished, which ultimately leads to a great deal of confusion. Moreover, proponents of formal legality maintain that incongruency between laws and official behaviour negatively affects agency. As Rundle explains, Fuller believed that “every departure from the principles of the internal morality of law is an affront to the legal subject’s dignity as a responsible agent.”¹⁴³ It follows that Fuller and supporters of formal legality would argue that because tolerated illegality causes unpredictable law enforcement it harms human agency. The argument is that someone’s ability to exercise his or her agency depends on knowing what behaviour is legally (im)permissible and this information ought to remain relatively constant. Without legal predicability, citizens will not know how officials will react to their behaviour, which leaves them feeling uncertain and insecure.^{144,145}

Tolerated illegality creates a degree of legal uncertainty and instability, and proponents of formal legality see these characteristics as threats to a legal system. The concern shared by a number of legal philosophers is that when laws are not enforced predictably, and legal certainty begins to disappear, people will not have reliable guidelines upon which to base future decision-making. Jeremy Waldron expresses this concern when he claims that citizens “need predictability in the conduct of their lives” and argues that “the Rule of Law is violated when the norms that are applied by officials do not correspond to the norms that have been made public to

¹⁴² Rundle, *Forms Liberate*, 128.

¹⁴³ Rundle, *Forms Liberate*, 98.

¹⁴⁴ Tamanaha, *On the Rule of Law*, 122.

¹⁴⁵ Again, the idea that a lack of certainty and stability will result in insecurity is reminiscent of Hobbes’ argument justifying the Sovereign in *Leviathan*.

the citizens.”¹⁴⁶ Likewise, Andrei Marmor suggests that “[r]ules cannot guide conduct unless deviations from the rule are actually treated as such, namely, as deviations from the rule.”¹⁴⁷ Tolerated illegality makes it difficult for laws to guide behaviour because it creates “mixed messages;” sometimes illegality is permitted and sometimes it is punished, so people are left unsure about how legal officials will react to their behaviour at any given moment. From this perspective, tolerated illegality causes the consistency of law enforcement to disappear and causes the mandate of formal legality—to make the law more certain and predictable—to fail.

Finally, tolerated illegality can lead people to believe that illegality has become acceptable, so they are often unpleasantly surprised when unexpected enforcement occurs. Raz argues that the rule of law is violated when “the appearance of stability and certainty which encourages people to rely and plan on the basis of the existing law is shattered.”¹⁴⁸ Such scenarios, according to Raz, “offend dignity in expressing disrespect for people’s autonomy” because “one is encouraged innocently to rely on the law and then that assurance is withdrawn...”¹⁴⁹ As Raz argues, the disappearance of legal certainty can be similar to entrapment. Although written laws may clearly state that an action is illegal, routine tolerance of illegal behaviour (on the part of legal officials) may provide evidence to the contrary. When the toleration of illegal behaviour becomes a trend, people rely on its reoccurrence. As time passes, people grow accustomed to permissible illegality, and illegality supplants legality as the new expectation. However, none of this changes the fact that the behaviour in question remains “officially” illegal and could be punished at any time.

CONCLUDING DISCUSSION

In this chapter, what began as an exploration of the idea of “tolerated illegality”

¹⁴⁶ Waldron, “The Concept and the Rule of Law,” 6-7.

¹⁴⁷ Marmor, “The Rule of Law and Its Limits,” 34.

¹⁴⁸ Raz, *The Authority of Law*, 222.

¹⁴⁹ Raz, *The Authority of Law*, 222.

transformed into an examination of how legal philosophers understand and theorize the “rule of law” or “legality.” What we learn throughout this chapter is that many legal philosophers (including legal positivists and natural law scholars, as well as 20th and 21st century scholars) share some overarching arguments regarding the rule of law. They generally agree that the purpose of law is to “act as a guide to behaviour,” and that the rule of law strives to increase legal “certainty and predictability” in order to ensure that laws serve as reliable “guidelines for future conduct.” In addition, many legal philosophers agree that the underlying intention of the rule of law is to promote the “dignity and agency” of legal subjects. Moreover, some scholars (Fuller and his supporters in particular) argue that the link between formal legality and agency fosters a sense of “fidelity to law” from legal subjects because when the lawmaking process respects people as agents, people respect laws in return. This argument leads legal positivists like Raz, and “natural law” theorists like Fuller to argue that the “moral quality” of a law-making institution can command respect, independent of the substance of the laws produced. Finally, through the congruence principle, we learn about the connection scholars—such as Brunnée and Toope—see between law enforcement and legal fidelity, as well as the problems that tolerated illegality is seen to cause in these areas.

The findings in this chapter—gleaned from Fuller, his supporters, and beyond—suggest that arguments in favour of formal legality share a similar logic; in order to effectively guide behaviour, laws must be certain and predictable, and this legal stability demonstrates respect for legal subjects because it provides them with the information they need to plan their lives. However, part of why this argument achieves a tight logical structure is because certain complicating details are omitted. To begin, an early warning sign in the work of philosophers such as Hart, Fuller, and their contemporary proponents, is that the “people” in their arguments

are referred to as an undifferentiated mass of “legal subjects,” suggesting that corporate executives, university students, homeless citizens (a group which is itself quite diverse¹⁵⁰), and so on, are all identically affected by laws.

For instance, if tenants know that they cannot afford the annual rent increase for their apartments, or if a community knows that the pro-fracking laws in their town are destroying the local environment, then knowing the law’s demands does not enhance agency, but rather means knowing what one is up against.¹⁵¹ The point is not that the legal philosophers reviewed are unaware that unjust laws exist (they are), but rather that across their works, the ideology they promote is that the merits of legal certainty outweigh the harms. They engage with the problem of legal abuses and *inconsistencies* (e.g. “corrupt regimes”), but not with the problems that may arise from *the desire for certainty*. Moreover, their fundamental pre-commitment to law, and their faith in its abilities to contribute to the general “public good,” causes them to resist applying a critical (or autocritical) lens to their legal philosophies.

Perhaps this concern is best illustrated by bringing Foucault back into the discussion, and considering the relevance of an important word for both Fuller and Foucault: “conduct.” Fuller’s view of law is “the enterprise of subjecting human conduct to the governance of rules,” which entails “the view that man is, or can become, a responsible agent, capable of understanding and

¹⁵⁰ For more information about Canada’s homeless population and a thoughtful discussion about “rooflessness,” urban camping, and tent cities (via the narratives of homeless people themselves) please see: Mark Z. Zion, “What is a Right to Shelter in the Desert of Post-Democracy?: Tracking Homeless Narratives from the Courtroom to Dissensus.” LLM thesis, University of Victoria, 2015.

¹⁵¹ As Brown and Halley note, whereas “critique” is commonly accused of lacking “purchase on or in something called the Real World,” (Brown and Halley, “Introduction,” 25) it is often critique itself that pulls us away from abstract, normative, liberal thinking, and brings us back to the “real world,” a world in which populations are not homogenous and different groups and individuals are disproportionately affected by totalizing laws, or more accurately, the values that inform these laws.

following rules, and answerable for his defaults.”¹⁵² Now consider what Foucault says about “conduct” in “The Subject and Power”:

To ‘conduct’ is at the same time to ‘lead’ others (according to mechanisms of coercion that are, to varying degrees, strict) and a way of behaving within a more or less open field of possibilities. The exercise of power is a ‘conduct of conducts’ and a management of possibilities.¹⁵³

This comparison highlights a central idea that Fuller and his colleagues largely overlook when they argue that certain and predictable rules enhance people’s agency.

Whereas Fuller argues that clear rules (paradoxically) enhance our ability to make decisions for ourselves, Foucault cautions us that regulating people’s conduct (e.g. by subjecting them to rules) is an *exercise of power* that frequently forecloses options and opportunities. Here I am not suggesting that Fuller is completely incorrect; subjecting human conduct to the governance of rules can be helpful, such as imposing rules that limit individual agency for the benefit of collective wellbeing (e.g. A red traffic light might stop an individual who wants to continue driving, but overall the traffic light system increases road safety). However, Fuller still misses a crucial dimension of his socio-legal analysis, pertaining to power, which Foucault helpfully illuminates.

Fuller’s comment about subjecting human conduct to the governance of rules is his *aspiration* for law, not his *critique* of law. Fuller promotes an ethic of responsibility, trusting that people are intelligent enough to understand and follow rules (regardless of disproportional effects) and “responsible enough” to accept the consequences of disobedience. He does not engage with questions about how and why people have been conditioned over time to desire certain, predictable, and sometimes even foreclosed paths. Indeed, Fuller himself had already

¹⁵² Fuller, *Morality of Law*, 162.

¹⁵³ Michel Foucault, “The Subject and Power,” in *Essential Works of Foucault 1954-1984, Volume III: Power*. Translated by Robert Huxley et al., ed. by James D. Faubion (New York: New York Press, 2000), 341.

been preconfigured to desire consistent rules (and to see as unproblematic the saturation of the social with power and rules) prior to his analysis of the merits of such a system. Meanwhile, Foucault's famous insight about power relations reminds us that the idea of "subject[ing] human conduct" to rules involves a range of coercive measures and a *narrowing* of the field of possibilities. Although it has already been acknowledged that rules that limit individuals' agency can have some social benefits (e.g. general public safety), the arguments put forward by Fuller and colleagues still mostly homogenize all people into the category of "legal subjects," masking the unequal effects that laws have across the population; the very act of regulating people's conduct is an exercise of power, which has unequal effects across citizens, often having particularly devastating effects on marginalized groups.

It is important to remember, however, that Fuller's work makes more sense in its historical-political context. Situating Fuller's work is not meant to exonerate him from criticisms, but rather to suggest that whereas Fuller was responding to a political/legal catastrophe (i.e. Nazi Germany), his contemporaries have less reason to reproduce the legal thinking that was significantly influenced by WWII. The Hart-Fuller debate occurred in the 1950s, and these two scholars were largely responding to the socio-legal transformation in Nazi Germany leading to World War II. Hart and Fuller were concerned about how the atrocities of WWII were able to happen, how to prevent a similar situation from happening again, and how the rule of law could assist by playing a preventative role. Although Fuller remains vulnerable to many critiques (e.g. homogenizing "legal subjects," suggesting strict rules enhance agency, failing to discuss unequal power relations in a meaningful way, etc.), his project is more understandable in the context of the situation he was responding to. The most recent generation of Fullerian scholars (many of whom are cited throughout this chapter) argue that, in the twenty-first century, which is

dominated by neoliberal policies and practices, formal rules continue to enhance human agency. To continue to make this argument today without discussing the shifting socio-legal-political terrain in this era is more difficult to justify.

As will be discussed in more detail in chapter 2, the argument that certain and predictable laws enhance agency does not hold true when the laws in question leave people “certainly and predictably” anxious, desperate, and/or alienated. A tension within the argument that a clear system of dependable rules enhances agency is that often such fixedness actually renders people helpless; they know exactly where they stand in relation to the law, which is precisely what makes them feel trapped, helpless and oppressed. For individuals to enact their agency they need to be the authors of the rules and codes they collectively live by. Ironically, one need look no further than an essay by Fuller himself to find a counter-argument to the related claims that only laws that meet the IML principles count as valid laws, and that laws adhering to these principles have a claim to people’s allegiance (regardless of laws’ substantive ends).

Fuller’s body of legal theory is Janus-faced because his most famous argument (the “internal morality” thesis) and his essay “Human Interaction and the Law” are basically irreconcilable. Whereas the internal morality thesis focuses on the necessary principles that the law must follow (in its creation and administration) in order to be considered valid,¹⁵⁴ the human interaction thesis focuses on how the ability to shape and define laws is rooted in people’s interactions and behavioural patterns.¹⁵⁵ These two arguments are “irreconcilable” because in *The Morality of Law* Fuller argues that total failure in any one of the eight IML principles results in something “not properly called a legal system at all.”¹⁵⁶ By contrast, in “Human Interaction and the Law” Fuller argues that customary law is not only a valid form of law, but also that we

¹⁵⁴ Fuller, *Morality of Law*, 39.

¹⁵⁵ Lon L. Fuller, “Human Interaction and the Law,” *American Journal of Jurisprudence* 14 (1969): 5.

¹⁵⁶ Fuller, *Morality of Law*, 39.

could not understand “ordinary law” (“that is, officially declared or enacted law”) without it.¹⁵⁷ In this essay, Fuller focuses on how people can “reach out for rules by a kind of inarticulate collective preference,”¹⁵⁸ and argues that “for a given social context one form of law may be more appropriate than another.”¹⁵⁹ Importantly, customary law, as Fuller develops it throughout “Human Interaction and the Law” does not satisfy the eight principles of law’s internal morality, and thus cannot be considered “valid” by Fuller’s own standards that he articulated in *The Morality of Law*. Rundle does not really discuss “Human Interaction and the Law” in *Forms Liberate* (she only mentions the essay on a single page, and only by name in the footnotes¹⁶⁰) for obvious reasons; it is far easier to exclude Fuller’s “Human Interaction” paper than discuss it because acknowledging this essay and engaging with its thesis would dramatically complicate (and likely derail) her tightly focused argument that “forms liberate.”

Furthermore, one of the main differences between the internal morality thesis and the human interaction thesis is that the former focuses more on legal form and the latter focuses more on legal substance. Fuller’s *Morality of Law* argument maintains that as long as the IML principles are followed, the substantive aims of the law are not one of his major concerns. He believed that if lawmakers adhere to the proper law-making process, then the best substantive laws possible would follow as a result. Conversely, much of the importance of the “Human Interaction” thesis rests on the fact that there must be some sort of correspondence between people’s beliefs and conventions, and the law’s directives. Fuller conveys this idea when he says that “the attempt to force a [...] law upon a social environment uncongenial to it may miscarry

¹⁵⁷ Fuller, “Human Interaction,” 2.

¹⁵⁸ Fuller, “Human Interaction,” 5.

¹⁵⁹ Fuller, “Human Interaction,” 27.

¹⁶⁰ Rundle, *Forms*, 39.

with damaging results.”¹⁶¹ In his commentary on the “Human Interaction” essay, Kenneth Winston explains that “[i]f made law is divorced from its context, it may be projected upon a social terrain incapable of supporting it, in which case tacit modifications or evasions of the law will ensue.”¹⁶² I will conclude this chapter by turning to these “tacit modifications or evasions of the law” to which Winston refers, or, as I call them, “tolerated illegalities.”

This chapter’s findings about popular arguments regarding “legality” (particularly that strict rules enhance agency) have significant implications for tolerated illegality (which will be discussed in greater detail in chapter 2). If the dominant view is that the rule of law aims to infuse the law with increased certainty and predictability, then tolerated illegality must be viewed as an aberration. Tolerated illegality necessarily entails a disconnection between written laws and official action. As a result, people no longer know for certain whether written laws will be enforced or ignored by legal officials, laws cease to function as reliable guidelines for conduct, and people are left confused about what behaviour is legally permissible. This confusion of expectations may have undesirable effects: officials might abuse their power and overstep the law, laws might lose their integrity due to a lack of enforcement,¹⁶³ and people might feel misled by the sudden enforcement of a generally tolerated “illegal” behaviour. Thus, the logic of the formal legality framework leaves no real option but to cast tolerated illegality as harmful and antithetical to legality. The implication of this conclusion for the present project is that, based on the logic of formal legality, tolerated illegality loses much of its complexity and nuance and becomes merely a problem to be fixed.

¹⁶¹ Lon Fuller, “Human Interaction,” 27.

¹⁶² Winston, *The Principles of Social Order*, 231.

¹⁶³ Brunnée and Toope discuss such situations in the context of international law. They argue that when actors (in their case individual nations, but individual people would also apply) observe a widespread disregard for legal rules and there is a lack of consequences for such disobedience, a widespread disrespect for the law ensues. (Brunnée and Toope, *Legitimacy and Legality*, 35)

The subsequent chapter will continue to explore the legal values of certainty and predictability as well as to raise critical questions about these values. Chapter 2 challenges the logic of the formal legality framework by arguing that it is problematically paradoxical in suggesting that rigid laws enhance autonomy and decision-making. In other words, we should be wary of an argument that maintains that agency is increased by clear, certain and predictable laws. Additionally, chapter 2 will aim to complicate our understanding of both “legality” and “tolerated illegality,” suggesting that neither can be simply or neatly understood. Indeed, tolerated illegality is a complex socio-legal phenomenon that does not fit tidily into the good/bad or for/against binary format.¹⁶⁴ ★

¹⁶⁴ As Brown and Halley explain: “The preemptive conversion of political questions into legal questions can displace open-ended discursive contestation: adversarial and yes/no structures can quash exploration; expert and specialized languages can preclude democratic participation; a pretense that deontological grounds can and must always be found masks the historical embeddedness of many political questions; the covertness of norms and political power within legal spaces repeatedly divests political questions of their most crucial concerns.” (Brown and Halley, “Introduction,” 19)

CHAPTER 2: AGENCY BEYOND THE LAW

Every departure from the principles of [formal legality] is an affront to man's dignity as a responsible agent. To judge his actions by unpublished or retrospective laws, or to order him to do acts that are impossible, is to convey to him your indifference to his powers of self-determination.¹

...every time that we [mechanically] apply a good rule to a particular case, to a correctly subsumed example, according to a determinant judgment, we can be sure that law may find itself accounted for, but certainly not justice. Law is not justice. [...] [T]he decision between just and unjust is never ensured by a rule.²

The two quotations above speak to a tension that will be explored in this chapter; a sort of paradox emerges through the desire for clear and predictable rules, and the desire for incalculable, indeterminate justice. On the one hand, in the first quotation Lon Fuller captures the aspiration, shared by many legal scholars, to have a stable system of clear laws. On the other hand, in the second quotation, Jacques Derrida describes how predictability and just outcomes are not always compatible. Although justice is not necessarily the antithesis of legal certainty, the certain application of legal rules cannot guarantee justice.

This chapter will discuss why legal certainty and predictability are not automatically helpful or agency enhancing. Whereas certainty is laudable in particular scientific domains, law is not a science.³ Although law may attempt to emulate scientific values, it is part of organic lived realities and unpredictable cultural spaces in which the strict application of legal rules can have detrimental effects. The difficulty with formal legality thinking is that it often overlooks

¹ Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven: Yale University Press, 1969), 162-163.

² Jacques Derrida, "Force of Law: The Mythical Foundation of Authority," *Cardozo Law Review* 11, no. 5-6 (1990): 947.

³ It is important to recognize, of course, not to flatten out the "sciences" and to recognize that not all "sciences" favour certainty and predictability. Whereas certainty and predictability are instrumental to the construction of buildings and modes of transportation, science studies scholars such as Donna Haraway and Karen Barad offer a more sophisticated view of the nuances of scientific inquiry.

how concretizing rules might re-inscribe entrenched inequalities, further social alienation, and limit people's possibilities rather than enhance their agency.

That being said, this chapter is careful not to oversimplify the analysis by suggesting that a more flexible legal approach is necessarily desirable either. Indeed, increased "flexibility" is a neoliberal trend that leaves many people in vulnerable and precarious positions in relation to the law, their employment, and more. The modest aim of this chapter is to complicate the formal legality framework outlined in chapter 1, as well as its implied stance towards tolerated illegality (i.e. suggesting that it is not only an unambiguous obstacle to achieving legal certainty and predictability). By the close of this chapter I hope to expose the limits of formal legality and provide alternative ways of understanding tolerated illegality.

Inspired by Wendy Brown's introductory style, I will now provide a few questions to guide the discussion in this chapter. Brown often opens her chapters with a list of nagging questions. Her lists not only help establish the types of questions that she will investigate throughout the chapter, but also suggest that not all questions require answers; indeed, the purpose of some questions is to inspire discussions that will conclude by asking better and more meaningful questions. Consequently, here are some of the questions I would like to raise at the outset of this chapter: Why might lawyers and legal academics be fixated on the qualities of legal certainty and predictability? When lawyers and legal academics focus on these two qualities, what factors or considerations are left out of their analyses? Conversely, if we applaud legal flexibility and adaptability, what complications are introduced? How might the present neoliberal system actually make legal flexibility more pervasive and destructive than legal predictability? If legal flexibility is also detrimental, what options remain? What are the roles of critically thinking "legal subjects" in this discussion, and what options are available to them?

This chapter unfolds in two major parts. Part I troubles the logic of formal legality. More specifically, it problematizes the assumption that legal certainty and predictability enhance agency. However, this section also exposes the precarity that accompanies neoliberal flexibility. Part I ends with the rather unsatisfying conclusion that legal certainty is flawed, legal flexibility introduces its own challenges, and trying to navigate them both ensures an infinite stalemate and unchanging conversation. Part II shifts the chapter in a literary direction and engages with Sophocles' *Antigone*. Thinking through the discussion in part I in relation to *Antigone* helps further illuminate the potential harmful consequences of legal rigidity. Moreover, Slavoj Žižek's alternative endings (plural) of the play truly expose the extent to which agency is often limited, not enhanced, by firm rules. Finally, *Antigone* allows us to consider different dimensions of tolerated illegality, including its relationship to agency and power.

I. CRITIQUING LEGAL FRAMEWORKS

Legal "Logics"

The "formal legality" framework described in the preceding chapter follows a particular kind of "logic." Thinking more critically about this underlying logic can help expose the problems and limitations of this framework. In his current work on legal "logics," Michael M'Gonigle focuses on the "logics behind the rules" operating within Western socio-legal systems.⁴ For M'Gonigle, "[s]ocial logics pervade the human world," and they "act as implicit *social laws* behind the explicit *legal laws*."⁵ These social logics take diverse forms and exist on different time-space scales while operating in the background and influencing laws and policies.

⁴ Michael R. M'Gonigle, "Logics as Law: Rethinking Social Regulation in the Precarious Age of Liberal Modernity (Short Law Review Version)," *DRAFT: citable and quotable only with written permission of the author* (2016): 1.

⁵ M'Gonigle, "Law as Logics," 1-2.

As M’Gonigle explains, the idea of “logics-as-law” is difficult to pinpoint, and rightly so.⁶ Nonetheless, he offers a tentative explanation of what he means by the social logics that underlie the law: “a logic can be understood as the animating core of a complex process.”⁷ M’Gonigle provides a simple example by describing how the logic behind a well-manicured lawn is the intent to convey wealth and status.⁸ The idea of the “logic behind the law” is helpful in this chapter because it assists in exposing one of the hidden logics that drives the “rule of law as certainty/predictability” mentality: a widespread desire to transform law into a *science*. Indeed, as I will explore next, although certainty and predictability may be desirable goals in domains such as medicine and structural engineering, privileging these two qualities in a social field like law can have detrimental effects for the people involved.

The “Scientification” of Law

As described in the previous chapter, certainty and predictability recur throughout the legal philosophy literature as primary goals of the rule of law. Following Roger Berkowitz, I argue that legal professionals and academics tend to privilege these two attributes because they are valued in many scientific domains, which are commonly perceived as the most prestigious (and well-funded) academic areas in today’s highly technological societies. Berkowitz argues that the birth, rise, and current dominance of legal positivism can be traced to lawmakers’ desire to make law resemble science. In *The Gift of Science*, he traces the origin of legal positivism to the 17th and 18th century scholar Gottfried Leibniz. As Berkowitz reports, although Leibniz’s aim was to “make jurisprudence – the prudential knowing of justice – into a *scientia juris* – an epistemic knowing of justice,” by creating a “posited legal code in which the entirety of law

⁶ M’Gonigle, “Law as Logics,” 18.

⁷ M’Gonigle, “Law as Logics,” 18.

⁸ M’Gonigle, “Law as Logics,” 19.

would be set down in a few short pages,” he unwittingly birthed the positive law approach.⁹ “Against Leibniz’s intentions,” explains Berkowitz, “the turn to science and specifically the scientific legal code as a way of knowing law contributed to the very transformation of natural law into positive law that Leibniz sought to prevent.”¹⁰ Because Leibniz was not only a philosopher, but also a mathematician, his aim was to bring a logical, rational, and rigorous approach to his project: a systematic codification of legal rules (thus moving away from moral and/or religious foundations of law and toward a scientific approach).

Intentionally or not, from Leibniz onward, scholars took up the task of pursuing law’s “scientific quest for absolute certainty.”¹¹ As Berkowitz puts it, this ongoing quest has left the law “dependent on science for the rational grounds of its authority – the only grounds that modern man [sic] is willing to recognize.”¹² Costas Douzinas and Adam Gearey have similarly noted that the study of law continues to emulate the study of science, which “could only be founded on observable, objective phenomena, not on subjective and relative values.”¹³ What is lost when scholars approach the study of law like science is, as Douzinas and Gearey put it, “all non-systemic normative matter, such as content, context, or history.”¹⁴ The “rule of law as certainty” mentality is part of the “scientification of law:” a diffuse transformation designed to make law more quantifiable and verifiable, but often out of step with organic lived realities.

Law has predominantly become a detailed code of legal rules and precedents aimed at providing certain answers to even the most uncertain situations. The goal of achieving legal certainty—knowing exactly what rules to apply and what outcomes to expect—frequently

⁹ Roger Berkowitz, *The Gift of Science: Leibniz and the Modern Legal Tradition* (Cambridge, MA: Harvard University Press, 2005), 27.

¹⁰ Berkowitz, *The Gift of Science*, 7.

¹¹ Berkowitz, *The Gift of Science*, 20.

¹² Berkowitz, *The Gift of Science*, 10.

¹³ Costas Douzinas and Adam Gearey, *Critical Jurisprudence: The Political Philosophy of Justice* (Oxford: Hart Publishing, 2005), 6.

¹⁴ Douzinas and Gearey, *Critical Jurisprudence*, 6.

outweighs considerations of the beings (human and beyond) involved.¹⁵ Moreover, law's scientific quest for absolute certainty regularly trumps conceptions of "justice." Although justice is not the antithesis of legal certainty, the certain application of legal rules cannot ensure justice.¹⁶ Berkowitz argues that "[a]s law retreats behind reasons and grounds, it loses its natural connection to [...] ideas of truth and justice" and "threatens to become merely a means to any rational ends that legislators posit."¹⁷ A significant problem occurs when belief in the importance of legal certainty and predictability becomes a dominant ideology that underpins legal thinking. With its focus on legal stability and dependability, this ideology risks favouring the preservation of legal certainty over considering the damaging effects these laws may have on different peoples, animals and the environment. Moreover, this way of thinking threatens to lose sight of the injustices that stem not only from individual instances in which applying the codified law is cruel, but also from the very act of imposing laws on people.

Positivism Masquerading as Natural Law

Returning to chapter 1's discussion of Lon Fuller's jurisprudence helps to expose how the underlying "logic" of his argument subscribes to the science-like principles of legal positivism described by Berkowitz. Many scholars are "rediscovering" Fuller's work today (see chapter 1);

¹⁵ Berkowitz, *The Gift of Science*, 86 & 119.

¹⁶ It might not be reasonable to expect that the certain application of legal rules can ensure justice, but this does not prevent people from believing it nonetheless. For example, consider the Supreme Court of Canada's ruling in *R. v. Ferguson*. In this case, the Supreme Court rejects the possibility of a deviation from mandatory minimum sentences, arguing that the mandatory minimum must be imposed. In the decision, the Court states that: "Constitutional exemptions from mandatory minimum sentences leave the law uncertain and unpredictable..." [71] and that "[t]he divergence between the law on the books and the law as applied — and the uncertainty and unpredictability that result — exacts a price paid in the coin of injustice." [72] (emphasis added) Moreover, as the Court states, one of the "unjust" consequences of deviations from the rules (e.g. of mandatory minimum sentences) is that a deviation "impairs the right of citizens to know what the law is in advance and govern their conduct accordingly — a fundamental tenet of the rule of law" [72]. (*R. v. Ferguson*, [2008] 1 S.C.R. 96) Now, this is not the final say from the Courts on mandatory minimum sentences, and different judges have ruled both in favour of, and against, the implementation of mandatory minimum sentences. However, the judgment above nonetheless represents a stark example of the seduction of certainty and predictability and the belief in their connection to justice.

¹⁷ Berkowitz, *The Gift of Science*, 52.

I suggest they are attracted to his argument (that law has its own “internal morality”) because it allows them to express concern for “human agency” while tacitly satisfying their (known or unknown) psycho-social desire for scientific certainty (not to mention preserving the status quo). As noted, fields of study, such as engineering, often operate based on “scientific principles,” which are presented as objective, universal, and reliable. Fuller’s eight principles of legality (widely believed to constitute a list of rule of law ideals)¹⁸ have an appealing type of logic, like applying a mathematical formula to lawmaking. The principles also have a sort of “tidiness” about them; together they form a complete set—eight to be exact—and they are simple and countable. One can (attempt to) create “tests” to determine which principles are present, which ones are weak, and which ones are largely missing from a given legal system.

Berkowitz argues that legal positivism was founded on a scientific view of law that privileges certainty. As discussed in chapter 1, one of the reasons that Fuller’s views of legality *seem* similar to those of Hart and Raz is because, indeed, they *are* similar. Fuller’s internal morality of law (IML) thesis perpetuates a scientific view of the law disguised as an innovative form of natural law. Fuller’s eight principles (or at least the first seven principles) are essentially a code for lawmakers to use when creating new laws. According to Berkowitz, the “*highest striving of legal positivism*” is “*the clear, certain, and knowable expression of the valid law*” (emphasis added).¹⁹ Fuller’s eight IML principles, which provide a checklist of requirements for “valid” laws, exemplify this central aim of legal positivism.

Fuller himself resisted the label “natural law,” which was attributed to him against his wishes. Furthermore, Fuller was not keen on his word choice “morality” in his book title *The*

¹⁸ Jeremy Waldron explains that, “the phrase ‘the Rule of Law’ is used to conjure up a sort of laundry list of features that a healthy legal system should have,” and these lists are “mostly variations of the eight desiderata of Lon Fuller’s ‘internal morality of law’.” (Jeremy Waldron, “Is the Rule of Law an Essentially Contested Concept (In Florida)?” *Law and Philosophy* 21, no. 2 (March 2002): 154)

¹⁹ Berkowitz, *The Gift of Science*, 1-2.

Morality of Law, and, in fact, preferred the word “trusteeship.” Rundle divulges that, in a letter to H.L.A. Hart, Fuller asks whether, “peace could be had by substituting for ‘morality’ some word like ‘trusteeship’.”²⁰ Fuller’s admission that “trusteeship” could have been a workable substitute for “morality” adds to the argument that his project was more closely aligned with the positivist tradition of positing clear legal rules than any variation of natural law. Arguably, the professional characteristics of a trusteeship relationship are more reminiscent of codes of conduct or contracts than of moral principles. Current supporters of Fuller’s jurisprudence seem to believe that they can use his work to obtain the “best of both worlds;” they can criticize legal positivism while subscribing to a theory that continues to entrench positivism’s primary values.

Law is a domain of expertise,²¹ and the experts, the legal “scientists,” have the power to shape new laws and make legal decisions. Although Fuller’s IML principles are ostensibly for the benefit of legal subjects (enhancing their agency), the reality is that the principles are intended as instructions for lawmakers (and law administrators). Generally, legal subjects are passive recipients of, not active participants in, legal processes. For the most part, Fuller’s IML principles do not create spaces or opportunities for people to participate, deliberate, or engage in the formation of new laws (I will return to this idea at the close of the chapter). Fuller’s argument (or rather, Rundle’s argument on Fuller’s behalf) is that “forms liberate:” properties of legal form enhance agency by creating a predictable legal system that gives people the stability they need for future planning. However, the problem with the formal legality camp is that it tends to “confuse freedom with the ever-increasing subjection of mankind to rules of utility and

²⁰ Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Oxford: Hart Publishing, 2012), 107.

²¹ Berkowitz, *The Gift of Science*, 117.

efficiency.”²² Just because rules are clear does not make them moral or mean that they will enhance people’s agency—on the contrary, people might find themselves *clearly* in trouble.

The Violence of Law En-force-ment

In Fuller’s work and beyond, the idea of *enforcement* plays a central role in rule of law analyses. Many rule of law discussions contain some variation of the ideas that laws should be enforced as advertised, and everyone—including legal officials—should act in accordance with the rules. Here we reach another problem with the formal legality camp that adopts the “rule of law as certainty” mentality: all enforcement necessarily entails some form of violence. As Jacques Derrida observes, the word *force* is built directly into the word *enforcement*. Derrida explains that:

There are, to be sure, laws that are not enforced, but there is no law without enforceability, and no applicability or enforceability of the law without force, whether this force be direct or indirect, physical or symbolic, exterior or interior, brutal or subtly discursive and hermeneutic, coercive or regulative, and so forth.²³

This violence, sometimes obvious and other times less visible, is an omnipresent component of law enforcement. Derrida’s observation calls into question the argument that the clear and certain application of legal rules enhances agency; regardless of intentions, any time that people are forced to follow laws they are subjected to some degree of force, which is necessarily violent.²⁴

²² Berkowitz, *The Gift of Science*, 3.

²³ Derrida, “Force of Law,” 927.

²⁴ In his text *Violence*, Slavoj Žižek explains that when people think about violence they usually imagine “obvious” examples, such as horrific crimes and armed conflicts. However, one of the central points of Žižek’s text is that we need to move beyond our focus on this “directly visible” violence, this “violence performed by a clear identifiable agent.” (1) Žižek’s text explores three types of violence: (i) “subjective” violence (the obvious, visible kind); (ii) “symbolic” violence (found in language and communication); and (iii) “systemic” violence (the “often catastrophic consequences of the smooth functioning of our economic and political systems”). (2) I would argue—and Derrida might agree—that legal systems are often complicit in systemic violence, restated by Žižek as “the violence inherent in a system: not only direct physical violence, but also the more subtle forms of coercion that sustain relations of domination and exploitation, including the threat of violence.” (9) Indeed, the subsequent chapter of the dissertation discusses the ways in which the Canadian State and legal systems sustain a relation of domination over Indigenous peoples. Finally, as Žižek reminds his readers, it is often those who condemn subjective violence that lay the very

Drawing on the work of Walter Benjamin, both Derrida and Saul Newman (respectively) discuss how violence exists both at the time laws are created, and when they are enforced. As Newman explains, “Benjamin introduces a conceptual distinction between ‘law-making’ (*rechtsetzend*) violence and ‘law-preserving’ (*rechtserhaltend*) violence: the violence that establishes a new law, and the violence that enforces existing law.”²⁵ Derrida describes the former as the “the founding violence, the one that institutes and positions law,” and the latter as “the violence that conserves, the one that maintains, confirms, ensures the permanence and enforceability of law.”²⁶ Violence, in the form of coercion and ratified domination, is often built into and hidden within the creation of new laws, but there is an additional violence that comes from repeatedly enforcing such laws and allowing them to maintain their hold.²⁷ Sometimes predictable law enforcement does, in fact, enhance human agency by creating a stable legal order that citizens can rely on. However, sometimes this stability itself is also a significant cause of harm; the certain application and enforcement of legal rules can perpetuate a cycle of violence that further marginalizes the most marginalized members of society.²⁸

foundation for it through their perpetration of structural violence (37) (e.g. capitalist business moguls who decry acts of visible violence but further oppress marginalized populations, destroying their ways of life and making them increasingly desperate) (22). (Slavoj Žižek, *Violence: Six Sideways Reflections* (New York: Picador, 2008).

²⁵ Saul Newman, “Anarchism and Law: Towards a Post-Anarchist Ethics of Disobedience,” *Griffith Law Review* 21, no. 2 (2012): 316.

²⁶ Derrida, “Force of Law,” 981.

²⁷ Derrida, “Force of Law,” 981.

²⁸ Žižek explains that the idea of “systemic” violence took on a new form with the rise of Capitalism. The problem, Žižek explains, is that although Capitalist forces seem “abstract,” their felt effects are all too “real.” Žižek elaborates that “the fate of whole strata of the population [...] can be decided by the [...] speculative dance of capital, which pursues its goal of profitability in blessed indifference to how its movement will affect social reality.” (12) So, even a seemingly insignificant bylaw, like a fine for a parking violation, has not only unequal effects on citizens based on their socio-economic status, but more importantly it “naturalizes the existent” (a phrase borrowed from Mark Zion, which in this example means that fines for parking violations become “normal”) while feeding back into Capitalist logic (i.e. trying to make money anywhere one can). Why do people need to pay for “public” parking to begin with—why not rearrange the existent and make parking free? Perhaps an even better question would be: why have we created communities that sprawl so far outwards (with downtown real estate costing the most money), necessitating a reliance on automobiles? (Žižek, *Violence*, 12)

A recent Supreme Court of Canada decision also helps illustrate the type of systemic violence that emerges from the certain application and enforcement of legal rules. In *Ktunaxa Nation v. British Columbia (Forests, Lands, and Natural Resource Operations)*, Glacier Resorts wanted to build a ski resort on the Ktunaxa Nation’s territories, and

Thus, we return to the impasse described at the outset of the chapter: for some, arbitrariness is “the epitome of injustice,”²⁹ whereas for others, certainty only exists “in the realm of [...] violence.”³⁰ Derrida explains this paradox in the following passage from *Force of Law*:

...for a decision to be just and responsible, it must [...] be both regulated and without regulation: it must conserve the law and also destroy it or suspend it enough to have to reinvent it in each case, rejustify it, at least reinvent it in the reaffirmation and the new and free confirmation of its principle. Each case is other, each decision is different and requires an absolutely unique interpretation, which no existing coded rule can or ought to guarantee absolutely. As least, if the rule guarantees it in no uncertain terms, so that the judge is a calculating machine – which happens – we will not say that he is just, free and responsible. But we also won’t say it if he doesn’t refer to any law, to any rule or [...] if he improvises and leaves aside all rules, all principles.³¹

The paradox that Derrida describes exists beyond courtroom law; different social actors adopt the tacit role of “the judge” in a spectrum of daily situations, some more or less “official” than others. For example: a bus driver must decide whether to accept \$1.50 rather than the \$2.50 fare from a passenger, a professor must decide whether to deduct marks from a paper that is one week late, a security officer must decide whether to admit an individual who forgot proper identification, and so on. We are repeatedly caught between adhering to the rules, and using our own judgment to break the rules in pursuit of a result that may be considered more just in a particular situation.

Certainty and predictability, although valuable in some scientific domains like engineering and medicine (in which lives depend on precise equipment and techniques), become

the Ktunaxa argued that the resort would destroy not only their land, but also their spirituality (the Grizzly Bear Spirit). The violence that stems from the certain application of legal rules can be found in statements such as this: “The question is not whether the Ktunaxa obtained the outcome they sought, but whether the process is consistent with the honour of the Crown. [...] Where adequate consultation has occurred, a development may proceed without the consent of an Indigenous group.” [83] Moreover, the legal decision in this case demonstrates its complicity with the logic of Capitalism, choosing the construction of a new ski resort over preservation of Indigenous lands and spirituality, and using words like “financial,” “economic,” and “revenue” throughout the decision. (*Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)* [2017] 2 S.C.R. 386)

²⁹ Berkowitz, *The Gift of Science*, 153 (citing Rudolf von Jhering’s position).

³⁰ Derrida, “Force of Law,” 1033.

³¹ Derrida, “Force of Law,” 961.

problematic when applied to complicated, unpredictable cultural spaces. Arguably, in law's attempt to emulate science, it often becomes too calculating and detached, and distances itself from decency and empathy for others.³² The realms of law application and enforcement highlight the tension between striving for certain outcomes and striving for just outcomes. To be sure, the consistent application of the same laws to similar situations aims to—and often does—help to ensure that people are treated fairly. However, sometimes enforcing laws in a determinate way both homogenizes the important differences between relatively similar situations and perpetuates underlying patterns of domination laden in existing laws.

The Violence of Legal Flexibility

In addition to the critique above, it is important to consider how deviations from the rules—from the values of legal certainty and predictability—actually transpire, and what problems these deviations may cause. In today's "neoliberal" era, authorities' discretion is usually connected to money and/or power and rarely rooted in empathy for the individuals involved or for their situations. Here I follow Wendy Brown's understanding of neoliberalism as: "a peculiar form of reason that configures all aspects of existence in economic terms,"³³ or, in other words, the "economization of everything and every sphere, including political life."³⁴

Within today's neoliberal order, people are transformed into "*homo oeconomicus*," where each

³² One example of this lack of empathy can be found in the case of *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, cited on the previous page. Another example is the *Victoria (City) v. Adams* case, a "landmark" case in which homeless citizens were granted the right to overhead shelter—but only between the hours of 7:00pm and 7:00am. By 7:01am, the shelter had to be removed. (*Victoria (City) v. Adams*, [2009] B.C.C.A. 563) These examples are not to suggest that there are no counter-examples to my claim, but rather to suggest that there is a troubling ideology underpinning legal thought which tends to prioritize certainty (often in the form of procedure, as in *Ktunaxa Nation v. British Columbia*) over empathy. Even in cases praised for their pioneering decisions, like *Victoria (City) v. Adams*, the court's empathy only stretches for far (i.e. to 7:00am). (Also, for an excellent discussion and analysis of *Victoria (City) v. Adams* please see: Mark Z. Zion, "What is a Right to Shelter in the Desert of Post-Democracy?: Tracking Homeless Narratives from the Courtroom to Dissensus." LLM thesis, University of Victoria, 2015.

³³ Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (New York: Zone Books, 2015), 17.

³⁴ Brown, *Undoing the Demos*, 40.

person becomes a “governed bit of human capital.”³⁵ In the neoliberal present, significant deviations from the rule of law are not only tolerated, but often encouraged, especially if the deviations are linked to economic gain.

In *Undoing the Demos*, Wendy Brown states that the “ugly words ‘flexibilization’ and ‘responsibilization’” characterize our current “neoliberal order.”³⁶ She goes on to describe how, for example, transformations in university employment practices have led to more job precarity and uncertainty, and increased vulnerability among employees. As she states, “a flexibilized, unprotected and poorly paid labor force come[s] to replace one enjoying modest security of employment, along with provisions for health, disability, and retirement.”³⁷ Moreover, Brown describes the role of “soft power” as a governance strategy in today’s neoliberal society.³⁸ Rather than a regimented and “scientific” approach, legal and business policies use “soft power” to manipulate people into governing themselves and seeking their own self-improvement; such tactics are “more termitelike than lionlike [...] boring in capillary fashion into the trunks and branches of workplaces, schools, public agencies....”³⁹ Consequently, the *lack* of certainty and predictability in current societal configurations is not only injurious to today’s citizens, but it is also an integral part of pursuing the neoliberal maxim to increase profits.

David Harvey notes that “flexibility” has become a “watchword” in today’s neoliberal society.⁴⁰ Harvey reflects on the tensions surrounding the idea of flexible guidelines and regulations. He notes that “[i]t is hard to argue that increased flexibility is all bad,” and that there are “reformists of a leftist persuasion” who advocate for increased flexibility.⁴¹ Nonetheless,

³⁵ Brown, *Undoing the Demos*, 10.

³⁶ Brown, *Undoing the Demos*, 133.

³⁷ Brown, *Undoing the Demos*, 132.

³⁸ Brown, *Undoing the Demos*, 35.

³⁹ Brown, *Undoing the Demos*, 35-36.

⁴⁰ David Harvey, *A Brief History of Neoliberalism* (New York: Oxford University Press, 2005), 75.

⁴¹ Harvey, *A Brief History of Neoliberalism*, 75.

Harvey goes on to argue that the balance of power is so often tipped in favour of employers and policy makers that “flexibility” commonly ends up disadvantaging labourers and those subjected to the policies in question.⁴² Indeed, despite the problematic logic behind the idea of formal legality, we should also be wary of the danger of legal flexibility and the way that law and policy makers, as well as businesses, may take advantage of flexible neoliberal policies to the detriment of workers and citizens.⁴³

Similarly, Mark Fisher also warns about the ways in which deviations from legal certainty and predictability occur within today’s neoliberal society. Drawing on the work of Gilles Deleuze and Felix Guattari, Fisher describes today’s version of Capitalism⁴⁴ as:

...a system that is no longer governed by any transcendent Law; on the contrary, it dismantles all such codes, only to re-install them on an *ad hoc* basis. The limits of capitalism are not fixed by fiat, but defined (and re-defined) pragmatically and improvisationally. This makes capitalism very much like the Thing in John Carpenter’s film of the same name: a monstrous, infinitely plastic entity, capable of metabolizing and absorbing anything with which it comes into contact.⁴⁵

For Fisher, one of the very problems with today’s neoliberal legal-political order (which he calls *Capitalist Realism*) is that there is too much flexibility. “Flexibility” and “spontaneity” are two

⁴² Harvey, *A Brief History of Neoliberalism*, 75.

⁴³ Relatedly, consider what David Graeber explains in *The Utopia of Rules*: “Consider the word ‘deregulation.’ In today’s political discourse, ‘deregulation’ is—like ‘reform’—almost invariably treated as a good thing. Deregulation means less bureaucratic meddling, and fewer rules and regulations stifling innovation and commerce. This usage puts those on the left-hand side of the political spectrum in an awkward position, since opposing deregulation—even, pointing out that it was an orgy of this very ‘deregulation’ that led to the banking crisis of 2008—seems to imply a desire for more rules and regulations, and therefore, more gray men in suits standing in the way of freedom and innovation and generally telling people what to do.” (David Graeber, *The Utopia of Rules: On Technology, Stupidity and the Secret Joys of Bureaucracy* (Brooklyn: First Melville House, 2015), 16)

⁴⁴ For Brown, neoliberalism is a “modality” of capitalism. (47) As she explains, neoliberalism builds on capitalism’s “imperatives” – “the imperative of cheapening labor and expanding markets, the imperative of economic growth, the imperative of constant renovations in production (and now in financial instruments) to generate profit” – by adding “a new order of economic *reason*, a new governing *rationality*, new *modes* and *venues* of commodification, and of course, new *features* of capitalism and new *kinds* of capital.” (*emphasis added*) (Brown, *Undoing the Demos*, 75-76) For a related argument, see the work of David Harvey, who argues that neoliberalism is a new version of capitalism that emerged in the 1970s in response to decreasing profit rates. (Harvey, *A Brief History of Neoliberalism*)

⁴⁵ Mark Fisher, *Capitalist Realism: Is There No Alternative?* (Winchester: Zero Books, 2009), 6.

of the “hallmarks” of organizations today.⁴⁶ Indeed, the fact that so many facets of people’s lives are *uncertain* and *unpredictable* causes innumerable problems; the former “rigidity” of social institutions (e.g. Fordist manufacturing) has given way to “a new ‘flexibility’,” which is “defined by a deregulation of Capital and labor [sic].”⁴⁷ As Fisher explains, many people today find themselves, “in a series of short term jobs, unable to plan for the future.”⁴⁸ The uncertain socio-legal systems and structures that govern today’s neoliberal societies leave people vulnerable in many overlapping areas, from employment to housing to encounters with the law. In these times when legal predictability may lead to oppression and flexible guidelines may lead to vulnerability, people often feel trapped in a system with no options.

“Polarity” and the Rule of Law

It has been observed that the law is often plagued by the inability to think two contradictory things at the same time. That is, the law almost always necessitates choosing a side in a conflict, and it is generally uncomfortable with the idea of paradoxes or the possibility that multiple irreconcilable positions could all be, in a sense, “true” or “correct.” Desmond Manderson’s interpretation of the “rule of law” offers a suggestion regarding how to confront this impasse between “legal certainty” and “incalculable justice.” To begin, Manderson opens by proclaiming that the rule of law “is in peril.”⁴⁹ This peril is the result of a “wilful blindness” on the part of rule of law advocates, who ignore critique, and reciprocally, on the part of those engaged in critique, who ignore the rule of law.⁵⁰ To help us navigate the identified deadlock,

⁴⁶ Fisher, *Capitalist Realism*, 28.

⁴⁷ Fisher, *Capitalist Realism*, 33.

⁴⁸ Fisher, *Capitalist Realism*, 33.

⁴⁹ Desmond Manderson, “Modernism, Polarity, and the Rule of Law,” *Yale Journal of Law and Humanities* 24, no. 2 (2012): 475.

⁵⁰ Manderson, “Modernism, Polarity, and the Rule of Law,” 475.

Manderson argues for a return to post-WWI scholarly debates on the rule of law, as well as revisiting the literary fiction produced at that time.⁵¹

After WWI, Manderson argues that there was a “standoff” between “positivism and romanticism” (which he sometimes also calls “transcendentalism”).⁵² On the one hand, positivism “claims that objective meaning can be derived from established legal rules such that judges and other interpreters are able to apply them in a predictable and pre-determined fashion...”.⁵³ On the other hand, romanticism proposes a “rejection of abstract rules,” and “the rule of law,”⁵⁴ as well as “an appeal to a transcendent justice unassimilable to legal rules.”⁵⁵ Manderson cites H.L.A. Hart as a representative of positivism, who argues that law requires a “core of settled meaning,”⁵⁶ and Derrida as an example of romanticism, who argues that justice involves a “moment of undecidability” that exists in tension with law.⁵⁷ For Manderson, the “real question” is how to address the critique rather than ignoring it.⁵⁸ He suggests that literary work around the same time period (the 1920s) offers the means to overcome this impasse.

Manderson turns to the work of author D.H. Lawrence, who wrote about the notion of “polarity.” Polarity captures the idea that, “contradiction and opposition, such as those between rules and applications, general norms and particular persons, law and justice” should “*neither be separated [...] nor harmonized,*” but rather “maintained and preserved”⁵⁹ (original emphasis). Because polarity is all about *opposition* (“not synthesis, not balance, not transcendence, and categorically not harmony”), Manderson suggests that it offers “a way past this false

⁵¹ Manderson, “Modernism, Polarity, and the Rule of Law,” 476.

⁵² Manderson, “Modernism, Polarity, and the Rule of Law,” 476.

⁵³ Manderson, “Modernism, Polarity, and the Rule of Law,” 478.

⁵⁴ Manderson, “Modernism, Polarity, and the Rule of Law,” 499.

⁵⁵ Manderson, “Modernism, Polarity, and the Rule of Law,” 486.

⁵⁶ Manderson, “Modernism, Polarity, and the Rule of Law,” 478.

⁵⁷ Manderson, “Modernism, Polarity, and the Rule of Law,” 482.

⁵⁸ Manderson, “Modernism, Polarity, and the Rule of Law,” 482.

⁵⁹ Manderson, “Modernism, Polarity, and the Rule of Law,” 477.

dichotomy—a way of understanding the rule of law while *at the same time* embracing contingency, uncertainty, and contradiction”⁶⁰ (original emphasis). Again, we return to the tension between the two quotations at the outset of the chapter: Fuller’s claim that rules need to be dependable, and Derrida’s assertion that justice cannot be ensured by a rule. For Manderson, this seeming opposition need not be totalizing or paralyzing. As he suggests:

...the irreconcilable and irresolvable conflict between predictable rules and unpredictable circumstances is not a legal disaster, but a crucial opportunity. [...] Rather than promising certainty or finality, the rule of law might promise something more human and more honest.⁶¹

For Manderson, this more “honest approach” includes preserving the conflict between opposing factions and treating the struggle as an ongoing learning process.

Manderson concludes that a central component in the revival of the rule of law is the claim that we should never settle on a pole because “the movement itself matters” and we must “*never stop deciding*”⁶² (original emphasis). As already discussed in the chapter (Derrida and Newman referencing Benjamin), Manderson also notes that all legal decisions are violent, but he argues that the violence that proceeds unaware and remains ignorant of its own existence is worse than the violence that recognizes itself as such and continually attempts to think problems through.⁶³ For Manderson, an important part of preserving opposition in this “irresolvable conflict” inherent to the rule of law is that those in the role of legal judges must be open to “a constant process of learning,” including admitting when they have been “fool[s].”⁶⁴ This learning process entails “listening, deciding and explaining” in the hope that law will become “better

⁶⁰ Manderson, “Modernism, Polarity, and the Rule of Law,” 477.

⁶¹ Manderson, “Modernism, Polarity, and the Rule of Law,” 502-503.

⁶² Manderson, “Modernism, Polarity, and the Rule of Law,” 501.

⁶³ Manderson, “Modernism, Polarity, and the Rule of Law,” 501.

⁶⁴ Manderson, “Modernism, Polarity, and the Rule of Law,” 504.

connected to its community.”⁶⁵ For Manderson, ideally, legal judgement is a process that remains open to preserving the struggle through input, dialogue and deliberation.

Critiquing Polarity

To begin, Manderson’s article is a refreshing departure from conventional rule of law scholarship; he takes a historical and literary approach, and tries to negotiate between traditional jurisprudence and critiques of legality. He also successfully moves beyond the liberal limits of most jurisprudential works by including “romantics” like Derrida in his legal analysis. Moreover, although this section goes on to critique Manderson’s piece, it must be recognized that article-length publications cannot cover everything, and Manderson certainly packs a great deal of analysis into his short paper. Nonetheless, there are a few significant limitations in his contribution that should be discussed, namely reinscribing familiar dualisms, avoiding particular critiques, and evading meaningful discussions about politics and power.

At first glance, Manderson’s argument that both “poles” (positivism/certainty versus romanticism/incalculable justice) are valid and justifiable positions seems both reasonable and insightful. He presents himself as the one in the middle—the moderate one—and the one with the way to move forward past the impasse and beyond the “peril.” As Manderson reports, Lawrence’s polarity emerges from a “rejection of unity and coherence” and a desire to allow tensions to persist rather than resolving them.⁶⁶ This aspect of Manderson’s article is appealing because it moves past the “certainty” or “incalculability” debate (forcing one to choose *A or B*) and suggests both (*A and B*). However, by arguing that both conflicting parties are, in effect,

⁶⁵ Manderson, “Modernism, Polarity, and the Rule of Law,” 504.

⁶⁶ Manderson, “Modernism, Polarity, and the Rule of Law,” 492.

“correct,” Manderson’s argument still succumbs to the problem of reinscribing unproductive dualisms (a problem upon which I will elaborate below).

Throughout the article, Manderson repeatedly frames the conflicts he identifies, his own analysis, and even his proposed outcomes in binary terms. He employs phrases such as: “two opposite poles, positive and negative;”⁶⁷ “two flows, one sympathetic and loving, the other mighty and authoritarian;”⁶⁸ “justice as sameness and justice as difference;”⁶⁹ “law as calculation and justice as the incalculable;”⁷⁰ “two irreconcilable poles—general and particular, prior rules and new circumstances;”⁷¹ and so on. Even his proposal to address the primary conflicting poles in his argument (positivism/certainty versus romanticism/incalculability) ultimately reinscribes them in an infinite loop. He relates that “we are constantly thrown from one pole to the other, from the singularity of justice back to the (re-)construction of rules,” and surmises that whenever we encounter “a new circumstance, the previous interpretation *must* generate new tensions and a new polarity pulling us in opposite directions again”⁷² (emphasis added). The problem here is that thinking in binary terms is not only fairly unimaginative, but it also necessarily pits two elements against each other, and, when only two elements receive all of the attention, what other considerations fall away from the discussion?

In *Touching Feeling*, Eve Kosofsky Sedgwick conveys that one ambition for her work is to “get away from dualistic modes of thinking.”⁷³ As she explains, several “linear logics” produce dualistic thinking, such as “cause and effect,” “subject and object,”⁷⁴ “means versus

⁶⁷ Manderson, “Modernism, Polarity, and the Rule of Law,” 491.

⁶⁸ Manderson, “Modernism, Polarity, and the Rule of Law,” 492.

⁶⁹ Manderson, “Modernism, Polarity, and the Rule of Law,” 497.

⁷⁰ Manderson, “Modernism, Polarity, and the Rule of Law,” 497.

⁷¹ Manderson, “Modernism, Polarity, and the Rule of Law,” 500.

⁷² Manderson, “Modernism, Polarity, and the Rule of Law,” 500.

⁷³ Eve Kosofsky Sedgwick, *Touching Feeling: Affect, Pedagogy, Performativity* (Durham: Duke University Press, 2003), 10.

⁷⁴ Sedgwick, *Touching Feeling*, 8.

ends,”⁷⁵ and “mind/body.”⁷⁶ Alternatively, Sedgwick proposes an approach (inspired by Gilles Deleuze) that emphasizes the orientation of “*beside*.” “Beside” is a significantly different approach from Manderson’s “opposition.” As Sedgwick explains, “beside” is not dualistic because many things may lie beside one another.⁷⁷ Moreover, “beside” offers a broader range of possible relations between elements (e.g. “desiring, identifying, representing, paralleling, differentiating, rivalling, leaning, twisting, mimicking, withdrawing, attracting, aggressing, warping” and more).⁷⁸ Interestingly, Sedgwick observes that even critical work often succumbs to the trap of reinscribing dualisms:

...the structuralist reliance on symbolization through binary pairings of elements, defined in a diacritical relation to one another and no more than arbitrarily associated with the things symbolized, has not only survived the structuralist moment but, if anything, has been propagated ever more broadly through varied and unrelenting critique—critique that reproduces and popularizes the *structure*, even as it may complicate an understanding of the *workings*, of the binarisms [...] such [...] as presence/absence, lack/plentitude, repression/liberation, and subversive/hegemonic⁷⁹ (original emphasis).

The passage above resonates with Manderson’s work. He is engaged in a type of critique of the rule of law, recognizing the controversy and unrest surrounding it, and yet he is unable to move beyond a dualistic structure (polarity). As Sedgwick mentions above, Manderson is certainly able to complicate the *workings* of the binary (A *and* B, not A *or* B), and yet, the *structure* of the binary remains intact. Consequently, other important factors (beyond certainty/incalculability) fall outside the scope of Manderson’s analysis of the rule of law to the detriment of his argument, and two of these factors will now be discussed.

One main issue that Manderson overlooks pertains to his lack of genuine engagement with existing critiques of the rule of law. Although Manderson argues that maybe “the peril to

⁷⁵ Sedgwick, *Touching Feeling*, 21.

⁷⁶ Sedgwick, *Touching Feeling*, 113.

⁷⁷ Sedgwick, *Touching Feeling*, 8.

⁷⁸ Sedgwick, *Touching Feeling*, 8.

⁷⁹ Sedgwick, *Touching Feeling*, 94.

the rule of law might be averted not by ignoring the critique of positivism but by embracing it,”⁸⁰ one wonders which critique(s) he is referring to here. Arguably, if one were to take seriously some of the critiques mounted against positivism and the rule of law, and appreciate their force, one could not “embrace them” in a project intended to salvage the wonder of the rule of law (“to hold both ends at once and feel the current—the life—coursing through us”).⁸¹ Early on in the article, Manderson has a brief section entitled “Critique,” in which he acknowledges multiple literatures engaged in critiquing legality, but then goes on immediately afterward to focus solely on Derrida and the particular (dualistic) argument that helps Manderson set the stage for polarity:

Yet critiques of this claim for a rational, abstract, and certain objectivity have only multiplied with the passing years, from legal realists and Marxists to feminists in the 1970s, race theorists and critical legal studies in the 1980s, and post-structural theorists in the 1990s. Thus, according to Derrida, justice embodies two opposed impulses: equal treatment and singular respect.⁸²

One cannot help but think that the “thus” sentence does not follow from the prior list, and Manderson sidesteps all of these literatures that critique legality in favour of using Derrida’s work to establish polarity. Consider, just one counter-example, an excerpt from critical theorist and geographer Nicolas Blomley, writing about the rule of law in the 1990s. “The rule of law,” he states, “appears rational, benign, and necessary,”⁸³ but its “very defensibility assumes its independence from the power struggles and ‘value judgments’ of social and political life.”⁸⁴ Legal scholars like Manderson who write about legality often falsely assume that the law is a “neutral” arbitrator of disputes rather than part of an ideological system imbued with its own values and complicit in societal power structures.⁸⁵ Blomley’s critique brings considerations of

⁸⁰ Manderson, “Modernism, Polarity, and the Rule of Law,” 476.

⁸¹ Manderson, “Modernism, Polarity, and the Rule of Law,” 499.

⁸² Manderson, “Modernism, Polarity, and the Rule of Law,” 479.

⁸³ Nicholas K. Blomley, *Law, Space, and the Geographies of Power* (New York: Guilford Press, 1994), 9.

⁸⁴ Blomley, *Law, Space, and the Geographies of Power*, 10.

⁸⁵ I will return to this idea in Chapter 4, thesis #2.

politics and power back into the forefront of discussions about the rule of law, something that Manderson's discussion omits.

Manderson's lack of power/political analysis warrants elaboration. At the outset of the paper, Manderson declares that one possible explanation for the rule of law's "peril" is "reactionary politics."⁸⁶ He proceeds to suggest that critiques of the rule of law cannot be dismissed because of one's "political preferences."⁸⁷ Manderson seems to imply that the political dimension of the rule of law is, at a minimum, relevant to the perilous situation he has identified. And yet, throughout the article, the mention of politics is almost exclusively limited to two contexts: lists in which politics is included amongst other categories (e.g. "legal, jurisprudential, and political"⁸⁸ or "literary, personal, political, or legal"⁸⁹), or titles of works cited, which are accompanied by discussions omitting political questions (e.g. Aristotle's *Politics*⁹⁰ or Brian Tamanaha's *On the Rule of Law: History, Politics, Theory*⁹¹). Here Manderson makes a move that acts as a kind of "technique of rhetorical manipulation;"⁹² he refers to a notion ("politics"), in order to point to evidence that the issue has indeed been raised, but ultimately he does not engage in a genuine discussion of the political aspects of the rule of law.

To be fair, it should be mentioned that Manderson does discuss the topic of power in relation to the rule of law; however, these discussions are, again, essentially limited to two areas: the rule of law's relationship to separating governmental powers,⁹³ and synopses of work by Carl Schmitt and Walter Benjamin.⁹⁴ What is missing is a discussion of politics and power in relation

⁸⁶ Manderson, "Modernism, Polarity, and the Rule of Law," 475.

⁸⁷ Manderson, "Modernism, Polarity, and the Rule of Law," 475.

⁸⁸ Manderson, "Modernism, Polarity, and the Rule of Law," 490.

⁸⁹ Manderson, "Modernism, Polarity, and the Rule of Law," 504.

⁹⁰ Manderson, "Modernism, Polarity, and the Rule of Law," 470.

⁹¹ Manderson, "Modernism, Polarity, and the Rule of Law," 481.

⁹² Pierre Schlag, "Normative and Nowhere to Go," *Stanford Law Review* 43, no. 1 (1990): 184.

⁹³ Manderson, "Modernism, Polarity, and the Rule of Law," 479.

⁹⁴ Manderson, "Modernism, Polarity, and the Rule of Law," 484-486 & 494-496.

to Manderson's argument for polarity. Manderson writes that "[f]ramed by public conversation," the rule of law impasse need not be "a legal disaster,"⁹⁵ but rather could be a "vital opportunity."⁹⁶ Furthermore, he suggests that this conundrum presents "an invitation to judge the judges" and "participate in the making of law."⁹⁷ These ideas are relatively naïve and detached from the realities of the power and privilege that come with being a part of the legal profession. Given the inaudibility that many people experience in their encounters with the law, it is unlikely that judges will be open to community feedback and critique regarding judicial decision-making. Indeed, as the chapter-closing discussion of *Antigone* will suggest, the process that Manderson hopes will be two-directional is often tied to political considerations and unequal power distributions, and consequently it is usually unidirectional (or, in the case of *Antigone*, largely unidirectional until it is too late).

II. TURNING TO SOPHOCLES' *ANTIGONE*

I will now turn to Sophocles' *Antigone* to help elaborate on many of the ideas throughout this chapter. Bonnie Honig writes that, "*Antigone* may be the most commented-upon drama in the history of philosophy, feminism, and political theory,"⁹⁸ and there seems to have been a particular "turn to *Antigone* in the latter half of the twentieth century."⁹⁹ Furthermore, contemporary philosopher and cultural theorist Slavoj Žižek recently published his own rewriting of Sophocles' tale. In the forward to Žižek's work, Hanif Kureishi describes the character of Antigone as, "a particularly modern heroine," because she is "a rebel, a refusenik, a

⁹⁵ Manderson, "Modernism, Polarity, and the Rule of Law," 502.

⁹⁶ Manderson, "Modernism, Polarity, and the Rule of Law," 503.

⁹⁷ Manderson, "Modernism, Polarity, and the Rule of Law," 503.

⁹⁸ Bonnie Honig, *Antigone, Interrupted* (Cambridge: Cambridge University Press, 2013), 6.

⁹⁹ Honig, *Antigone, Interrupted*, 1.

feminist, an anti-capitalist (principles are more important than money),” and more.¹⁰⁰ Kureishi notes that the text “has been repeatedly written about by philosophers, psychoanalysts, feminists, literary critics and revolutionaries,” and goes on to report that G.W.F. Hegel called *Antigone* “one of the most sublime, and in every respect, most consummate works of human effort ever brought forth.”¹⁰¹ Indeed, I would also add legal scholars to Kureishi’s list because *Antigone* is often a subject of inquiry in relation to the tension between legal positivism and natural law.

In Žižek’s rewriting of *Antigone*, he audaciously reimagines this iconic work by penning three alternative endings. The first version largely follows Sophocles’ original work, with Antigone dying for her principles. The second ending “shows what would have happened were Antigone to win;”¹⁰² in other words, it recounts the aftermath following her success in convincing Creon to let her bury Polynices. Finally, in the third version, the people of Thebes intervene and take action. Žižek describes this third ending as follows: the Chorus “becomes an active agent,” overthrows Creon *and* Antigone, and “takes over as a collective organ and imposes a new rule of law, installing people’s democracy in Thebes.”¹⁰³ Although I will largely be engaging with Sophocles’ original version of *Antigone*, it is Žižek’s third (alternative) ending that I will explore at the conclusion of the chapter.

Antigone plays an important role in this thesis by *collecting* and *connecting* the ideas that both precede and follow it. In doing so, my treatment of *Antigone* here acts as a sort of hub that joins the critiques of legality in Chapter 2 with concerns addressed in the upcoming discussion of Indigenous dispossession in Chapter 3.¹⁰⁴ As the representative of state law, Creon provides an

¹⁰⁰ Hanif Kureishi, “Foreword,” in *Antigone*, rewritten by Slavoj Žižek, viii-x. (London: Bloomsbury, 2016), vii.

¹⁰¹ Kureishi, “Foreword,” vii.

¹⁰² Slavoj Žižek, *Antigone* (London: Bloomsbury, 2016), xxiv.

¹⁰³ Žižek, *Antigone*, xxiv.

¹⁰⁴ Chapter 3 includes a discussion about the relationships between Indigenous peoples and their homelands, and consequently the ways in which “land dispossession” is inseparable from loss of culture, identity, spirituality, and ways of life.

example of a lawgiver who subscribes to principles of formal legality, particularly clarity and publicity. Notably, these principles make it more difficult for Creon to reverse his legal decision; the very fact that his decision is unambiguous and widely known means that recanting this law requires admitting that he changed his mind or made an error—he cannot blame a simple confusion or misunderstanding.¹⁰⁵ The fixedness of Creon’s position also highlights the violence of law *en-force-ment*, which is demonstrated by passages in which both Ismene and Antigone (respectively) lament that they are “forced” by Creon’s law to contradict their own agential impulses.

Throughout the play, various characters implore Creon to rethink his law, but these pleas go unheard (or at least unaccepted). This inaudibility highlights not only the parameters of what constitutes a legally acceptable argument (arguments perceived as “emotional,” as opposed to “logical,” are rejected), but also opens up discussions about power and politics that are often conspicuously absent in the formal legality literature. In Sophocles’ *Antigone*, the Chorus of citizens remains largely passive, and Antigone notes that this inaction is a result of Creon’s strict leadership and citizens’ corresponding fear.¹⁰⁶ In Žižek’s *Antigone*, the Chorus transforms into active agents in response to—not thanks to—the rule of law. Here the citizenry rejects both Creon *and* Antigone, and its members claim that they can speak for themselves. This turn of events foreshadows Chapter 3’s conversation about Indigenous resurgence and the Idle No More movement. The legal philosophers critiqued throughout this chapter suggest that legality enhances agency (“forms liberate”), but they generally homogenize and overlook “legal

¹⁰⁵ There is a parallel here between the challenges obstructing Creon from changing his law (to leave Polynices unburied) and the ways in which changes occur (or fail to occur) in a common law system. Within the common law, decisions which could be seen to contradict or reverse past decisions (e.g. laws against abortion or “sodomy”) are instead reframed as new interpretations or applications of old rules in order to avoid admitting errors or mistakes.

¹⁰⁶ Sophocles, *Antigone*, 84.

subjects” and the actual effects of the law. This chapter’s discussion of *Antigone*, and the subsequent chapter’s discussion of Indigenous dispossession, challenges readers to ask: *who composes* this synthesized group of “legal subjects,” or this allegedly uniform Chorus? Moreover, in what ways does the law foreclose their audibility and agency, and what might their *political* participation (engaging in open contestation in public time/space) look like?

Plot Overview of Antigone

Sophocles’ *Antigone* opens with Antigone’s despair about an “emergency decree”¹⁰⁷ issued by the new king, her uncle Creon. Creon became king after his two nephews, Eteocles and Polynices (Antigone’s brothers), killed each other in battle while fighting on opposite sides of a war. According to the Chorus, whereas Eteocles, “died fighting for Thebes” and shall be “buried, crowned with a hero’s honours,”¹⁰⁸ Polynices “thirsted to drink his kinsmen’s blood” and will be “left unburied, his corpse carrion for the birds and dogs to tear.”¹⁰⁹ Creon has declared that Eteocles will be given “all the rites” and “full military honors [sic],” while he has forbidden anyone to mourn Polynices or bury his body.¹¹⁰ Creon informs the people, “in no uncertain terms,” that whoever disobeys his decree will be punished by “stoning to death.”¹¹¹

Antigone asks her sister Ismene if she will help her give Polynices a proper burial. Ismene reminds Antigone that a “law forbids the city” from doing so,¹¹² and Antigone counters that although abstaining from burying Polynices might adhere to Creon’s decree, it would also

¹⁰⁷ Sophocles, *The Three Theban Plays: Antigone, Oedipus the King, Oedipus at Colonus*, trans. by Robert Fagles (New York: Penguin Books, 1982), 59.

¹⁰⁸ Sophocles, *Antigone*, 68.

¹⁰⁹ Sophocles, *Antigone*, 68.

¹¹⁰ Sophocles, *Antigone*, 60.

¹¹¹ Sophocles, *Antigone*, 60.

¹¹² Sophocles, *Antigone*, 61.

“dishonour the laws the gods hold in honor.”¹¹³ Ismene informs Antigone that she has “no strength” for “defy[ing] the city,”¹¹⁴ and Antigone chastises Ismene for her weakness and sets out to bury Polynices alone.¹¹⁵ After Antigone leaves, Ismene remarks that her sister is “wild” and “irrational.”¹¹⁶ Subsequently, the Chorus declares that the “traitor” will not be honoured “above the patriot” and that proving “loyalty to the state” is praiseworthy in life as well as death.¹¹⁷

Creon receives a message from one of his sentries that someone has performed burial rites for Polynices. The sentry informs Creon the scene was “as if someone meant to lay the dead to rest and keep [him] from getting cursed,” but none of the sentries know who did it.¹¹⁸ Later on, the sentry returns to Creon with Antigone in his custody. The Chorus, unsure about what Antigone has done, asks in awe: “did you break the king’s laws? Did they take you in some act of mad defiance?”¹¹⁹ When questioned by Creon, Antigone does not deny her actions, explicitly stating: “I did it.”¹²⁰ First, Creon asks Antigone if she was aware that the law forbade her actions, and she replies that she was “[w]ell aware” because “[i]t was public.”¹²¹ Next, Creon inquires about her audacity to wilfully break the law and she responds that Zeus did not make the decree (to leave Polynices unburied) and she does not believe that he, “a mere mortal, could override the gods.”¹²²

¹¹³ Sophocles, *Antigone*, 63.

¹¹⁴ Sophocles, *Antigone*, 63.

¹¹⁵ Sophocles, *Antigone*, 64.

¹¹⁶ Sophocles, *Antigone*, 64.

¹¹⁷ Sophocles, *Antigone*, 68.

¹¹⁸ Sophocles, *Antigone*, 71.

¹¹⁹ Sophocles, *Antigone*, 78.

¹²⁰ Sophocles, *Antigone*, 81.

¹²¹ Sophocles, *Antigone*, 81.

¹²² Sophocles, *Antigone*, 82.

Antigone knows that the penalty for her actions is death, but she says that she would rather be put to death than live with the agony of leaving her brother to rot.¹²³ Here, the Leader of the Chorus remarks that Antigone is “passionate” and “wild.”¹²⁴ Creon responds that Antigone “overrode the edicts we made public” and moreover she mocks him by glorifying her crimes.¹²⁵ Antigone counters that tyrants are the lucky “perquisites of power” because they can transform their will into law.¹²⁶ Although Creon claims that Antigone is the only person in Thebes who feels this way, Antigone contradicts him, saying to Creon that they see things her way too but “defer to you [Creon] and keep their tongues in leash.”¹²⁷ Next, Antigone and Creon succinctly state their positions; for Antigone “[d]eath longs for the same rites for all” whereas for Creon “[n]ever the same for the patriot and the traitor.”¹²⁸ The Chorus foretells that although “[Creon’s] law prevails,” mortals cannot wield such power “free and clear of ruin.”¹²⁹

Haemon, Creon’s son and Antigone’s betrothed, enters the scene and has a discussion with his father. Creon explains to Haemon that he must execute Antigone for her crimes because when orders are not obeyed “Anarchy” ensues,¹³⁰ and he must “defend the men who live by law.”¹³¹ Haemon replies that Creon ought not be so “single-minded” and “self-involved.”¹³² Moreover, Haemon tells Creon that he is unwise to “be too rigid,”¹³³ but Creon counters that the “city is the king’s—that’s the law!”¹³⁴ and Haemon storms out.

¹²³ Sophocles, *Antigone*, 82.

¹²⁴ Sophocles, *Antigone*, 82.

¹²⁵ Sophocles, *Antigone*, 83.

¹²⁶ Sophocles, *Antigone*, 84.

¹²⁷ Sophocles, *Antigone*, 84.

¹²⁸ Sophocles, *Antigone*, 85.

¹²⁹ Sophocles, *Antigone*, 92.

¹³⁰ Sophocles, *Antigone*, 94.

¹³¹ Sophocles, *Antigone*, 94.

¹³² Sophocles, *Antigone*, 95.

¹³³ Sophocles, *Antigone*, 96.

¹³⁴ Sophocles, *Antigone*, 97.

Antigone is brought before Creon in preparation for her death. She laments that she is “forced by such crude laws” to go to her grave.¹³⁵ The Chorus remarks that “attacks on power never go unchecked, not by the man who holds the reins of power,” and also claims that “passion” destroyed Antigone.¹³⁶ Antigone asks aloud: “[w]hat law of the mighty gods have I transgressed?” and Creon orders the guards to take her away and seal her in a tomb to die.¹³⁷

After Antigone has been entombed, Tiresias (a prophet) comes to see Creon, and warns him about the ominous vision he has seen. Tiresias tells Creon that his “high resolve [...] sets this plague on Thebes,”¹³⁸ and goes on to say that:

All men make mistakes, it is only human. But once the wrong is done, a man can turn his back on folly, misfortune too, if he tries to make amends, however low he’s fallen, and stops his bullnecked ways.¹³⁹

Creon insults and dismisses Tiresias and resolves to continue down the path he has started on. The Leader of the Chorus reminds Creon that Tiresias has never lied before, and Creon admits that he is “shaken, torn.”¹⁴⁰ However, although Creon feels a sense of dread, he states that to resist now and “yield” would ruin his pride, which would be dreadful too.¹⁴¹ Creon asks for the Leader’s advice, and The Leader urges Creon to free Antigone from the tomb, give Polynices a proper burial, and make amends. Creon replies that “givi[ng] in”¹⁴² goes against his “heart’s desire,” but that he will do it because he now believes that he is “fighting a losing battle.”¹⁴³

However, Creon’s decision to reverse his orders comes too late. When he enters Antigone’s tomb, he finds that she hanged herself and is now dead. Haemon wails in grief and

¹³⁵ Sophocles, *Antigone*, 103.

¹³⁶ Sophocles, *Antigone*, 104.

¹³⁷ Sophocles, *Antigone*, 106.

¹³⁸ Sophocles, *Antigone*, 111.

¹³⁹ Sophocles, *Antigone*, 112.

¹⁴⁰ Sophocles, *Antigone*, 116.

¹⁴¹ Sophocles, *Antigone*, 116.

¹⁴² Sophocles, *Antigone*, 116.

¹⁴³ Sophocles, *Antigone*, 117.

lunges at Creon with a sword, but Haemon misses and subsequently decides to end his own life instead. Haemon impales himself with his blade and then embraces Antigone with his dying breath. The Chorus remarks that Creon has shown the world that “of all the ills afflicting men the worst is lack of judgment.”¹⁴⁴ Whereas Antigone’s behaviour was initially described as an “act of mad defiance,”¹⁴⁵ the Leader (of the Chorus) declares that it is Creon who is now mad, and that his “madness” led to this tragedy.¹⁴⁶ In his grief, Creon bemoans that his “crimes,” “stubborn[ness],” “mad fanatic heart,” and “stupidity” led to his misery.¹⁴⁷ There is one final death before the tale ends: Eurydice, Creon’s wife and Haemon’s mother, takes her own life after the news of her son’s death. In the end, Creon, now a broken man, cries that “the guilt is all mine [...] I killed you [...] I admit it all!”¹⁴⁸ but this revelation comes too late to save Antigone, Haemon, or Eurydice.

Analysis of Antigone

In *Antigone*, Creon, King of Thebes, represents state law in the sense of “King as lawgiver” to the State (as opposed to, potentially, the laws of the gods). Even though the play was produced around 441 B.C.,¹⁴⁹ one can still see an emphasis on some aspects of Fuller’s “laundry list” of rule of law principles.¹⁵⁰ In particular, clarity and publicity seem to be considered significant criteria for making a law official. Regarding clarity, Antigone notes that Creon has been informing people “in no uncertain terms” that “Whoever disobeys [the law] in

¹⁴⁴ Sophocles, *Antigone*, 123.

¹⁴⁵ Sophocles, *Antigone*, 78.

¹⁴⁶ Sophocles, *Antigone*, 124.

¹⁴⁷ Sophocles, *Antigone*, 124.

¹⁴⁸ Sophocles, *Antigone*, 126.

¹⁴⁹ Bernard Knox, “Introduction to Antigone,” in Sophocles, *The Three Theban Plays: Antigone, Oedipus the King, Oedipus at Colonus*, trans. by Robert Fagles (New York: Penguin Books, 1982), 35.

¹⁵⁰ Waldron, “Essentially Contested Concept,” 154.

the least will die....”¹⁵¹ Furthermore, the clarity of the law is never challenged; when Antigone is brought in for questioning and asked, “[w]ere you aware a decree had forbidden [Polynices’ burial]?,” she replies, “[w]ell aware.”¹⁵² Additionally, the principle of publicity seems to be an important criterion for legal validity in *Antigone*. In her initial conversation with Creon, Antigone affirms that she could not have avoided knowledge of the law because “[i]t was public.”¹⁵³ Later on, Creon states that “she overrode the edicts we made public.”¹⁵⁴ Here, the concern is not only that she broke the law, but also that she broke a law that was commonly known. Thus, the “publicity” of the law is not only a criterion for legal validity, but also an obstacle to Creon’s discretion; if Creon were to pardon Antigone’s actions, then all of Thebes might feel licensed to defy the law as well.

As the representative of state law, Creon also embodies the qualities of certainty and predictability that are characteristic of legal positivism (which, I have argued, includes Fuller’s IML thesis). Early on in the play, Creon’s decree is established as fixed, rigid, and unwavering. His uncompromising position is articulated by Ismene: “[w]hoever disobeys in the least will die, his [sic] doom is sealed....”¹⁵⁵ Ismene (who arguably represents the dominant law-abiding ideology) implies that there is nothing she nor Antigone can do for Polynices because of the “fixed decree of the throne” (emphasis added), imploring that they “must be sensible.”¹⁵⁶ Creon reiterates the fixity of his position when he asks Haemon: “you’ve heard the final verdict on your bride?”¹⁵⁷ Haemon, in turn, urges Creon to “give way” and “change!” but Creon is unyielding.¹⁵⁸

Later on in the play, Tiresias warns Creon that his “high resolve” is causing disaster, and also

¹⁵¹ Sophocles, *Antigone*, 60.

¹⁵² Sophocles, *Antigone*, 81.

¹⁵³ Sophocles, *Antigone*, 81.

¹⁵⁴ Sophocles, *Antigone*, 83.

¹⁵⁵ Sophocles, *Antigone*, 60.

¹⁵⁶ Sophocles, *Antigone*, 62.

¹⁵⁷ Sophocles, *Antigone*, 93.

¹⁵⁸ Sophocles, *Antigone*, 96.

that “[s]tubbornness brands [him] for stupidity – pride is a crime.”¹⁵⁹ Nonetheless, against the pleas and distress of those around him, Creon adheres to the clear, public, and official law that he decreed.

Far from enhancing the agency of the characters (“legal subjects”) involved, *Antigone* highlights how law en-*force*-ment (referred to by Derrida) is inherently violent. From the play’s opening, Ismene establishes the typical position of someone who wants to do what she feels is just, but she dares not disobey the law. As she says to Antigone, “I, for one, I’ll beg the dead to forgive me – I’m *forced*, I have no choice – I must obey the ones who stand in power” (emphasis added).¹⁶⁰ It is probably easy to dismiss Ismene for being weak compared to Antigone; however, her character seems quite realistic because, faced with the prospect of almost certain death for disobedience, many people would likely feel that they “had no choice” but to obey the law. Although the force of Creon’s decree is not enough to stop Antigone from her defiance, she still feels the violence of the law when it comes time for her punishment. She cries: “*forced* by such crude laws I go to my rockbound prison...” (emphasis added).¹⁶¹ According to Derrida, enforcing laws as advertised always entails some violence, but for Antigone this violence is overt and extreme: she is sentenced to death. Creon generalizes the problematic logic of formal legality when he states that authorities’ laws “must be obeyed, large and small, right and wrong.”¹⁶² Again, we see that even if laws are made the “right” way (e.g. clear, public, not retroactive, etc.), the argument that their certainty/predictability enhances agency is troubling, and the argument that enforcing laws entails violence is rather persuasive.

¹⁵⁹ Sophocles, *Antigone*, 111-112.

¹⁶⁰ Sophocles, *Antigone*, 68.

¹⁶¹ Sophocles, *Antigone*, 103.

¹⁶² Sophocles, *Antigone*, 94.

Toward the play's end, the Chorus informs the audience of Creon's lesson: "of all the ills afflicting men the worst is lack of judgment."¹⁶³ This line helps audiences understand both the tragedy in *Antigone*, as well as the problem with transferring the scientific principles of certainty and predictability to human conflicts involving emotional responses. Scholars have critiqued legal arguments for reducing complex debates to simple yes/no or for/against binaries,¹⁶⁴ and for attempting to enforce a false boundary between "reason" and "emotion."¹⁶⁵ An instructive lesson in *Antigone* is that there is a dimension beyond arguing what is legally (or logically) "right" and "wrong" that the law often fails to touch. Creon is "legally right" in the sense that he is the King, and thus the lawgiver of Thebes. He is also championing the law—his law—and the need for legal stability in part because he is trying to prevent further conflict (after the battle that resulted in Eteocles and Polynices killing each other). However, sometimes being "legally right" should not be the most important concern, and there are other dimensions (involving emotion, affect, empathy, etc.) that do not permeate the confines of what constitutes a legally acceptable argument—but perhaps they should.¹⁶⁶

¹⁶³ Sophocles, *Antigone*, 123.

¹⁶⁴ Wendy Brown and Janet E. Halley, "Introduction," in *Left Legalism/Left Critique*, ed. by Wendy Brown and Janet E. Halley (Durham: Duke University Press, 2002), 19.

¹⁶⁵ Rebecca Johnson, "Television, Pleasure and the Empire of Force: Interrogating Law and Affect in *Deadwood*," in *Law and Justice on the Small Screen*, ed. by Peter Robson and Jessica Silbey (Oxford: Hart Publishing, 2012), 37-38.

¹⁶⁶ For an excellent discussion about what types of arguments are included and excluded in legal processes, see Orit Kamir's article "Cinematic Judgment and Jurisprudence." In this article, Kamir argues that "[l]egal truth and legal guilt can only be determined on the basis of hard evidence beyond a reasonable doubt, which Paulina [the film's protagonist and rape survivor] cannot supply." (36) Paulina is also deemed too "emotionally unstable" to provide admissible evidence. (36) Moreover, Kamir reflects on the "judgmental aspect" and "inherent violence" of the law." (43) Kamir's work will reappear in the fifth and final chapter of the dissertation, which explores the ideology of superhero shows and their implications for tolerated illegality with the help of law and film scholarship. (Orit Kamir, "Cinematic Judgment and Jurisprudence: A Woman's Memory, Recovery and Justice in a Post-Traumatic Society (a Study of Polanski's *Death and the Maiden*)," in *Law on the Screen*, ed. by Austin Sarat, Douglas and Martha Umphrey (Princeton: Princeton University Press, 2005)

In his conversation with Creon, Haemon urges his father not to be so “single-minded,”¹⁶⁷ and “rigid.”¹⁶⁸ For Creon, the law is clear and well known and Antigone violated it—these are the *facts*. Haemon, however, is operating on a more emotional register. He does not dispute the form or contents of the law, or the fact that Antigone broke it, but rather he implores Creon to think about the *human beings* involved and the foreseeable personal consequences. Creon’s “lack of judgment” had little to do with judging facts, but rather pertains to the limitations placed on the scope of acceptable arguments in the judging process. Moreover, the irony of his dismissal of arguments stemming from anguish and distress is that his decree to leave Polynices’ body for “the birds and dogs to tear”¹⁶⁹ was quite likely an emotional reaction to his nephew’s perceived traitorship. Arguably, part of why Creon did not yield to Antigone’s grief was because he was unwilling to acknowledge his own anger towards his nephew for betraying Thebes and his niece defying his authority. In the end, tormented, Creon cries out that his “crimes” of “stubbornness” and “stupidity” led to his misery.¹⁷⁰ As the representative of state law, Creon also had the ability to change the law. However, Creon chose legal stability over empathic compromise, possibly due in part to the recent battle, as well as the desire to prevent another one. Nonetheless, the tragedy of Antigone helps raise questions about what arguments do (or do not) penetrate the dominant rule of law paradigm in legal decision-making, as well as the pain experienced by those whose voices go unheard.

The Chorus of Citizens

As already mentioned, one troubling aspect of analytical legal philosophy arguments

¹⁶⁷ Sophocles, *Antigone*, 95.

¹⁶⁸ Sophocles, *Antigone*, 96.

¹⁶⁹ Sophocles, *Antigone*, 68.

¹⁷⁰ Sophocles, *Antigone*, 124.

supporting formal legality is that they tend to lump all people involved into the homogenous category of “legal subjects,” suggesting that the same dependable system of rules should generally enhance everyone’s agency alike. Relatedly, in *Antigone* the people of Thebes are basically indistinguishable and represented by the Chorus, which mostly provides simplistic commentary and remains passive. In both examples, “the people” are an undifferentiated mass that stays largely in the background. As Žižek puts it, in Sophocles’ original play, the Chorus is “the purveyor of stupid commonplace wisdoms.”¹⁷¹ Žižek’s rewriting of *Antigone* explores what could happen if people really did enact their agency, agency that was not bestowed on them thanks to the certainty and predictability of the law, but rather agency that they possessed all along and that they could use to resist this very system of formal legality.

In Žižek’s third alternative ending of the play, the members of the Chorus transform into active agents. They announce that the “suffering people of Thebes” are “tired of standing in the shadow.”¹⁷² Creon asks them if this means that they are taking Antigone’s side, but they reply that they are “step[ping] forward against both of [them].”¹⁷³ Their plan is to “take over as a collective organ and impose a new rule of law, deciding together.”¹⁷⁴ More specifically, the members of the Chorus intend to transform Thebes into “a people’s court,” so that the city can “start breathing normally.”¹⁷⁵ In Žižek’s ending, Creon defends himself, claiming that he was just trying “to control the damage, as a master enforcing law and order.”¹⁷⁶ The Chorus rebuts that he was trying to impose a “false order” and argues that a “true order, on the contrary, creates

¹⁷¹ Žižek, *Antigone*, xxiv.

¹⁷² Žižek, *Antigone*, 25.

¹⁷³ Žižek, *Antigone*, 25.

¹⁷⁴ Žižek, *Antigone*, 25.

¹⁷⁵ Žižek, *Antigone*, 25.

¹⁷⁶ Žižek, *Antigone*, 26.

the space of freedom for all citizens.”¹⁷⁷ Afterwards, Creon is taken away and is no longer in charge of Thebes.

Antigone addresses the Chorus and claims that she is on their side. She tells the Chorus that in challenging Creon’s law she was attempting to give a voice “to all those who are excluded.”¹⁷⁸ However, the Chorus replies that “the excluded don’t need sympathy or compassion from the privileged,” and “they don’t want others to speak for them.”¹⁷⁹ In speaking on behalf of the people, the Chorus argues that Antigone “deprived [the People] of their voice.”¹⁸⁰ Ultimately, the third ending concludes with the Chorus rejecting Antigone and reiterating that people must “rule themselves collectively.” Thus, Žižek’s third alternative ending for Sophocles’ *Antigone* reminds readers that there is an entire citizenry in Thebes, beyond the few characters in the play, and citizens’ agency does not necessarily stem from law, but rather becomes visible as a reaction to, and in spite of, the rule of law.

Conclusion: Antigone and Tolerated Illegality

Rather than being understood monolithically as a harmful occurrence (as the formal legality framework implies), tolerated illegality can also be understood to facilitate desirable agency. Sometimes tolerated illegality can be a manifestation of people enacting their agency rather than following the law. Too many legal philosophers argue in favour of certainty and predictability without considering that knowing where one stands in relation to the law might not enhance agency. The argument that agency is generally increased by the certain application of legal rules is problematically paradoxical in suggesting that fixed laws enhance autonomy and

¹⁷⁷ Žižek, *Antigone*, 26.

¹⁷⁸ Žižek, *Antigone*, 27.

¹⁷⁹ Žižek, *Antigone*, 27.

¹⁸⁰ Žižek, *Antigone*, 27.

decision-making. If laws are alienating and oppressive, then knowing where one stands in relation to the law is not agency-enhancing; rather than increase people's capacity to make choices, certain and predictable laws often foreclose agency and limit people's scope of possible actions.

Was there an example of "tolerated illegality" in Sophocles' *Antigone*? One could easily reply that there was not; Antigone's deeds were not tolerated and she was punished for her defiance. However, there is a way to reframe the analysis. Thinking beyond the law of the state, one could argue that Creon's decree to leave Polynices buried, and its widespread acceptance across Thebes (not challenged by the majority of citizens), is a tolerated illegality. Consider the following passage from the play in which Antigone defends her actions as legally valid according to the laws of the gods, laws that transcend "manmade" decrees:

CREON: And still you had the gall to break this law?

ANTIGONE: Of course I did. It wasn't Zeus, not in the least, who made this proclamation—not to me. Nor did that Justice, dwelling with the gods beneath the earth, ordain such laws for men. Nor did I think your edict had such force that you, a mere mortal, could override the gods, the great unwritten, unshakable traditions. They are alive, not just today or yesterday: they live forever, from the first time, and no one knows when they first saw the light. These laws—I was not about to break them, not out of fear of some man's wounded pride...¹⁸¹

Similarly, in the subsequent passage (a conversation between Creon and Haemon) Haemon reframes the events that transpired and, like Antigone, puts her actions in a more cosmological context. Below, Haemon calls Creon the "criminal," and claims that Creon is violating the "honors of the gods:"

CREON: Why, you degenerate—branding accusations, threatening me with justice, your own father!

HAEMON: I see my father offending justice—wrong.

CREON: Wrong? To protect my royal rights?

¹⁸¹ Sophocles, *Antigone*, 81-82.

HAEMON: Protect your rights? When you trample down the honors of the gods?
 CREON: You, you soul of corruption, rotten through—woman’s accomplice!
 HAEMON: That may be, but you will never find me accomplice to a criminal.
 CREON: That’s what *she* is, and every word you say is a blatant appeal for her—
 HAEMON: And you, and me, and the gods beneath the earth.^{182,183}

In both of these excerpts Creon is branded as the offender, as the one who broke the ancient laws of the gods when he ordered that Polynices’ body remain unburied. Although Antigone, Haemon (and arguably Tiresias too) challenge Creon’s law, the citizens of Thebes seem to be largely apathetic; representing the voice of the citizenry, the Chorus does ultimately express concerns about Creon’s actions, but these concerns take the form of commentary rather than intervention. If there are “natural” laws that supersede state law, and Creon broke these laws, then his actions can be framed as a tolerated illegality because they were met with minimal resistance across the city of Thebes.

Thinking through this “tolerated illegality” in *Antigone* allows us to problematize the framework of state-made law as the standard for what constitutes “legal” versus “illegal” actions. This expansion introduces new questions into the analysis regarding who gets to create laws, who must tolerate or follow them, and who decides what is “tolerable.” The subsequent chapter continues to follow this type of thinking as it considers the dispossession of Indigenous peoples of their lands as the foundational tolerated illegality in Canadian socio-legal history. Chapter 3

¹⁸² Sophocles, *Antigone*, 98.

¹⁸³ Despite all of the scholarship about *Antigone* that has been produced, in her book *Antigone, Interrupted*, Bonnie Honig explores an as yet unnoticed aspect of *Antigone*: the role of interruptions. Honig considers the significance of interruptions as intrusions, collaborations, signs of power, and political interventions. Whereas Honig largely focuses on interruptions pertaining to Antigone herself (on page 6, Honig outlines four key times the heroine is interrupted both in words and actions), the passage above is an example of Haemon verbally interrupting Creon (when Haemon jumps in and adds: “And you, and me, and the gods beneath the earth”). Haemon’s interruption is not the collaborative kind (“a kind of conversational co-stewardship” or the process of “knit[ting] together a conversation in tandem”), but rather an “intrusion,” as when one party is forced to “yield the floor.” (13) What might Haemon’s interruption of Creon mean in this scene? Perhaps the interruption adds a dramatic emphasis to Haemon’s point (he is not arguing on behalf of Antigone alone, but rather on behalf of all who ought to respect and fear the gods, including the two of them). Perhaps it is meant to convey a subtle shift in power as Haemon’s position gains a little more traction, or maybe Haemon’s interruption is ominous as it foreshadows events to come. (Honig, *Antigone, Interrupted*, 6 & 13)

will develop the idea that the Canadian state, widely believed by many to be the source and authority of law in Canada, is guilty of perpetrating an illegality that remains “tolerated” (or, perhaps, is “made tolerable”) today. Like the people of Thebes, some Canadians remain ignorant or indifferent, while others may agree that this situation is unjust but ultimately remain largely passive. The consequence is that the State’s crimes against Indigenous peoples continue to be, in a sense, largely “tolerated” to this day. ✪

CHAPTER 3: CANADA'S FOUNDATIONAL TOLERATED ILLEGALITY

...I suggest that critically holding on to our anger and resentment can serve as an important emotional reminder that settler-colonialism is still very much alive and well in Canada, despite the state's repeated assertions otherwise.¹

The dispossession and removal of Indigenous Peoples from our homelands so that these homelands can be exploited for large-scale natural resource development is the end goal of Canadian colonialism whether it's 1876 or 2013 [or 2018].²

As discussed in the introduction to the thesis, “tolerated illegality” is a broad phrase that has an abstract and flexible meaning and encompasses a multitude of different actions and inactions. Accordingly, discussions about tolerated illegality touch on a variety of topics in everyday conversation, such as: jaywalking, speeding, texting while driving, marijuana use, prostitution regulations, financial crime, corporate disregard for environmental policies, and more. However, this chapter takes a different perspective on tolerated illegality by disrupting popular assumptions about the law and the State. Whereas almost all Canadians are taught from a young age that the State upholds the law and punishes those who break it (for their own protection and greater societal wellbeing), historically, few young Canadians have been taught about the State's own crimes and its failure to be held accountable.

This chapter turns to the major tolerated illegality in Canadian socio-legal history, which is the dispossession of Indigenous peoples of their lands, the corresponding deprivation of culture and ways of life, and the subsequent physical and cultural genocide. This multifaceted tolerated illegality differs from the examples that commonly arise in conversations because

¹ Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014), 128.

² Leanne Simpson, “The PKOLS reclamation: Saturating Our Land With Stories,” in *The Winter We Danced: Voices from the Past, the Future, and the Idle No More Movement*, ed. by the Kino-nda-niimi Collective (Winnipeg: Arp Books, 2014), 362.

rather than operating within the confines of the existing legal order it questions the legitimacy of that order itself. Whereas the examples listed above are deemed “illegal” based on Canadian state law, the dispossession of Indigenous peoples of their lands calls into question the legality of the Canadian state, and raises the questions: Whose law? Who has power and authority? Who gets to recognize? Who has to tolerate?

This chapter draws on the work of three Indigenous scholars: Taiaiake Alfred, Leanne Simpson, and Glen Coulthard. I focus on these three scholars because they are in dialogue with one another and they are part of an important conversation about Indigenous *resurgence* (a concept that will be discussed in part IV of this chapter). Alfred, Simpson and Coulthard agree that seeking State recognition, and the “politics of recognition” paradigm in general, has not worked and will not work, and we need to encourage and support Indigenous resurgence movements outside of State channels and formal institutions. As Coulthard explains, the common vision that Alfred and Simpson share is that they “start from a position that calls on Indigenous people and communities to ‘turn away’ from the assimilative reformism of the liberal recognition approach....”³ The call to “turn away” suggests abandoning the goal of seeking recognition from the State institutions that continue the process of colonization. In his review of Coulthard’s *Red Skin, White Masks*, Kan’ayaam/Chachim’multhnii (Cliff Atleo, Jr.) writes that Coulthard, “joins Leanne Simpson, Taiaiake Alfred and others in a small but growing canon of resurgent Indigenous literature that promises to keep disrupting colonial lines of power and demanding a better future for all Indigenous peoples....”^{4,5} Because of their convincing critiques

³ Coulthard, *Red Skin, White Masks*, 154.

⁴ Cliff Atleo Jr. (Kan’ayaam/Chachim’multhnii), “*Red Skin, White Masks*: A Review,” *Decolonization: Indigeneity, Education & Society* 3, no. 2, (2014): 193-194.

⁵ In his review, Cliff Atleo, Jr (Kan’ayaam/Chachim’multhnii) also writes that, “A book hasn’t generated this much excitement in Indigenous academic and activist circles since Leanne Simpson’s *Dancing on our Turtle’s Back* or

of the politics of recognition and their ongoing commitment to Indigenous resurgence, Alfred, Simpson and Coulthard are the three scholars I will discuss in this chapter on Canada's foundational tolerated illegality.

Two final notes on this chapter: the first on methodology and the second on audience reception. Firstly, this chapter relies heavily on direct quotations. The reason for this choice is that I want to highlight Indigenous scholars' voices and foreground their words. My aim is to let this trio of Indigenous resurgence scholars articulate why and how the crimes committed by the State against Indigenous peoples have not been righted and continue to be tolerated today. Secondly, Indigenous peoples and their allies (both inside and outside of academia) who have worked tirelessly for justice through State channels may find this chapter contentious. As Coulthard writes early on in *Red Skin, White Masks* regarding the thesis of the book:

This argument will undoubtedly be controversial to many Indigenous scholars and Aboriginal organization leaders insofar as it suggests that much of our efforts over the last four decades to attain settler-state recognition of our rights to land and self-government have in fact encouraged the opposite—the continued dispossession of our homelands and the ongoing usurpation of our self-determining authority.⁶

This is not to say that nothing useful can be achieved via state and legal systems, but rather that confronting colonialism from within state channels tends to leave the coordinates of colonialism intact. The type of critique found in Alfred, Simpson, and Coulthard's work, and hopefully in this chapter as well, is necessary to challenge present approaches that are not resulting in the desired long-term change sought by Indigenous peoples and their allies. As Coulthard puts it, it is time to redirect energy toward a "*resurgent politics*" (original emphasis).⁷

This chapter will proceed as follows. I will begin with a brief discussion about

Taiaiake Alfred's *Wasáse*, which is fitting as Glen Coulthard's new book is very much in the same political vein." (Atleo Jr., "Review," 187)

⁶ Coulthard, *Red Skin, White Masks*, 24.

⁷ Coulthard, *Red Skin, White Masks*, 24.

terminology and word choice in conversations about Indigenous–State relations. Next, Part I frames the dispossession of Indigenous peoples of their lands as a “tolerated illegality,” and uses this notion as a way to think about the past and ongoing crimes committed against Indigenous peoples by the State and its beneficiaries. Part II discusses the ways in which the Canadian State’s actions were and are “illegal.” Firstly, the concept of *terra nullius* is a “racist legal fiction”⁸ that allows beneficiaries of colonization to justify past and current injustices. Secondly, people often claim treaties have been made between Indigenous peoples and the Canadian state so nothing “illegal” has transpired. Finally, dispossessing Indigenous peoples of their homelands can also be framed as unlawful based on conceptions of natural law and international law.

Part III discusses the ways in which the Canadian state’s crimes against Indigenous peoples continue to be “tolerated” (or perhaps, more accurately, are “made tolerable”).⁹ This section discusses multiple arguments regarding recognition and reconciliation processes, including critiques of: the temporality of recognition processes, the “industry” dedicated to reconciliation processes, the State-led approach to forgiveness, and the reliance on legal Courts for change. Part IV looks at the concept of Indigenous *resurgence* and considers how resurgence movements offer ideas for resisting the State’s ongoing colonization.¹⁰ The “Idle No More” movement, although not problem-free, nonetheless offers an example of what Indigenous

⁸ Coulthard, *Red Skin, White Masks*, 175.

⁹ Related to the idea that crimes against Indigenous peoples are “made tolerable,” Audra Simpson writes about the techniques that “sustain” Indigenous dispossession and occupation. She states: “These techniques—occupying, treating, forceful elimination, containment, assimilation, the coterminous logics and practices and languages of race and civilization, the practice of immigration (called such in the United States and Canada, rather than ‘settlement’), the legal notion of natal right, and presumptions of just occupancy—all form the fulcrum of settlement’s labor [sic] (and its imaginary) as well as a whole host of other self-authorizing techniques and frameworks that *sustain* dispossession and occupation.” (21) (Audra Simpson, *Mohawk Interruptus: Political Life Across the Borders of Settler States* (Durham: Duke University Press, 2014))

¹⁰ That being said, it is also important not to remove individual responsibility by putting all of the blame on the State; saying “it is the government’s fault” displaces responsibility from Canadian citizens onto the State and dissolves settler guilt. In order for decolonization to happen, settler-Canadians need to be more aware and involved. Although the State needs to be held accountable for ongoing colonial oppression, it is not enough to focus solely on the government without also considering who continues to benefit from the government’s actions (or lack thereof).

resurgence might look like. The idea of resurgence entails a power surge, from a seemingly quiet or dormant source, that brings repressed power to the foreground.

LANGUAGE AND TERMINOLOGY

Before proceeding, I will discuss a concern regarding language and terminology, which is that multiple terms invoked in discussions about the relationship between Indigenous peoples and the Canadian state are contested and/or disliked by many Indigenous peoples and their allies. To begin, one important contested concept is “colonialism.”¹¹ Alfred and Erin Michelle Tomkins define colonialism as, “a system of domination that involves the destruction and/or theft of Indigenous forms of governance, economies, spiritualities, resources, legal systems, territories, languages, values, goals and perspectives, and efforts to supplant them with those of the colonial power through violent means.”^{12,13} Alfred’s definition emphasizes that the concept of colonialism is diffuse and permeates many facets of the lives of Indigenous peoples. Colonialism is not limited to land theft and displacement of peoples from their homelands but also extends to Indigenous ways of living, being, and knowing.

Relatedly, Coulthard defines a “settler-colonial relationship” as “one characterized by a particular form of *domination*; that is, it is a relationship where power [...] has been structured into a relatively secure or sedimented set of hierarchical social relations that continue to facilitate

¹¹ Taiaiake Alfred and Erin Michelle Tomkins, “The Politics of Recognition: A Colonial Groundhog Day,” *Discussion Paper, prepared for Chiefs of Ontario* (August 25, 2010): 4.

¹² Alfred and Tomkins, “Groundhog Day,” 4.

¹³ For two more definitions of “colonialism” see also: (1) “The invasion, seizing control and exploitation of Indigenous land and populations by successive generations of non-indigenous people, and the institutionalizing of this situation into a form of government and law” (Alfred and Tomkins, “Groundhog Day,” 3); and (2) “a process of disconnecting [Indigenous peoples] from our responsibilities to each other and our respect for one another, our responsibilities and our respect for the land, and our responsibilities and respect for the Culture.” (Taiaiake Alfred, “Pathways to an Ethnic Struggle,” *Canadian Dimension* 41, no. 1 (Jan/Feb 2007): 36)

the *dispossession* of Indigenous peoples of their land and self-determining authority”¹⁴ (original emphasis). An important aspect of Coulthard’s definition is the temporality of colonialism. Many Canadians may wish to situate Canada’s history of colonial violence in the past, but Coulthard’s definition affirms that colonialism continues to disempower Indigenous peoples and support state beneficiaries today.

Colonial power and domination are latent and diffuse, and take a variety of implicit and indirect forms. Alfred and Jeff Corntassel provide a useful definition of “contemporary colonialism” that highlights the idea that fighting colonialism, today more than ever, often means facing an invisible enemy. They explain that contemporary colonialism is “a form of post-modern imperialism in which domination is still the Settler imperative but where colonizers have designed and practice more subtle means.”¹⁵ The “subtle means” of contemporary colonialism can make it seem as though past wrongs have been righted, and that colonialism’s dominating grip has loosened, when in fact its tactics have merely become more evasive.

Colonialism’s indirect violence¹⁶ and subtle means of exerting power make it an elusive force that continues to oppress while remaining largely hidden. Simpson conveys this point brilliantly in her short story, “gezhizhwazh.” This story is about a woman, called gezhizhwazh, who was credited with killing the last wiindigo.¹⁷ When she defeated the wiindigo it was a historic victory and everyone celebrated and rejoiced. But gezhizhwazh never truly believed that the conflict was over. As time went by, people began to think that the wiindigo were only ever a

¹⁴ Coulthard, *Red Skin, White Masks*, 7.

¹⁵ Taiaiake Alfred and Jeff Corntassel, “Being Indigenous: Resurgences against Contemporary Colonialism,” *Government and Opposition* 40, no. 4 (2005): 597.

¹⁶ In *Dancing On Our Turtles’ Back* Leanne Simpson recounts that, “we had all indirectly, or directly, experienced the violence of colonialism, dispossession and desperation at one time or another.” (Leanne Simpson, *Dancing on our Turtle’s Back: Stories of Nishnaabeg Re-Creation, Resurgence and a New Emergence* (Winnipeg: Arp Books, 2011), 11)

¹⁷ In *Dancing on Our Turtles Back* Simpson explains that “[i]n contemporary times, Wiindigo is often used to refer to colonization and its capitalist manifestations, particularly around natural resources” (Simpson, *Dancing*, 70).

myth and never really existed. However, gezhizhwazh knew that the wiindigo were not truly gone. She discovered that the wiindigo had not actually disappeared, but rather had regrouped and adopted a new strategy; they were cleverer and sneakier this time, and seemingly impossible to fight. gezhizhwazh realized that the wiindigo were putting a tiny hole inside the heart of every newborn baby so that babies were born with an emptiness inside them that they would spend their whole lives trying to fill.¹⁸

The story of gezhizhwazh speaks to hidden modes of colonialism and its internalized and normalized effects. In *Dancing On Our Turtles' Back*, Simpson recounts that “we had all indirectly, or directly, experienced the violence of colonialism, dispossession and desperation at one time or another.”¹⁹ This *indirect violence* is often a faceless enemy that is difficult to combat. Simpson also talks about the “shame that is rooted in the humiliation that colonialism has heaped on our peoples for hundreds of years and is now carried within our bodies, minds and our hearts.”²⁰ Across these works, Simpson conveys the deceptive mechanisms of contemporary colonial violence and their devastating effects. This understanding of colonialism is pertinent to discussions about how the State’s crimes against Indigenous peoples continue to be “tolerated” today.

Another commonplace term that is rejected by many Indigenous peoples is “aboriginal.” The term “aboriginal” was created by settler-Canadians and is frequently associated with, and invoked by, the Canadian state and legal system. Alfred’s “First Nation Perspectives on Political Identity” documents Indigenous peoples’ thoughts on, and reactions to, the word “aboriginal.”²¹ Although I will not provide an exhaustive review of Indigenous peoples’ responses to the word

¹⁸ Leanne Simpson, *Islands of Decolonial Love: Stories & Songs* (Winnipeg: Arp Books, 2013), 108-112.

¹⁹ Simpson, *Dancing On Our Turtles' Back*, 11.

²⁰ Simpson, *Dancing On Our Turtles' Back*, 13.

²¹ Alfred, Taiaiake, “First Nation Perspectives on Political Identity,” *First Nation Citizenship Research & Policy Series: Building Towards Change* (June 2009): 23-27 & 35.

“aboriginal” in this chapter, here are a couple of illustrative replies: (1) “Aboriginal is a government appointed term [...] manifested without consultation by the federal government to oppress Indigenous peoples further, by removing their inherent identities and framing their identities in a colonial origin” (Angela Grier, a Blackfoot woman);²² and (2) “Aboriginal to me is more of an academic and political construct of ‘other’” (Nuskmata, Jacinda Mack, a woman from the Nuxalk Nation).²³ Additionally, a particular highlight was the response from 80 year-old Adeline Dickie (a Dene woman) when she was asked, “Do you think you’re an Aboriginal?” Her reply to that question was: “No. I don’t know what that is.”²⁴ “Aboriginal” is a formal word used at negotiation tables, but it is a foreign and unnatural word to many Indigenous peoples.

Scholars suggest that the word “Indigenous” should replace other perceived synonyms or alternatives. Alfred recommends that the word “Indigenous” should be used “as the English-language general reference to take the place of ‘citizenship,’ ‘membership,’ ‘Indian status,’ ‘Aboriginal’ and ‘First Nation’.”²⁵ That being said, he also notes that multiple alternative word choices can and do have an appropriate time and a place. Alfred explains that, in “broader discussions” in his own work, he uses:

‘Indian’ (as it is a legal term still in use among some indigenous people in North American), ‘Native’ (in reference to the racial and cultural distinctiveness of individuals, and to distinguish our communities from those of the mainstream society), ‘American Indian’ (in common use and a legal-political category in the United States), ‘Aboriginal’ (a legal category in Canada), and ‘indigenous’ (in global contexts and to emphasize natural, tribal, and traditional characteristics of various peoples). All are appropriate in their contexts and are used extensively by Native people themselves.”²⁶

²² Alfred, “First Nation Perspectives,” 24.

²³ Alfred, “First Nation Perspectives,” 27.

²⁴ Alfred, “First Nation Perspectives,” 35.

²⁵ Alfred, “First Nation Perspectives,” 36-37.

²⁶ Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto*, 2nd ed. (Oxford: Oxford University Press, 2009), 23.

It is worth noting how language is imposed, adopted, claimed, rejected, and reclaimed by various parties throughout struggles for justice. In this chapter I will primarily use the term “Indigenous,” as opposed to any of the alternatives listed above, unless citing quotations, documents, or legislation containing different terms.

I. FRAMING THE FOUNDATIONAL TOLERATED ILLEGALITY

Settlers stole Indigenous peoples’ homelands, and this crime continues to be tolerated by the Canadian state and its beneficiaries today. Alfred succinctly frames Canada’s foundational tolerated illegality in the following passage: “we have never really resolved the problem of colonization’s theft of our lands, its imposition of foreign sovereignties and laws on our nations, and its forced acculturation of our people to European ways of life.”²⁷ The “continued and illegal occupation”²⁸ of land belonging to Indigenous peoples is an ongoing crime that is tolerated by State officials and the majority of the Canadian population alike through a combination of ignorance, indifference, and continued efforts toward further colonial domination.

Describing the theft of Indigenous peoples’ lands as Canada’s “original” or “foundational” tolerated illegality is compatible with Alfred, Simpson and Coulthard’s views. Alfred tells his readers that the “truth” is that Canada “is a country whose *foundation* and conduct is wrong by any moral standard” (emphasis added).²⁹ Relatedly, Simpson describes how “Indigenous political movements contest the very *foundations* of the Canadian state,”³⁰ while Coulthard discusses “[t]he dispossession that *originally* displaced Indigenous peoples from their

²⁷ Taiaiake Alfred, “What is Radical Imagination? Indigenous Struggles in Canada,” *Affinities: A Journal of Radical Theory, Culture and Action* 4, no. 2 (Fall 2010): 1.

²⁸ Alfred, “First Nations Perspectives,” 21.

²⁹ Taiaiake Alfred, “Manifesto for A New Century,” *Windspeaker* 17, no. 9 (Jan. 2000): 4-5.

³⁰ Simpson, *Dancing On Our Turtles’ Back*, 16.

traditional territories...” (emphasis added).³¹ In short, the theft of lands via colonization is the original tolerated illegality in Canadian socio-legal history.

Author Upton Sinclair wrote that it is “difficult to get a man to understand something, when his salary depends upon his not understanding it....”³² Similarly, it is difficult to get a State to admit something when its existence depends upon not admitting it. If the Canadian state declared the full extent of its crimes, it would necessarily concede that its foundation was/is illegitimate.³³ As Alfred and Tomkins state, it is “illogical” to believe “that the same institutions that colonize(d) Indigenous people, and the same people that benefit from ongoing oppression, will be the ones to eventually and willingly give up their power and privileges.”³⁴ The state’s legitimacy is dependent on a carefully crafted narrative, and thus it has a disincentive to expose its illegalities. This is the impasse that Indigenous peoples have faced and continue to face in their battle with the Canadian state.

An important dimension to understand about Canada’s foundational illegality is the significance of land beyond physical space. The devastation caused by the separation of Indigenous Peoples from their lands cannot be overstated. In a passage from Coulthard’s *Red Skin, White Masks*, he argues that Indigenous peoples’ struggles are best understood in the context of “the question of land.” As Coulthard puts it:

Stated bluntly, the theory and practice of Indigenous anticolonialism, including Indigenous anticapitalism, is best understood as a struggle primarily inspired by and oriented around *the question of land* – a struggle not only *for* land in the material sense, but also deeply *informed* by what the land *as system of reciprocal relations and*

³¹ Coulthard, *Red Skin, White Masks*, 175.

³² Upton Sinclair, *I, Candidate for Governor: And How I Got Licked* (1935) (Berkeley, CA: University of California Press, 1994), 109.

³³ As Audra Simpson reminds us: “the United States and Canada can only come into political being because of Indigenous dispossession.” (12) Thus, these two nations have a significant motive for not wanting to listen to Indigenous peoples’ challenges to their (respective) national sovereignties. (Simpson, *Mohawk Interruptus*, 12).

³⁴ Alfred and Tomkins, *Groundhog Day*, 18.

obligations can teach us about living our lives in relation to one another and the natural world in nondominating and nonexploitative terms...³⁵

Because Indigenous conceptions of land include an awareness and appreciation of the symbiotic relationship between land, human and animal lives, displacing Indigenous peoples from their homelands extends to losses beyond physical space.

By removing Indigenous Peoples' connection to their lands, Settlers (at inception) and State beneficiaries (on an ongoing basis) also disrupt(ed) their laws, culture, spirituality, relationships, identity, and ways of life.³⁶ As Alfred explains, displacing Indigenous peoples from their territories disconnected them "from the physical and spiritual resources essential to our livelihoods, cultures, and identities."³⁷ Like Alfred, Simpson explains that Indigenous peoples conceive of land as being inextricably mixed with identity, explaining that "[o]ur homeland is our identity, and our identity is our homeland."³⁸ She adds that the relationships nurtured "with the land, waters, plants, animals, and the ecological and spiritual forces within our territory are the foundation of who we are as a people."³⁹ To be displaced from one's homeland is to be painfully separated from many aspects of one's identity and ways of life.⁴⁰

Before proceeding further, I should address the limitations of applying the Foucauldian notion of "tolerated illegality" to the dispossession of Indigenous peoples of their lands.

³⁵ Coulthard, *Red Skin White Masks*, 13.

³⁶ Alfred, "First Nations Perspectives" 29.

³⁷ Alfred, "First Nations Perspectives," 29.

³⁸ Alfred, "First Nations Perspectives," 29.

³⁹ Alfred, "First Nations Perspectives," 29.

⁴⁰ In *Braiding Sweetgrass*, Robin Wall Kimmerer discusses how the English language lacks the capacity for "animacy." That is, in English, nonhuman beings and objects are often rendered inanimate. As she explains: "[i]n English you are either a human or a thing. Our grammar boxes us in by the choice of reducing a nonhuman being to an *it*, or it must be gendered, inappropriately, as a he or a she." (56) But Kimmerer notes that her own Indigenous language, Potawatomi, as well as most other Indigenous languages, use "the same words to address the living world as we use to address our family. *Because they are our family.*" (*emphasis added*) (55) These language choices reflect a way of thinking about the familial-type relations and connectivity between Indigenous peoples and their surroundings, further underscoring the far-reaching devastation caused by the dispossession of their lands. (Robin Wall Kimmerer, *Braiding Sweetgrass: Indigenous Wisdom, Scientific Knowledge, and the Teachings of Plants* (Minneapolis, MN: Milkweed Editions, 2013))

Problems may emerge when one adopts a foreign register to structure a problem. Using “law” to frame the dispossession of Indigenous peoples of their lands forces the conversation, right from the outset, into a Western mode of thinking. In other words, the injustice experienced by Indigenous peoples becomes understood in relation to Western legal logic. In his response to critics of *Red Skin, White Masks*, Coulthard recognizes the danger of “framing our struggles in the language of land and sovereignty,” which “threatens to make ourselves over in the image of state and capital....”⁴¹ Although Coulthard is engaging here with the concepts of “land” and “sovereignty,” the concept of Western “law” (and, by extension, “legality” and “illegality”) may raise similar concerns. However, Coulthard also explains that by using words like “land” and “sovereignty” he aims to both “acknowledge that this is the language through which our struggles are most commonly articulated in our communities,” and register his “*refusal* to surrender this common language of contestation and resistance....”⁴² The labels “illegal” and “criminal” have powerful negative connotations in the popular social imagination. Redirecting these labels that emerge from the State’s legal system back onto the State might be an effective way to awaken more people to the truth of the crimes committed by the State against Indigenous peoples. It is my hope that using the language of tolerated illegality can help us think critically about the construction of the categories “legal” and “illegal,” as well as challenge assumptions and disrupt dominant ways of thinking about the law and the State.

Reframing law’s scope and scale opens up questions like: who gets to decide what actions count as legal and illegal? Who gets to enforce the law? And who benefits from enforcement or lack thereof? While thinking these questions through, a clear conflict emerges: the State is the author and enforcer of laws, and hence is able to tolerate its own illegalities. The

⁴¹ Glen Coulthard, “Response,” *Historical Materialism* 24.3 (2016): 95-96.

⁴² Coulthard, “Response,” 96.

question, “Who Watches the Watchmen?” which runs through Alan Moore and Dave Gibbons’s graphic novel *Watchmen* is apropos here.⁴³ This question from *Watchmen* raises the concern about who keeps those in power in check.⁴⁴ Hopefully, the application of the concept of tolerated illegality to discussions about Indigenous-State relations will give a new perspective to those familiar with the topic, offer insights to those less familiar with the conflict, and promote the *resurgence* movement advocated for by Alfred, Simpson, and Coulthard.

Finally, it is also important not to remove individual responsibility by putting all of the blame on the State; saying “it is the government’s fault” displaces responsibility from Canadian citizens onto the State and dissolves settler guilt. In order for decolonization to happen, settler-Canadians need to be more aware and involved. Simpson expresses a hope that Canadians will develop “a sense of responsibility to the land and to the peoples whose homelands they live in—a responsibility to learn what that means on the terms of [Indigenous] nations.”⁴⁵ Although the State needs to be held accountable for ongoing colonial oppression, it is not enough to focus solely on the government without also considering who continues to benefit from the government’s actions (or inaction).

⁴³ Alan Moore and Dave Gibbons, *Watchmen* (New York: DC Comics, 1987).

⁴⁴ The question “Who watches the watchmen?” first appears in Chapter II on page 18. The question is seen on a wall after various superheroes have decided to ban together and form a group called the “Crimebusters.” The Crimebusters try to clear an unruly crowd from the streets, and members of the crowd yell comments like, “We don’t want vigilantes! We want regular cops!” and “My son is a police officer [...]!” (II, 17) Shortly afterwards, two superheroes/vigilantes see the question written on the wall and one says, “They don’t like us an’ they don’t trust us.” (II, 18) One interpretation of these scenes is that the superheroes/vigilantes are out of control, and the “regular police” need to rein them in. However, another interpretation—the one that I prefer—is that the question simply asks if anyone regulates the behaviour of those with the most power. For me, the question could be rephrased as “who polices the police?” or “who governs the government?” depending on the political situation. Moreover, as we shall see in Chapter 5, Dan Hassler-Forest (in *Capitalist Superheroes*) amusingly describes how a German magazine depicted the George W. Bush administration as action heroes (e.g. Rambo types) on the cover of one of its issues as a critique of the administration’s violent and war-centric ways. The administration was “flattered” and asked for copies. (Dan Hassler-Forest, *Capitalist Superheroes: Caped Crusaders in the Neoliberal Age* (Winchester, Zero Books: 2012), 1). All of this is to suggest that boundaries can blur between the police, state, government, and “superheroes/vigilantes,” such that the question “Who watches the watchmen?” stands in for concerns about particular groups accumulating too much power and abusing it. (Moore and Gibbons, *Watchmen*)

⁴⁵ Simpson, “The PKOLS Reclamation,” 359-360.

II. ILLEGAL HOW?

There are those who might not agree that the Canadian state's actions (past and ongoing) are "illegal." A variety of words are used in discussions to describe the harms committed against Indigenous peoples: wrong, immoral, unjust, illegitimate, and so on. But what does the idea of "illegality" have to offer that these other ideas do not? The word "illegal" is interesting because it raises the question, "whose law?" The dominant legal phrase in the popular imagination is "law and order;" in other words, obeying the law is right and disobeying the law is wrong. Many people perceive the State as a protective authority that enforces laws and provides citizens with safety, security, and structure. This part of the chapter hopes to complicate this picture by developing a critical perspective: the State, not as a paradigm of law and order, but as the criminal perpetrator. The hope is that, by considering this perspective, more settlers will become allies and that both Indigenous peoples and their allies will be (or continue to be) critical of the State and aspire to hold it accountable for past and present illegalities.

The fact that European colonizers alleged that Indigenous lands were uninhabited by "civilized peoples" and claimed those lands as their own was an immoral, illegitimate, and *illegal* act. The concept of *terra nullius* implies that the land was devoid of inhabitants and there was no one on it; it was free, blank, and available for colonization. In other words, based on ancient conceptions of sovereignty, there was "no flag in the soil." As John J. Borrows and Leonard I. Rotman explain:

The doctrine of discovery has been – and still is – rigorously advanced by various authors, jurists, legal scholars, nation states and domestic courts as the foundation upon which English, Canadian or American sovereignty in North America is based. The basic premise is that the first state to "discover" an uninhabited region with no other claims to it automatically acquires territorial sovereignty. Originally, the doctrine was linked to

terra nullius – literally, a barren and deserted area [...]. The concept of *terra nullius* was expanded later, without justification, to include any area devoid of ‘civilized’ society.⁴⁶

Coulthard calls *terra nullius* a “racist legal fiction” that allows beneficiaries of colonization to justify past and current injustices. He explains that this fictitious narrative permitted colonial powers to declare that Indigenous peoples were “too ‘primitive’ to bear rights to land and sovereignty,” thus proclaiming “their territories legally ‘empty’ and therefore open for colonial settlement and development.”⁴⁷ The myth of *terra nullius* is what allowed (allows) colonizers to justify the theft of Indigenous lands, and although the myth has been exposed, the damage has been done and not yet undone.⁴⁸

Another way that the illegalities of colonization are justified is through the treaty process. Canadians are sometimes taught that agreements, in the form of treaties, have been made between Indigenous peoples and the Canadian state so nothing “illegal” has transpired. In other words, some Canadians believe that Indigenous peoples agreed to give up their lands for financial compensation. They think of treaties like “legal agreements” whereby Indigenous peoples ceded “lands for cash.”⁴⁹ Simpson describes the way the Canadian state perceives treaties as a “receipt for a business transaction.”⁵⁰ She goes on to say that:

From the perspective of the Canadian state, treaties are about obtaining title to our lands “legally,” or at least “legally” according to the traditions of the British legal system. Indigenous Peoples, however, have a different perspective on the meaning of those treaties and we have a different history in treaty making.⁵¹

⁴⁶ John Borrows and Leonard Ian Rotman, *Aboriginal Legal Issues: Cases, Materials & Commentary*. 3rd ed (Markham, Ont: LexisNexis Canada, 2007), 195.

⁴⁷ Coulthard, *Red Skin, White Masks*, 175.

⁴⁸ As Alfred explains, “We have not resolved the problem of the European’s imagination of this continent as *terra nullius*, a land empty of civilization, culture, law, governance, and empty of people worthy of respect” (Alfred, “Radical Imagination,” 1).

⁴⁹ Simpson, *Dancing On Our Turtles’ Back*, 106.

⁵⁰ Simpson, *Dancing On Our Turtles’ Back*, 106.

⁵¹ Simpson, *Dancing On Our Turtles’ Back*, 106.

Simpson explains that a central aspect of Indigenous treaty making is that treaties are characterized by reciprocity and balance. Prior to contact, Indigenous peoples made treaties between animal nations and fellow nations with the understanding that in no way did a treaty mean that one nation would dominate the other. One nation would never think that just because it signed a treaty it would have control over all of the land and resources.⁵² For example, Simpson recounts that when the Haudenosaunee formed the “Dish with One Spoon” treaty with the Nishnaabeg people, both parties “assumed that they would share the territory” and that “they would remain separate, sovereign, self-determining and independent nations.”⁵³ However, in the eyes of many Settlers, treaty agreements prove that Indigenous peoples gave up their lands to the control of the Canadian State and thus the State has committed no crime.

In his lecture, “Who are the Beneficiaries of Treaties between First Nations Peoples and Canada?” Don McIntyre presents his argument about Indigenous treaties. He defines a treaty as “a contract between sovereign nations,”⁵⁴ and explains that it includes many components.⁵⁵ Indigenous treaties are recognized through stories and songs that recount the relationship between the sovereign nations. “Bundles” are also created to commemorate the treaty, and they contain art and artefacts that tell the story of the treaty.⁵⁶ These bundles are “recognized as living agreements;” they are “alive” like contracts in the West.⁵⁷ Parchments only began when Indigenous nations started making treaties with Western nations, whose representatives said, “we want it [the agreement] on a piece of paper.”⁵⁸ Indigenous peoples replied: “Okay, we’ll add that

⁵² Simpson, *Dancing On Our Turtles’ Back*, 107.

⁵³ Simpson, *Dancing On Our Turtles’ Back*, 113.

⁵⁴ Don McIntyre, “Who are the Beneficiaries of Treaties between First Nations Peoples and Canada?” Presentation at a Southern Alberta Council on Public Affairs (SACPA) Meeting, Lethbridge, AB, May 12, 2016. http://sacpa.ca/index.php?p=38&action=view_session&ID=1203: 5:26.

⁵⁵ McIntyre, “Beneficiaries,” 5:43.

⁵⁶ McIntyre, “Beneficiaries,” 6:20.

⁵⁷ McIntyre, “Beneficiaries,” 6:49.

⁵⁸ McIntyre, “Beneficiaries,” 7:10.

to the bundle.”⁵⁹ And so, there are “bundles that still have the original parchment inside.”⁶⁰ The problem is that the Western nations wanted the written contract because they required “certainty,”⁶¹ but there is more to the treaty than what is written on the parchment (there are stories, songs, bundles, etc.).⁶²

McIntyre explains that, for Indigenous peoples, a treaty is about “the give-and-get.”⁶³ There is an understanding that the parties both give something up and also receive something in return.⁶⁴ Two important parts of the treaty include: (1) a transfer that relates to “making peace,”⁶⁵ and (2) recognition that “two sides [are] working to achieve a common goal.”⁶⁶ Additionally, McIntyre suggests that there is a potential language confusion regarding the words “seed” and “cede,” with the former relating to agriculture (“seed the land”) and the latter related to giving up land (“cede the land”).⁶⁷ Even turning to treaties today, McIntyre argues that we can see more than one different spelling of “seed/cede” and ambiguity regarding which words and meanings were intended.⁶⁸ McIntyre ends his lecture with a quotation from Louise Crop Eared Wolf, who states that:

We believed and understood that we would share this territory amongst each other. We also believed that the land could not be given away because of its sacredness. Therefore, it did not belong to us or to anyone else.⁶⁹

To sum up, McIntyre’s lecture conveys that the Western nations included in treaty processes insisted on including parchment to enhance the “certainty” of the deal, but the parchments were

⁵⁹ McIntyre, “Beneficiaries,” 7:13.

⁶⁰ McIntyre, “Beneficiaries,” 7:18.

⁶¹ See chapter two for a discussion of the desire for legal certainty in jurisprudence.

⁶² McIntyre, “Beneficiaries,” 14:02.

⁶³ McIntyre, “Beneficiaries,” 15:31.

⁶⁴ McIntyre, “Beneficiaries,” 15:51.

⁶⁵ McIntyre, “Beneficiaries,” 16:28.

⁶⁶ McIntyre, “Beneficiaries,” 16:03.

⁶⁷ McIntyre, “Beneficiaries,” 29:13.

⁶⁸ McIntyre, “Beneficiaries,” 30:11.

⁶⁹ McIntyre, “Beneficiaries,” 30:44.

only one piece of treaties, which also included stories, songs, and entire bundles. Also, from an Indigenous perspective, treaties were about seeking peace, and two parties working to achieve a common goal. Moreover, there was some serious ambiguity in these agreements with respect to the ideas of “seeding” and “ceding” lands. Finally, as stated by Louise Crop Eared Wolf, Indigenous peoples did not imagine that the lands could be given away because they never owned them (in a Western sense of ownership) to begin with. Thus, there is a strong case to support the claim that Western nations manipulated, abused, and violated treaties with Indigenous peoples.

The Canadian state’s dispossession of Indigenous peoples of their homelands could also be construed as “illegal” based on conceptions of “natural law.” Although natural law theories vary, they commonly appeal to religion and/or morality, ideas believed to supersede the social construction of law. Legal scholars generally invoke “natural law” to refer to a “higher law” that transcends “man-made” law.⁷⁰ Alfred’s conception of natural law has a spiritual component, but it differs from those traditional theories rooted in religion and/or morality. Alfred uses natural law to refer to laws tethered to Nature, and the interconnectedness between humans and the natural world. Alfred describes “Natural Law” as “the relationship between spiritual forces, humankind, the land, the animals and the other elements of the natural environment.”⁷¹ He explains that Natural Laws were created via “experiential learning,” by which he means “through observations of, and interactions with, the natural environment across generations.”⁷² Alfred also describes this interaction with Nature as a “spiritual process” because “all nature is viewed as

⁷⁰ For Lon Fuller’s take on the natural law tradition. see chapter 1.

⁷¹ Alfred, “First Nation Perspectives,” 28-29.

⁷² Alfred, “First Nation Perspectives,” 28-29.

alive and imbued with spirit.”⁷³ The crime of stealing Indigenous Peoples’ lands can also be framed as “illegal” based on this conception of Natural Law.

By displacing Indigenous peoples from their homelands the Canadian State committed a crime that violated certain Indigenous conceptions of Natural Law. The type of Natural Law described by Alfred is rooted in the relationships between humankind and the natural world. One of the goals of Indigenous societies, which underlies this conception of Natural Law, is to “harmoniously and peacefully coexist with the natural world, to demonstrate respect, and work to protect and live with it as a relative.”⁷⁴ Accordingly, to sever violently those connections without regard for the land, the people, or what they mean to each other could be understood as a violation of Natural Law, and thus “illegal.”⁷⁵

Crimes committed by the State can also be framed as illegal based on standards of international law. As Alfred states: “people seem to easily forget that Canadian law and policy operate within a larger moral and legal universe,” which includes “international laws.”⁷⁶ In addition to the theft of Indigenous people’s lands, the Canadian state has also committed further crimes against Indigenous peoples. *Article II* of The United Nations “Convention on the Prevention and Punishment of the Crime of Genocide,” (1948) defines genocide as:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;

⁷³ Alfred, “First Nation Perspectives,” 29.

⁷⁴ Alfred, “First Nation Perspectives,” 28-29.

⁷⁵ To offer a couple examples of laws that could, arguably, supersede state law, consider what Audra Simpson writes in *Mohawk Interruptus*. She describes how, in Louis Hall’s “Mohawk Ten Commandments” (a piece of his *Warrior’s Handbook*, 1979), part of the fifth commandment includes: “Respect *Nature’s first law* of self-preservation and stop traitor [sic] seeking to destroy you and your people, for any nation which ignores *this law* stands condemned to extinction” (emphasis added). (27) Later on, Simpson also mentions “The Kaianere’kó:wa” or “*the Great Law of Peace*,” (emphasis added) belonging to the people of Kahnawà:ke (the Mohawk nation). (32) These are just a couple examples of more ancient laws that pre-date the existence of the Canadian state and, like Antigone’s argument in Sophocles’ play, help build a strong case that for some people, there are laws that are more important to follow than state law. (Simpson, *Mohawk Interruptus*)

⁷⁶ Taiaiake Alfred, “Upholding the Rule of Law,” *Windspeaker* 18, no. 6 (October 2000): 4-6.

- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.⁷⁷

Furthermore, *Article II* also states that “genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group....”⁷⁸ Thus, as Alfred asks: “who can deny that Canada has perpetrated the crime of genocide against Indigenous peoples as defined by the United Nations?”⁷⁹ Coulthard and Simpson also refer to the “state-sanctioned murdering, assimilating, and disappearing of Indigenous bodies....”⁸⁰ Insofar as the Indigenous genocide facilitated the seizure and occupation of Indigenous lands, it is a part of Canada’s foundational tolerated illegality, a compound illegality that transgressed (transgresses) international law.

Another important discussion to include in this section on legality and illegality is the incommensurability between Canadian (Western) and Indigenous values regarding legal systems, and how this divide might interfere with a just transformation of Indigenous–State relations. One fundamental incompatibility between Indigenous law and Canadian state law is that whereas the former values a dynamic and flexible approach, the latter tends to privilege stability. A Western conception of the rule of law generally aims to make rules clear and unambiguous (see Chapter 2). By contrast, Indigenous ways of being and knowing, which animate Indigenous legal systems, generally orient around “fluidity and diversity.”⁸¹ Simpson describes Indigenous systems of thought as being characterized by “non-authoritarian leadership, non-hierarchical ways of

⁷⁷ UN General Assembly. *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277, available at: <http://www.refworld.org/docid/3ae6b3ac0.html> [accessed 12 February 2016].

⁷⁸ UN General Assembly, *Prevention and Punishment of Genocide*.

⁷⁹ Alfred, “Rule of Law,” 4–6.

⁸⁰ Glen Coulthard and Leanne Simpson, “Grounded Normativity/Place-Based Solidarity,” *American Quarterly* 2, no. 68 (2016): 254.

⁸¹ Simpson, *Dancing On Our Turtles’ Back*, 53.

being, non-interference and non-essentialism;”⁸² “transmotion and fluidity;”⁸³ and “non-linear [reactions].”⁸⁴ For Simpson, an important part of decolonization is pushing back against the State’s inclination toward formulas and fixed methods. As she explains, resisting colonization requires embracing “the fluidity of our traditions, not the rigidity of colonialism.”⁸⁵ Western legal logics are often in conflict with Indigenous values, privileging legal clarity and predictability rather than being open to Indigenous philosophies and perspectives.

It is not possible for something to be predictable without being consistent (regularized, patterned in some way), so it is unsurprising that those who advocate predictability would also betray a desire for consistency (another one of Fuller’s eight IML principles—see chapter 1).⁸⁶ As Coulthard puts it, Canada’s reconciliation process with Indigenous peoples is fuelled by the State’s need to “render[...] things *consistent*” (original emphasis).⁸⁷ He elaborates by explaining that this need for consistency “lies at the core of Canada’s legal and political understanding of the term [reconciliation],” and the goal remains to make “the state’s unilateral assertion of sovereignty” somehow “consistent [with] Indigenous assertions of nationhood.”⁸⁸ However, as Alfred points out, the State’s desire for consistency is met with an insurmountable “logical contradiction:” within the present socio-legal-political configuration, one cannot be a member of a First Nation *and* the nation of Canada.⁸⁹ Consequently, one falls into what Alfred calls, “the

⁸² Simpson, *Dancing On Our Turtles’ Back*, 18.

⁸³ Simpson, *Dancing On Our Turtles’ Back*, 90.

⁸⁴ Simpson, *Dancing On Our Turtles’ Back*, 91.

⁸⁵ Simpson, *Dancing On Our Turtles’ Back*, 51.

⁸⁶ As mentioned in Chapter Two, Western legal systems generally struggle to think about (or accept) two contradictory ideas *simultaneously*. As Audra Simpson tells readers: “Built into ‘sovereignty’ is a jurisdictional dominion over territory, a notion of *singular law, and singular authority*” (emphasis added). (12) Consequently, this way of thinking leaves little to no room for multiple legal systems and authorities, or in Simpson’s account, “nested sovereignty,” in a single nation. (Simpson, *Mohawk Interruptus*)

⁸⁷ Coulthard, *Red Skin, White Masks*, 107.

⁸⁸ Coulthard, *Red Skin, White Masks*, 107.

⁸⁹ Taiaiake Alfred, “Who You Calling Canadian?” *Windspeaker* 18, no. 5 (Sept. 2000): 4-5.

trap of the legalism path.”⁹⁰ The trap is that in order to eliminate the logical contradiction, and achieve legal consistency, the concept of Indigenous nationhood must disappear.^{91,92}

There is a double standard when it comes to the application of the so-called “rule of law” to the Canadian state on the one hand, and Indigenous peoples on the other. Alfred calls the way the State deploys the rule of law “hypocritical”⁹³ and claims that it is “ignorant” to say that “the ‘law must be upheld the same for all Canadians’.”⁹⁴ The courts, politicians and the media deploy the “rule of law” in ways that reinscribe State sovereignty, and the State uses the rhetoric of the rule of law to justify wielding impregnable power. When Indigenous peoples use various resistance tactics, including direct action, to protest the illegal occupation of their land, they are accused of violating the “rule of law.”⁹⁵ Meanwhile, settler-Canadians are occupying stolen land. As Coulthard reports, Prime Minister Stephen Harper stated that, “[p]eople have the right in our country to demonstrate and express their point of view peacefully as long as they obey the

⁹⁰ Alfred, “Pathways,” 35-39.

⁹¹ Alfred, “Pathways,” 35-39.

⁹² A member of a First Nation might not want to register under the Indian Act because that is of a piece with Canadian sovereignty. Conversely, if he or she chooses to forego formal First Nation membership, then he/she technically only holds Canadian citizenship (not First Nation membership). Relatedly, Audra Simpson tells the story of the Iroquois National Lacrosse team that “bowed out” of the World Lacrosse League Championships when the organizers “refused to recognize the Haudenosaunee passport as secure and therefore legitimate.” (25) Simpson notes that the team could have used passports from recognized sovereign nations, but instead demonstrated “a refusal to play the game of being American or Canadian,” choosing instead to maintain “the deep history, philosophy, and authority of Iroquois governance.” (Simpson, *Mohawk Interruptus*, 25).

⁹³ Alfred, *Peace, Power, Righteousness*, 83.

⁹⁴ Alfred, “Who You Calling Canadian?,” 4-5.

⁹⁵ A thoughtful passage from Coulthard’s work explains this brilliantly: “With respect to those approaches deemed ‘legitimate’ in defending our rights, emphasis is usually placed on formal ‘negotiations’ – usually carried out between ‘official’ Aboriginal leadership and representatives of the state – and if need be coupled with largely symbolic acts of peaceful, nondisruptive protest that abide by Canada’s ‘rule of law.’ Those approaches that are increasingly deemed ‘illegitimate’ include, but are not limited to, forms of ‘direct action’ that seek to influence power through less mediated and sometimes more disruptive and confrontational measures. In the context of Indigenous peoples’ struggles, the forms of ‘direct action’ often taken to be problematic include activities like temporarily blocking access to Indigenous territories with the aim of impeding the exploitation of indigenous peoples’ land and resources, or in rarer cases still, the more-or-less permanent reoccupation of a portion of Native land through the establishment of a reclamation site which also serves to disrupt, if not entirely block, access to Indigenous peoples’ territories by state and capital for sustained periods of time” (Coulthard, *Red Skin White Masks*, 166).

law...”.⁹⁶ In this context, the implication is that creating so-called Indigenous “blockades” does not constitute “obeying the law.” Regardless of the specifics of the situation—the particulars of the issues that Indigenous peoples are fighting against or the resistance tactics they are employing—Coulthard argues that the mainstream media frames it all as “the typical Native ‘blockade:’ [m]ilitant, threatening, disruptive, and violent.”⁹⁷ Rather than seeing direct action as a simple violation of law, as it is frequently portrayed in the media, such tactics might instead be seen as a crucial realization of Indigenous voices when other channels do not exist. The following section discusses how formal state channels have in fact continually failed, despite the best efforts of Indigenous people and their allies, providing a wider context that recasts these tactics and resists the simple portrayal.

III. TOLERATED HOW?

Some people may challenge the notion that the crimes committed against Indigenous peoples by the State continue to be “tolerated” today. They may point to perceived “victories” for Indigenous people—including public apologies, truth and reconciliation committees, treaty agreements, court cases, and other forms of “recognition” —and claim that past wrongs are being righted, and that “progress” is being made. This section of the chapter aims to challenge this assumption by foregrounding Alfred, Simpson and Coulthard’s perspectives on the perceived headway achieved via state channels. Many of the processes listed above, from reconciliation committees to recognition politics, aim to place any wrongdoings by the State in the past and help Indigenous peoples “move on.” However, this aim of “moving on” is not helpful if the major issue—the theft of Indigenous land—has not been addressed in a meaningful way, and if

⁹⁶ Coulthard, *Red Skin, White Masks*, 167.

⁹⁷ Coulthard, *Red Skin, White Masks*, 166.

colonization is seen as a historic issue rather than an ongoing form of violence. The Canadian state has aimed to placate Indigenous peoples through apologies and Court rulings that, even while sometimes considered “victories” for Indigenous peoples, result in minimal day-to-day changes.

At times it seems as if desirable alterations to the relationship between Indigenous peoples and the Canadian state will be realized, and perhaps longstanding illegalities will be addressed, but ultimately the outcome is more of the same. Prime Minister Stephen Harper issued a public apology on behalf of the Canadian government to residential school survivors on June 11, 2008. Although there was much scepticism among Indigenous communities leading up to the event, after the apology many Indigenous peoples thought that it was, at least, a much needed “first step” toward sought-after change in the relationship between Indigenous peoples and the State.⁹⁸ However, on September 25, 2009, less than sixteen months after Harper’s public apology, he declared to the world that Canada has “no history of colonization.” In fact, at the G20 Summit he made the following statement: “We have all of the things that many people admire about the great powers but none of the things that threaten or bother them.”⁹⁹ This blatant contradiction between the residential school apology and the G20 speech is an example of how, “plus ça change, plus c’est la meme chose;” despite perceived “victories” for Indigenous peoples, the Canadian state has never truly rectified the original injustice of stealing Indigenous peoples’ homes, culture, and ways of life that are inextricably bound up with the land.

Restorative processes such as reconciliation committees and recognition politics make it seem like the crimes committed against Indigenous peoples are historic and not persisting today. Furthermore, many people think that once these processes are complete, the State has effectively

⁹⁸ Coulthard, *Red Skin, White Masks*, 105.

⁹⁹ Coulthard, *Red Skin, White Masks*, 105-106.

made amends with Indigenous peoples, who should now be satisfied that everything is resolved and move on. As Simpson explains: "...the perception of most Canadians is that post-reconciliation, Indigenous Peoples no longer have a legitimate source of contention."¹⁰⁰ In other words, "the historical 'wrong' has now been 'righted' and further transformation is not needed..."¹⁰¹ Along similar lines, Coulthard adds that, ultimately, "the optics created by these grand gestures of recognition and reconciliation suggest to the dominant society that we no longer have a legitimate ground to stand on in expressing our grievances."¹⁰² Restoration processes often create the illusion that sources of contention have been addressed and resolved, and any conflicts are now a closed chapter in Canadian history.

Additionally, Coulthard also observes that healing processes such as truth and reconciliation commissions (TRCs) are generally designed for States in which there has been a transition from authoritarian rule to a more "democratic" process.¹⁰³ In the absence of such a transition, a sleight of hand takes place whereby people are led to believe that we have shifted from an era of violence to an era of resolution, but in reality nothing significant has changed about the political situation. As Coulthard argues, in Canada, where there has been no transformation from "an authoritarian past to a democratic present," state-centered reconciliation approaches "tend to ideologically fabricate such a transition by narrowly situating the abuses of settler colonization firmly *in the past*."¹⁰⁴ Moreover, Coulthard elaborates that, consequently, reconciliation becomes about "*overcoming* the harmful 'legacy' left in the wake of this past abuse, while leaving the *present* structure of colonial rule largely unscathed" (original

¹⁰⁰ Simpson, *Dancing On Our Turtles' Back*, 22.

¹⁰¹ Simpson, *Dancing On Our Turtles' Back*, 22.

¹⁰² Coulthard, *Red Skin, White Masks*, 155-156.

¹⁰³ The quotation marks around "democratic" are meant to suggest that, to date, democracy exists in theory, but not in practice. For more on this, please see Jacques Rancière's *Disagreement: Politics and Philosophy*.

¹⁰⁴ Coulthard, *Red Skin, White Masks*, 22.

emphasis).¹⁰⁵ In other words, the “abuses of settler colonization” are relegated to “the dustbins of history.”¹⁰⁶ Building on this point, Coulthard adds that the illusion of the temporal shift (from violent past to a more amicable present) also craftily switches the focus of the TRC from colonial violence (perpetrated by the State) to “fixing” Indigenous people. Because the TRC “focuses the bulk of its reconciliatory efforts on repairing the injurious legacy left in the wake of this history [...] Indigenous subjects are the primary object of repair, not the colonial relationship.”¹⁰⁷ All of these moves contribute to a situation in which the unequal power dynamic between the State and Indigenous peoples carries on unchanged, State sovereignty remains unchallenged, and the status quo is preserved.

To my mind, the most powerful and persuasive critique of the politics of recognition comes from Coulthard’s *Red Skin, White Masks*. Kam’ayaam/Chachim’multhnii (Cliff Atleo, Jr.) calls Coulthard’s “in-depth understanding” of the politics of recognition in Canada a “vital wake up call.”¹⁰⁸ In his book, Coulthard lays out the implicit colonial techniques embedded in the politics of recognition and how they are designed to maintain state power. At the outset of his book, Coulthard states that one of his aims is to “challenge the increasingly commonplace idea that the colonial relationship between Indigenous peoples and the Canadian state can be adequately transformed via such a politics of recognition,” which “promises to reproduce the very configurations of colonialist, racist, patriarchal state power that Indigenous peoples’ demands for recognition have historically sought to transcend.”¹⁰⁹ Later on, Coulthard elaborates by explaining that three clusters of events in particular (opposition to the 1969 “White Paper;” reactions to the Supreme Court of Canada’s 1973 *Calder* decision; and resistance to natural gas,

¹⁰⁵ Coulthard, *Red Skin, White Masks*, 22.

¹⁰⁶ Coulthard, *Red Skin, White Masks*, 108.

¹⁰⁷ Coulthard, *Red Skin, White Masks*, 127.

¹⁰⁸ Atleo Jr., “Review,” 193.

¹⁰⁹ Coulthard, *Red Skin, White Masks*, 3.

mineral, and oil projects in the 1970s) forced the Canadian Government to create new techniques to assuage Indigenous peoples and their allies. The result was a switch from strategies aimed at excluding or assimilating to methods that claimed to focus on “recognizing” and “accommodating.” As Coulthard explains, the State shifted tactics from “the genocidal exclusion/assimilation double” to “a seemingly more conciliatory set of discourses and institutional practices that emphasize our *recognition* and *accommodation*” (original emphasis).¹¹⁰ However, Coulthard reminds readers that, despite these changes in appearance, “the relationship between Indigenous peoples and the state has remained *colonial* to its foundation.”¹¹¹ By appearing more conciliatory, restoration processes present a façade of “progress” while preventing meaningful change and deferring engagement with the main issue of Indigenous territories. This more recent technique of recognition politics, with its stated aim of reaching reasonable and amicable agreements, has (like much else in the present neoliberal era) become an “institution” or “industry” of its own.

Recognition and reconciliation have in practice become a network of State-administered processes that resemble a type of “business.” As Simpson simply puts it, “reconciliation has become institutionalized.”¹¹² Coulthard picks up on this point too, explaining that “[t]he last thirty years have witnessed a global proliferation of state institutional mechanisms that promote ‘forgiveness’ and ‘reconciliation’ as a means of resolving the adverse social impacts of various forms of intrastate violence and historical injustice.”¹¹³ This “global industry,”¹¹⁴ which exists for the purpose of issuing official apologies and forgiveness, seems like a bureaucratic way to

¹¹⁰ Coulthard, *Red Skin, White Masks*, 6.

¹¹¹ Coulthard, *Red Skin, White Masks*, 6.

¹¹² Simpson, *Dancing On Our Turtles’ Back*, 22.

¹¹³ Coulthard, *Red Skin, White Masks*, 22.

¹¹⁴ Coulthard, *Red Skin, White Masks*, 106.

deal with painful emotional trauma. Essentially, this industry reduces to affectless paperwork something that is irreducibly affective.

Furthermore, participating in recognition and reconciliation industries through State channels quickly becomes a bureaucratic nightmare for Indigenous peoples. As Alfred and Tomkins explain, the State's "legalistic or bureaucratic" approach means that "people are forced into meeting rooms and offices, are drowned in a flood of paperwork, and assaulted by a barrage of 'consultations,' audits, funding proposals, the required daily interactions with INAC [Aboriginal Affairs and Northern Development Canada], DFO [Fisheries and Oceans Canada], MNR [Ministry of Natural Resources and Forestry], Health Canada, among other annoyances and indignities."¹¹⁵ This quotation comes from an article called "Politics of Recognition: A Colonial Groundhog Day," and the title is appropriate; engaging with the State often means being trapped in a loop of administrative requirements in which no actual meaningful change ever happens. The recognition industry's administrative loop helps ensure that one of the few things that changes in Indigenous-State relations is the quantity of paperwork involved.

A further difficulty with recognition and reconciliation mechanisms is that the abuser, in this case the State, sets the terms and the rules. Simpson explains that the goal of restorative processes is for the perpetrator to take "full responsibility for his/her actions."¹¹⁶ However, rather than owning up to its actions, the State is in charge of the proceedings. Whereas the focus should be on the State as the abuser, the processes are ultimately about Indigenous peoples as the victims. Simpson explains that in a Nishnaabeg legal system, the restorative process would be different because the "interrogation is focused on the perpetrator of the violence, not on the survivors:"

¹¹⁵ Alfred and Tomkins, "Groundhog Day," 15.

¹¹⁶ Simpson, *Dancing On Our Turtles' Back*, 23.

In the case of state-perpetuated residential schools, the tables would be turned in a Nishnaabeg legal system. The survivors would have agency, decision-making power, and the power to decide restorative measures.¹¹⁷

Relatedly, because the State presides over restorative processes, recognition becomes something that is bestowed upon Indigenous peoples by the State. Coulthard explains that “‘recognition’ is conceived as something that is ultimately ‘granted’ or ‘accorded’ a subaltern group or entity by a dominant group or entity.”¹¹⁸ Consequently, such processes lack the ability to “modify, let alone transcend, the breadth of power at play in colonial relationships.”¹¹⁹ The politics of recognition industry ensures that the State retains power throughout the proceedings—both by leading the process and bestowing recognition—so that even if “recognition” is achieved, the State’s foundation and the power dynamics at play remain unaltered.

Participating in State-led restorative mechanisms and recognition politics means recognizing the legitimacy of the State prior to even commencing the process. In an unequivocal style, Alfred and Tomkins remark on why this reluctant concession is detrimental:

...you cannot, with any consistency, say, ‘We will sign this economic benefits sharing agreement, but we still don’t recognize your legitimacy on these lands.’ These positions simply cannot be reconciled.^{120,121}

For Alfred and Tomkins, the outcome of such an arrangement is surely “further entrenchment of the profoundly unfair and illegal colonizer/colonized relationship.”¹²² Opposing the State’s claim to legitimacy is one of the very things that Indigenous peoples are fighting for. If Indigenous peoples are required to acknowledge the State’s legitimacy prior to negotiations, then this key point of contention is already conceded.

¹¹⁷ Simpson, *Dancing On Our Turtles’ Back*, 23-24.

¹¹⁸ Coulthard, *Red Skin, White Masks*, 30-31.

¹¹⁹ Coulthard, *Red Skin, White Masks*, 30-31.

¹²⁰ Alfred and Tomkins, “Groundhog Day,” 8-9.

¹²¹ Put even more candidly, Alfred and Tomkins exclaim: “[i]t is illogical and political hypocrisy to both condemn Canada as an unjust colonial power while at the same time accepting political and legal concessions offered by that same power!” (Alfred and Tomkins, “Groundhog Day,” 6)

¹²² Alfred and Tomkins, “Groundhog Day,” 8-9.

Some scholars may argue that the situation in Canada is improving for Indigenous peoples by citing, for example, courtroom victories. However, as Alfred and Tomkins put it: “[i]t is disheartening to see the number of Indigenous commentators that continue to invest their hopes in the courts.”¹²³ Legal scholars sometimes make the argument that although Indigenous–state relations are not perfect, at least we are making “progress” through the court system. An excellent reply to this notion of courtroom “progress” comes from Alfred’s work:

In Canada, for example, the ongoing definition of the concept of ‘Aboriginal rights and title’ by the Supreme Court since the 1980s is widely seen as progress. Yet, even with a legal recognition of collective rights to certain subsistence activities within certain territories, indigenous people are still subject to state control in the exercise of their inherent freedoms and powers. They must also meet state-defined criteria for Aboriginal identity in order to gain access to these legal rights. Given Canada’s shameful history, defining Aboriginal rights in terms of, for example, a right to fish for food and traditional purposes is better than nothing. But to what extent does that state-regulated ‘right’ to food-fish represent justice for people who have been fishing in their rivers and seas since time began?¹²⁴

This passage is particularly powerful when Alfred notes that gaining a “right to fish” could be considered a small victory, but wonders why Indigenous peoples should require courts to give them a right to fish when they have been doing so since time immemorial. This is not to claim that incremental reductions in oppression are unimportant, but rather that many people, indigenous and non-indigenous, place a great deal of hope in the idea that the Courts can grant them the rights, recognition, or social change they seek. However, this approach both further valorizes a legal system that is often implicated in the problem itself, and distracts from more direct avenues of political emancipation. In terms of these emancipatory approaches, I am thinking of the politics of Jacques Rancière, who advocates that those who are socially and

¹²³ Alfred and Tomkins, “Groundhog Day,” 15.

¹²⁴ Alfred, *Peace, Power Righteousness*, 82.

politically excluded—the “part of those who have no part”¹²⁵—enact their innate equality and take what is already theirs (e.g. Rosa Parks assumed her equality and acted accordingly), as well as the theories of Indigenous Resurgence, which will be discussed in the final section of the chapter.

Similarly, Coulthard does not think that seeking recognition through the judicial system is effective. He explains that although the courts have guaranteed “protection for certain ‘cultural’ practices within the state, they have nonetheless repeatedly refused to challenge the racist origin of Canada’s assumed sovereign authority over Indigenous peoples and their territories.”¹²⁶ The problem, as Coulthard points out, is that the Court is willing to grant the right to certain cultural practices *within the state*. This system is designed to ensure that the Court acts as an institution that “grants” Indigenous peoples rights (e.g., to fish and to cultural protection) that they already inherently have.

Likewise, scholars may point to perceived “successes” in Treaty processes and negotiations to make the claim that State crimes, past and present, are no longer being tolerated and that significant change is happening. To challenge this view, here is a contradictory statement by Alfred and Jeff Corntassel:

In Canada, for example, the so-called British Columbia Treaty Process [BCTP] (on-going for over a decade) has been structured to achieve the legalization of the Settler society’s occupation of unceded and non-treaty lands that make up 90 per cent of the territory in that province, to have the Indigenous peoples ‘surrender their Aboriginal title to the Crown, whereupon it becomes vested in the province’.¹²⁷

In other words, simply put, “the BCTC process is designed to solve the problem of Indigenous

¹²⁵ Jacques Rancière, “10 Theses on Politics,” in *Dissensus: On Politics and Aesthetics*, trans. Steven Corcoran (London: Continuum International Publishing Group, 2010), 33.

¹²⁶ Coulthard, *Red Skin, White Masks*, 40-41.

¹²⁷ Alfred and Corntassel, “Being Indigenous,” 603.

nationhood by extinguishing it....”¹²⁸ Alfred also recounts his experiences talking to Indigenous peoples who have sought change through the avenue of the BC treaty process, and have become discouraged with the result. As he relates:

Since coming to live on the West Coast, I have spent many hours talking with people who are involved in the so-called BC Treaty Process, and the overwhelming consensus is that this process has failed. A typical reaction comes from a disappointed community negotiator who recently told me that she had decided it was time to quit the negotiating table and get back to asserting their rights in a more real way.^{129,130}

This idea of abandoning State channels that continue to tolerate past and present crimes and perpetuate colonial power relations is the subject of the final part of this paper, which will consider what asserting Indigenous rights “in a more real way” might look like.

IV. WHAT NOW? ALFRED, SIMPSON, AND COULTHARD ON INDIGENOUS RESURGENCE

This final section of the chapter turns to the question: what now? This section discusses the Indigenous resurgence movement for which Alfred, Simpson, and Coulthard advocate. To begin, we will consider what Indigenous resurgence means to these three scholars. For Simpson, an exact definition of resurgence cannot be pinpointed. In *Dancing on Our Turtle's Back*, she is careful “not to define ‘resurgence’,”¹³¹ explaining that, for Indigenous peoples, “there is not a singular version of resurgence, but many.”¹³² Alfred and Corntassel echo Simpson’s position, stating that there “is no concise neat model of resurgence.”¹³³ Indigenous resurgence is not a narrow, definable concept. Perhaps, like Mariana Valverde’s description of Foucauldian

¹²⁸ Taiaiake Alfred, “Time to Kill the BC Treaty Process,” *Windspeaker* 17, no. 12 (April 2000): 4-5.

¹²⁹ Alfred, “Time to Kill the BC Treaty Process,” 4-5.

¹³⁰ An additional quotation by Alfred, from the same article, is also telling: “[The BC Treaty Process] is not about negotiating treaties, which would in fact represent the start of a new relationship between the First Nations and the newcomers to this land. The process is all about assimilation and control; it uses base manipulation of our people’s poverty and weakness in an attempt to terminate their freedom and achieve a final degree of control over the futures of Indigenous peoples.” (Alfred, “Time to Kill the BC Treaty Process,” 4-5)

¹³¹ Simpson, *Dancing On Our Turtles’ Back*, 25.

¹³² Simpson, *Dancing On Our Turtles’ Back*, 68.

¹³³ Alfred and Corntassel, “Being Indigenous,” 612.

concepts, resurgence is not a concept but rather a “dynamic abstraction” that is “deployed strategically, rather than either scientifically or philosophically.”¹³⁴ That being said, although the idea of Indigenous resurgence is not fixed, it does have certain parameters. Two themes that unite Alfred, Simpson, and Coulthard’s conceptions of Indigenous resurgence are: (1) a desire for “freedom,” “liberation,” and “flourishing,” and (2) a rejection of State institutional solutions in favour of direct action tactics. I will discuss each of these points in turn.

The ideas of flourishing, freedom, and liberation reappear in Alfred, Simpson and Coulthard’s writings on Indigenous resurgence. Simpson explains that a goal of resurgence is to “create new and just realities in which our ways of being can flourish.”^{135,136} Alfred and Cornthassel relate resurgence to a “march to freedom.”^{137, 138} Additionally, Alfred calls Coulthard’s recent book a, “clear vision of Indigenous resurgence, and a serious contribution to the literature of freedom.”¹³⁹ Coulthard himself advocates that Indigenous peoples “find in their own *decolonial praxis* the source of their own liberation.”¹⁴⁰ These are just a few excerpts illustrating a common thread in Indigenous resurgence scholarship which is the shared goal of achieving freedom, flourishing and liberation for Indigenous peoples.

An additional commonality shared by Alfred, Simpson, and Coulthard regarding the notion of resurgence is a rejection of state institutional “solutions” and promotion of direct action tactics. Simpson encourages Indigenous peoples to “imagine [their] way out of the cognitive box

¹³⁴ Mariana Valverde, “Specters of Foucault in Law and Society Scholarship,” *Annual Review of Law and Social Science* 6 (2010): 52 (see Introductory Chapter for more).

¹³⁵ Simpson, *Dancing On Our Turtles’ Back*, 52.

¹³⁶ In a separate passage, Simpson similarly explains that the aim of Indigenous resurgence is “to provide the best political and cultural context for the lives of our people to flourish.” (Simpson, *Dancing*, 86)

¹³⁷ Alfred and Cornthassel, “Being Indigenous,” 614.

¹³⁸ Additionally, they also suggest that Indigenous peoples do not need colonizers “to validate our vision of a free future....” Alfred and Cornthassel, “Being Indigenous,” 614)

¹³⁹ Taiaiake Alfred, “Foreword,” in *Red Skin White Masks: Rejecting the Colonial Politics of Recognition*, by Glen Coulthard (Minneapolis: University of Minnesota Press, 2014), xi.

¹⁴⁰ Coulthard, *Red Skin, White Masks*, 48.

of imperialism”¹⁴¹ by “creat[ing] new and just realities.”¹⁴² She also suggests that resurgence needs to be done “on our own terms, without sanction, permission or engagement of the state...”¹⁴³ For his part, Alfred argues that the “horizon of our future generations can only be extended if we commit to take direct action in defence of our lands and rights, and begin to demand respect from Canada.”¹⁴⁴ Likewise, Coulthard suggests that Indigenous peoples “begin to collectively redirect our struggles *away* from a politics that seeks to attain a conciliatory form of settler-state recognition,” and “toward a *resurgent politics* [...] premised on self-actualization, direct action, and the resurgence of cultural practices....”¹⁴⁵ The vision that Simpson, Alfred, and Coulthard share is one in which Indigenous peoples redirect their efforts away from State mechanisms and toward reclaiming their lands and ways of life on their own terms.

The question is: what shape(s) might this kind of resurgence take? Coulthard argues that the Idle No More movement “offers a productive case study against which to explore what a resurgent politics might look like on the ground.”¹⁴⁶ Idle No More has been described as an “inspiring expression of Indigenous resurgent activity” (Coulthard),¹⁴⁷ “a fight for the fair and accurate representation of Indigenous Peoples and our issues” (Simpson),¹⁴⁸ and a “profound moment of resistance and resurgence” (Alfred).¹⁴⁹ One of the merits of this movement was its solidarity. As Coulthard puts it: “Canada had not seen such a sustained, united, and coordinated

¹⁴¹ Simpson, *Dancing On Our Turtles’ Back*, 146.

¹⁴² Simpson, *Dancing On Our Turtles’ Back*, 52.

¹⁴³ Simpson, *Dancing On Our Turtles’ Back*, 17.

¹⁴⁴ Taiaiake Alfred, “Aboriginal Rights Are Meaningless,” *Windspeaker* 19, no. 3 (July 2001): 4-5.

¹⁴⁵ Coulthard, *Red Skin, White Masks*, 24.

¹⁴⁶ Coulthard, *Red Skin, White Masks*, 159-160.

¹⁴⁷ Glen Coulthard, “#IdleNoMore in Historical Context,” in *The Winter We Danced: Voices From the Past, the Future, and the Idle No More Movement*, ed. by The Kino-nda-niimi Collective (Winnipeg: Arp Books, 2014), 32.

¹⁴⁸ Leanne Simpson, “Where the Mainstream Media Went Wrong,” in *The Winter We Danced: Voices from the Past, the Future, and the Idle No More Movement*, ed. by the Kino-nda-niimi Collective (Winnipeg: Arp Books, 2014), 299-300.

¹⁴⁹ Taiaiake Alfred and Toby Rollo, “Resettling and Restoring the Relationship Between Indigenous Peoples and Canada,” in *The Winter We Danced: Voices From the Past, the Future, and the Idle No More Movement*, ed. by The Kino-nda-niimi Collective (Winnipeg: Arp Books, 2014), 314.

nationwide mobilization of Indigenous nations against a legislative assault on our rights since the proposed White Paper of 1969.”¹⁵⁰ Furthermore, as Alfred points out, the “collective action” of the Idle No More movement showed that there is “support among Canadians” for “justice [for] Indigenous peoples.”¹⁵¹ The solidarity demonstrated by Indigenous peoples of various Nations as well as their allies indicates that people are tired of waiting for change—they are interested in taking action themselves.

The history prior to Idle No More,¹⁵² as well as the movement itself, shows the continued unrest among Indigenous peoples and their allies, and their desire for meaningful and foundational change. Indigenous resistance and the Idle No More movement are “an indication that Indigenous Peoples and communities [are] no longer willing to wait for Canada (or even their own leaders) to negotiate a just relationship in good faith.”¹⁵³ Coulthard claims that the emergence of the Idle No More movement is evidence that present tactics for healing, recovery, and recognition are not working, and the unrest among Indigenous peoples continues. As he puts it, Idle No More conveys “the ultimate failure of [present approaches] to reconciliation.”¹⁵⁴ The Idle No More movement suggests that past wrongdoings have not, in fact, been righted, and Indigenous peoples are still fighting for justice.

However, Alfred points out that although Idle No More was inspiring, it was not sufficient to bring about the kind of long-lasting change that Indigenous peoples seek.¹⁵⁵ As he puts it, “in terms of meaningful change in the lives of people and the struggle for justice, things

¹⁵⁰ Coulthard, *Red Skin, White Masks*, 161.

¹⁵¹ Taiaiake Alfred, “Idle No More and Indigenous Nationhood,” in *The Winter We Danced: Voices From the Past, the Future, and the Idle No More Movement*, ed. by The Kino-nda-niimi Collective (Winnipeg: Arp Books, 2014), 347.

¹⁵² As Simpson points out, the movement “is in fact a continuation of 400 years of resistance” (Simpson, “Where the Mainstream Media Went Wrong,” 297).

¹⁵³ Coulthard, “#Idle No More,” 35.

¹⁵⁴ Coulthard, *Red Skin, White Masks*, 163.

¹⁵⁵ Alfred, “Idle No More,” 348

are no different now than when this whole thing started.”¹⁵⁶ What this means is that Indigenous peoples’ struggle for justice—a struggle to stop the ongoing toleration of land theft and corresponding illegalities—does not end with Idle No More and must continue on. To borrow a phrase from Coulthard, the time has come to “*un-settle* settler-colonialism” (original emphasis).¹⁵⁷ Until past and present State illegalities are no longer tolerated the struggle will continue. Disrupting this longstanding toleration will require not only solidarity among Indigenous peoples, but will also require more settler-Canadians to become allies so that this fight for justice reaches a critical mass—a collective voice so loud that it cannot be silenced or ignored.

CONCLUDING DISCUSSION

Almost all students who take first year philosophy at a North American university are required to read Plato’s *Republic*. In *Republic*, Plato uses the character Socrates to describe the “just city.” Above all, the just city is founded on order; all of the people have specific roles, to which they must singularly dedicate their lives and from which they must not stray. The entire edifice of the just city is built on a crucial lie: a fictitious class system. As Socrates explains, all people of the just city will be told a “myth,” which goes as follows: “the god who made you mixed some gold into those who are adequately equipped to rule, because they are the most valuable” and “put silver in those who are auxiliaries and iron and bronze in the farmers and other craftsmen.”¹⁵⁸ The architects of this well-ordered city have a plan in place to eliminate any difficult questions or lingering doubts about the city’s social structure by censoring education

¹⁵⁶ Alfred, “Idle No More,” 349.

¹⁵⁷ Coulthard, “#Idle No More, 36.

¹⁵⁸ Plato, *Republic*, trans. by G.M.A. Grube, rev. by C.D.C. Reeve (Indianapolis: Hackett Publishing Company, 1992), 91 (III, 415a).

and banning inconvenient stories.¹⁵⁹ One foundational principle of the just city is to “supervise the storytellers.”¹⁶⁰ From their early education onward, children are subjected to games that make them “more law-abiding,” so that they “grow up into good and law-abiding [people].”¹⁶¹ Stories told to children in the just city are also censored so that “the first stories they hear [...] are the best ones for them to hear.”¹⁶² These censorship regulations are not merely guidelines but actual laws in the just city.¹⁶³

In Simpson’s *Dancing On Our Turtles’ Back* she discusses how storytelling can be a way to learn, grow, and heal. As she explains, “[s]torytelling is at its core decolonizing, because it is a process of remembering, visioning and creating a just reality...”¹⁶⁴ Simpson believes that the stories can provide a “resurgence narrative.”¹⁶⁵ Through the telling and retelling of stories people can expose deceptions, reveal injustices, and provide alternatives. “When we engage in artistic or creative processes,” notes Simpson, “we disconnect ever so slightly from the dominant economic system” and (re)connect to a different way of being.¹⁶⁶ For Simpson, stories allow us “to vision and dream our way out of the cognitive box of imperialism.”¹⁶⁷ Thus, it makes sense that Plato would advocate censoring the storytellers in his hypothetical “just city;” stories hold transformative power and they can mobilize individuals and communities to combat oppression.

¹⁵⁹ Plato, *Republic*, 53 (II, 378a) & 57 (II, 381e).

¹⁶⁰ Plato, *Republic*, 53 (II, 376c).

¹⁶¹ Plato, *Republic*, 100 (IV, 424e-425a).

¹⁶² Plato, *Republic*, 54 (II, 378e).

¹⁶³ Plato, *Republic*, 59 (II, 383c).

¹⁶⁴ Simpson, *Dancing On Our Turtles’ Back*, 33.

¹⁶⁵ Simpson, *Dancing On Our Turtles’ Back*, 80.

¹⁶⁶ Simpson, *Dancing On Our Turtles’ Back*, 93.

¹⁶⁷ Simpson, *Dancing On Our Turtles’ Back*, 81.

Donna Haraway reminds her readers that, “[i]t matters what stories tell stories.”¹⁶⁸ This idea speaks to my aim in this chapter: to take the story of State-based law and order and then “flip the script,” so that the State is exposed as the criminal, and State thievery and deception are the subjects of the story. Exploring Alfred, Simpson, and Coulthard’s writings on contemporary colonialism and Indigenous resurgence provides not only insight into the injustice of both Indigenous dispossession and Canadian state strategies for resolution, but also offers a new perspective on the concept of tolerated illegality. Whereas in the previous chapters it was assumed that the State is the authority that classifies actions as “legal” or “illegal,” this chapter challenges the legality of the Canadian State. The displacement of Indigenous peoples from their homelands—and corresponding loss of culture, spirituality, and ways of life—is a multi-faceted illegality that has never been rectified. This illegality continues to be “tolerated” in the sense that efforts towards recognition, reconciliation, forgiveness, and apologies (on the part of the State), both well intentioned and otherwise, have not resulted in significant change when it comes to restoring Indigenous lands and addressing the corresponding losses.

The concept of resurgence evokes imagery of water or electricity surging, pushing, or carrying forward. In the popular imagination, the word “surge” is often linked to a power surge, or a surging tidal wave. Resurgence has the capacity to make hidden facets of power visible, or at least make them visible to an unexpected extent or going in an unforeseen direction. The key to resurgence is a power surge, from a seemingly quiet or dormant source, that brings to the foreground a repressed power that is now pushing forward. At its core, tolerated illegality is about power. Those who have the most power usually define what constitutes “illegal” behaviour, and whether or not such behaviour will be tolerated. Next, Chapter 4 strives to

¹⁶⁸ Donna Haraway, “Staying with the Trouble: Anthropocene, Capitalocene, Chthulucene.” In *Anthropocene or Capitalocene? Nature, History, and the Crisis of Capitalism*, ed. by Jason W. Moore (Oakland, CA: PM Press, 2016), 42.

address a number of lingering questions about the idea of tolerated illegality, highlighting different dimensions of tolerated illegality and *power*, and reflecting the contradictory nature of lived experiences of tolerated illegality. ✪

CHAPTER 4: NINE THESES ON TOLERATION, ILLEGALITY AND POWER

Law tolerates that which is different only so long as it is not *so different* that it challenges the organizing norms, commitments, practices and symbols of the Canadian constitutional rule of law (original emphasis).¹

...the ultimate, hidden truth of the world is that it is something we make, and could just as easily make differently.²

This chapter is an exploration of the ways in which power operates through decisions about whether or not to tolerate various illegalities performed by particular individuals or groups. “Tolerance” is a deceptive idea because although it is often presented as a virtue, it harbours a network of troubling implications. Tolerance rhetoric often conceals an implicit fear of those who are perceived as deviant or threatening. Exploring the hidden assumptions of toleration is an instructive launching-off point for a discussion about power and tolerated illegality. One aim of this chapter is to think about the ways in which the “toleration” aspect of tolerated illegality—that is, whose deeds and what deeds are deemed legally permissible or not—organizes, categorizes, divides, excludes, punishes, and silences.

Another significant influence in this chapter is the role of bureaucracies in constructing arduous situations pertaining to illegality and power. The previous chapter referred to the idea that when Indigenous peoples are forced to engage with the State, they are bombarded with bureaucratic procedures, consultations, audits, paperwork, and more.³ Focusing on the work of David Graeber and Slavoj Žižek, this chapter explores how bureaucracies create feelings of

¹ Benjamin L. Berger, “The Cultural Limits of Legal Tolerance,” *The Canadian Journal of Law and Jurisprudence* 21, no. 2 (2008): 259.

² David Graeber, *The Utopia of Rules: On Technology, Stupidity and the Secret Joys of Bureaucracy* (Brooklyn: First Melville House, 2015), 89.

³ Taiaiake Alfred and Erin Michelle Tomkins, “The Politics of Recognition: A Colonial Groundhog Day,” *Discussion Paper, prepared for Chiefs of Ontario* (August 25, 2010): 15.

helplessness and indebtedness, cultures of institutional loyalty and complicity, and opportunities to punish those perceived as threatening. Graeber, in particular, emphasizes that bureaucratic structures are both synonymous with “structural violence”⁴ and also the means through which the State exercises its power. Theses 3 through 6 highlight different dimensions of how bureaucracies strategically use their institutional power and the idea of tolerance to their benefit.

Realistically, there cannot be one unified argument about how toleration and power operate relative to legality and illegality. There are too many variables involved in each example, including: laws, morals, religious norms, participants, behaviours, contexts, circumstances, public opinions, social pressures, identity politics, and so on. Accordingly, in this chapter, I choose not to construct one argument that strives to make sense of everything, and instead I offer nine theses on how power operates through toleration. Critical theorists Jacques Rancière and Glen Coulthard are example of scholars who have published works employing the format “X theses on Y” (e.g. Rancière’s “Ten Theses on Politics”⁵ and Coulthard’s “Five Theses on Indigenous Resurgence and Decolonization”).^{6,7} I adopt this organizational strategy in this chapter because it allows me to present arguments that constellate around a particular theme (i.e., tolerated illegality), but touch on different aspects of this theme and relate to one another in intriguing and nonlinear ways.

⁴ Graeber defines structural violence as “forms of pervasive social inequality that are ultimately backed up by the threat of physical harm” and he links it to the creation of the “willful blindness we normally associate with bureaucratic procedures.” (Graeber, *Utopia of Rules*, 57)

⁵ Jacques Rancière, “10 Theses on Politics,” in *Dissensus: On Politics and Aesthetics*, trans. Steven Corcoran (London: Continuum International Publishing Group, 2010).

⁶ Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014), 165-179.

⁷ I should also add to the list *Violence: Six Sideways Refelctions* by Slavoj Žižek. Žižek justifies his “six sideways glances” approach as follows: “Instead of confronting violence directly, the present book casts six sideways glances. There are reasons for looking at the problem of violence awry. My underlying premise is that there is something inherently mystifying in a direct confrontation with it: the overpowering horror of violent acts and empathy with the victims inexorably function as a lure which prevents us from thinking.” (Slavoj Žižek, *Violence: Six Sideways Reflections* (New York: Picador, 2008), 3-4)

The nine theses discussed in this chapter converge and diverge as they explore different dimensions of how power operates through the decision of whether or not to tolerate illegal behaviour. Sometimes the arguments complement one another, and other times they are contradictory; however, this inconsistency is merely an honest reflection of lived experiences of tolerated illegality. Tolerated illegality is a complex socio-legal phenomenon that cannot be neatly or realistically captured with one straightforward argument, but rather requires a network of interlocking theses to illuminate different aspects of its existence.

THESIS 1: *Although “toleration” is often lauded as a virtue, the ways in which toleration is deployed in liberal societies today frequently masks a fear of the “Other,” who is perceived as dangerous or threatening.*

This first thesis of the chapter takes a step back to emphasize the “toleration” part of “tolerated illegality” (more than the “illegality” part). Chapters 1 and 2 of the thesis focused on the ideas of legality and illegality, but here I consider what this idea of “toleration” means and how it operates in today’s (neo)-liberal society.⁸ In *Regulating Aversion: Tolerance in the Age of Identity and Empire*, Wendy Brown discusses the troubling underpinnings of liberal tolerance. In present-day liberal societies, tolerance is deployed as a virtue; that is, as a praiseworthy attribute that people should aspire toward in order to coexist peacefully in a multicultural society composed of people with varying racial, cultural, and religious identities. However, as Brown suspects, and later goes on to argue, tolerance discourse masks a fear of “the Other,” and further entrenches a divide between likeminded liberals and those with differing values (i.e. values that might threaten or challenge liberal beliefs). Tolerance, like its companion virtue, patience, is

⁸ Please see chapter 2 for my preferred explanation of neoliberalism (“a peculiar form of reason that configures all aspects of existence in economic terms,” or the “economization of everything and every sphere, including political life”). (Wendy Brown, *Undoing the Demos: Neoliberalism’s Stealth Revolution* (New York: Zone Books, 2015), 17 & 40)

“necessitated by something one would prefer did not exist,” and therefore “involves managing the presence of the undesirable [...] even the revolting, repugnant, or vile.”⁹ Although on the surface tolerance seems like an admirable personal quality, a closer examination begins to tarnish this virtuous veneer (I will elaborate on this idea throughout this first thesis, as well as thesis 2(a) and (b)).¹⁰

The troubling implications of tolerance discourse gain increased focus with Brown’s insightful etymology of “tolerance.” Her discussion becomes particularly thought-provoking when she abandons the realm of “generic dictionary definitions” and considers how the idea of tolerance is used in “various technical fields.”¹¹ She explains that in disciplines such as engineering and medicine, tolerance is about the quantity of a foreign force or influence a person or structure can physically tolerate before being harmed. For example, engineers study the amount of weight a bridge can tolerate before it collapses. Similarly, doctors examine whether or not a patient’s body can tolerate a particular drug without experiencing adverse effects. In all of the examples she provides from scientific and technical fields, tolerance is about how much of a threatening element the subject or object can handle before being damaged.¹²

Conversations about “tolerance” and conversations about “equality” mostly occur in different registers. “Tolerating” another person is not the same as recognizing another as an equal. To illustrate this idea, Brown discusses how we are taught to tolerate those with different

⁹ Wendy Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton: Princeton University Press, 2006), 25.

¹⁰ Here is an example to illustrate how rules or policies that seem “neutral” or “tolerant,” or claim to apply “equally to all,” may actually perform the opposite. Quebec’s Bill 62 is advertised as “religious neutrality” legislation. The Bill requires that all people uncover their faces while using public services. Moreover, it is purported to be “neutral” because it applies equally to everyone. However, in fact, Bill 62 almost exclusively affects Muslim women. This Bill asserts a “neutral” attitude, but belies an intolerance—arguably even a fear—of Muslim women who cover their faces.

¹¹ Brown, *Regulating Aversion*, 26.

¹² Brown, *Regulating Aversion*, 26-27.

religious beliefs, but we are taught that women and men are equal.¹³ Additionally, toleration not only masks a distaste for individuals perceived as different and a fear of those seen as threatening, but it also makes those who bestow tolerance on others seem falsely superior. The ones who confer tolerance on others believe that they are “better than” those whom they tolerate; that is, the bestowers see themselves as more progressive, charitable, and open-minded. As Brown points out, “[a]lmost all objects of tolerance are marked as deviant, marginal, or undesirable *by virtue of being tolerated*,” while the act of bestowing tolerance “inevitably affords some access to superiority” (emphasis added).¹⁴ The act of tolerating another reinforces the idea that this person is different and/or inferior somehow and thus requires toleration. Deciding that a particular person or group is a candidate for tolerance further entrenches their “Otherness,” and, in effect, actually exacerbates differences between peoples.

That being said, Brown’s intention is to construct a nuanced position on tolerance and not to oversimplify the concept by presenting it as an easy target. To “remove the scales from our eyes” about tolerance is not to “reject tolerance,” claims Brown.¹⁵ She is careful to note that her “critical set of concerns” does not mean that her book is “against tolerance,” but rather that it aims to “puncture the aura of pure goodness that contemporary invocations of tolerance carry.”¹⁶ Brown explains that it is “inarguable” that tolerance is preferable to “violent civil conflict.”¹⁷ However, “without foolishly positioning ourselves ‘against tolerance’ or advocating ‘intolerance,’” Brown argues that, “we can contest the depoliticizing, regulatory, and imperial aims of contemporary deployments of tolerance with alternative political speech and practices.”¹⁸

¹³ Brown, *Regulating Aversion*, 3.

¹⁴ Brown, *Regulating Aversion*, 14.

¹⁵ Brown, *Regulating Aversion*, 11.

¹⁶ Brown, *Regulating Aversion*, 10.

¹⁷ Brown, *Regulating Aversion*, 202-203.

¹⁸ Brown, *Regulating Aversion*, 205.

For Brown, the goal is to illuminate how and why an idea like tolerance can circulate widely without much critical thought. Brown's work on tolerance is an instructive launching off point for the rest of the chapter is because it highlights the underpinnings of liberal tolerance, and these are relevant to whose actions and what actions are deemed legal or illegal, tolerable or intolerable.

THESIS 2: *Certain people and actions perceived as “threatening” are less likely to be tolerated by law enforcement officials.*

2(a) *Who is seen as threatening?*

Reflecting on the ruling class in mid to late 19th century Europe, David Graeber states that the bourgeoisie had an “obsession with jailing poets and playwrights whose work they considered threatening....”¹⁹ This quotation draws out the interconnectedness between “who” and “what” is seen as threatening (and thus less likely to be tolerated by legal officials). In Graeber's quotation, both the poets/playwrights *and* their actions are inseparable and jointly regarded as potentially dangerous to the ruling class. In this second thesis, I pulled the “who” and the “what” apart for the purpose of highlighting different dimensions of the analysis (e.g. people's race, religion, class, sexuality, etc. *versus* political arguments and ideology), but in the majority of cases these two analytically separable categories are likely conjoined.

As thesis 1 described, liberal tolerance may seem like a virtue, but it is often deployed in a manner that fabricates the false superiority of the “bestowers” of tolerance and marginalizes those seen as “dangerous.” In Brown's words, the language of tolerance characteristically signals “the undesirable proximity of the Other in the midst of the Same,” and thus suggests that

¹⁹ Graeber, *Utopia of Rules*, 90.

we view those whom we tolerate not as equals but rather as “perceived threats.”²⁰ This point becomes clear when we think about how tolerance fluctuates according to whom and/or what is deemed threatening at any given time. For example, as Brown explains, “liberal commitments to tolerance are always modified by anxieties and perceived dangers,” which may range “from the effect of racial integration on neighborhood property values to the effect on schoolchildren when avowed homosexuals are teachers.”²¹ As collective anxiety about a particular group or concern escalates, the tolerance accorded to this group is often seen to decrease correspondingly.

The question of who is perceived as threatening directly relates to whose illegalities are tolerated and whose are not. For example, Brown explains that after the attacks on September 11th, 2001, there was a growing fear of men from the Middle East. Those liberal commitments to tolerance, modified by anxieties and perceived dangers, shifted after September 11th as Middle Eastern men living in America were increasingly regarded as threatening. As a result, many of these men were rounded up, denied their legal rights, and often detained without cause. As Brown explains:

The state detained thousands of Arabs and Arab Americans after the September 11 attacks, several hundred of whom remain[ed] in custody without being charged, despite subsequent revelations that evidence linking them to any illegal, let alone terrorist, activity [was] nonexistent. During these detentions, near relatives of the detainees were not informed of the names or whereabouts of the detainees, nor were the detainees permitted legal counsel. Interrogation at the residence of another 5,000 young men on student, tourist, or business visas who were reputed to ‘have come to the U.S. from countries with suspected terrorist links’ began in December 2001; Miranda rights were not read to these men, and those questioned who had expired visas joined the growing number of individuals from the Middle East targeted by the Immigration and Naturalization Service for immediate deportation or indefinite detention.²²

As the passage above suggests, there are often double standards pertaining to tolerated illegality, and some people can get away with breaking particular laws, whereas others cannot. For the state

²⁰ Brown, *Regulating Aversion*, 73.

²¹ Brown, *Regulating Aversion*, 188.

²² Brown, *Regulating Aversion*, 100.

officials trying to “keep America safe,” illegalities (e.g. detaining people without reading them their rights, without charging them, and without permitting them counsel) are commonly tolerated (by the State that these authorities represent). However, Middle Eastern men were not extended the same toleration. For some of these men, their presence in the U.S. was not even tolerated, despite the fact that they had committed no crimes. Others who had broken the law (their visas had expired) did not receive tolerance but rather were detained or deported.

Less extreme examples of increased fears and anxieties also affect whether or not someone’s “illegalities” are tolerated. As mentioned by Brown, race and sexuality are two categories that often cause societal panic, and, as a result, decreased tolerance. Another category that may cause similar reactions is (socio-economic) class. In his journal, homeless activist David Arthur Johnston (who is himself homeless) recounts being picked up by police officers for sleeping outdoors and being driven to the outskirts of town. In one of his journal entries, Johnston reports:

Wednesday night—No interruptions until about 5:00 AM (again)—police come—“arrest” me (no rights reading or anything)—cuffs on—drive out to the Town and Country Mall (about a 40 minute walk away) which is outside of city limits and drop me off—they suggested that next time they will take me out to the Malahat (a highway far out of town—maybe about 20km away)...²³

Here, again, we see a distinction between who can get away with “illegalities” and who cannot. Whereas the police, who represent State-based “law and order,” can unlawfully expel Johnson from the city centre (e.g. no reading of rights), Johnson’s outdoor living and sleeping preferences were not tolerated.²⁴ Indigenous peoples are also sometimes affected by fluctuations in liberal

²³ David Arthur Johnston, *The Right to Sleep* (Victoria, BC: Self-Published, 2011), 40 (Journal Entry for Thursday, May 20, 2004. <http://www.angelfire.com/apes/hatrackman/welcome.htm>).

²⁴ Note: this excerpt from Johnson’s journal was written in 2004, prior to the change in overnight shelter laws in Victoria, BC. In 2010, at the BC Court of Appeal, it was determined that nighttime overhead shelter (e.g. a box or tarp) is permissible only between the hours of 7pm and 7am. For more on this topic, please see: Mark Z. Zion, “What is a Right to Shelter in the Desert of Post-Democracy?: Tracking Homeless Narratives from the Courtroom to Dissensus.” LLM thesis, University of Victoria, 2015.

commitments to tolerance based on perceived dangers. Indigenous political-legal theorist Leanne Simpson describes a situation similar to Johnston's, in which Indigenous peoples are transported away by police officers. As Simpson explains, "[w]e have stories of being driven to the outskirts of our city by police and bar owners and dropped off to walk back to our reserves."²⁵ Arguably, a person's identity affects whether his or her legal transgressions will be punished or ignored. Who a person is, what he or she looks like, and whether he or she is perceived as a threat are important contributing factors when it comes to whether illegalities will be ignored or punished. Fluctuations in societal anxiety continually cause certain groups to be heightened targets for intolerance until anxieties shift and new groups become the recipients of panic and intolerance.

2(b) *What is seen as threatening?*

If, as Brown puts it, "[i]n every lexicon, tolerance signifies the limits of what foreign, erroneous, objectionable or dangerous element can be allowed to cohabit with the host without destroying the host,"²⁶ then what does this imply for the *types* of illegal behaviour that may or may not be tolerated? Ruling and governing officials tend to perceive particular illegal behaviours as more threatening than others. Whereas some crimes can be tolerated because allowing them to happen will not contribute to "destroying the host" (in this case, the state-legal-political apparatus), other illegalities are seen as more threatening because they call into question the ideological values of the State and law.

Discussing the intersection of courtroom law and religion, Ben Berger argues that legal decisions about religious difference hinge on one pivotal question: does the relevant religious practice threaten the core values of liberal legalism? If a particular religious practice can be

²⁵ Leanne Simpson, *Dancing on our Turtle's Back: Stories of Nishnaabeg Re-Creation, Resurgence and a New Emergence* (Winnipeg: Arp Books, 2011), 12.

²⁶ Brown, *Regulating Aversion*, 27.

safely relegated to the so-called “private” realm, where it will not interfere with the “public” realm, dominant socio-legal values, or with other citizens’ daily lives, then it is declared tolerable. If, however, the religious practice in question threatens one of the tenants of liberal legalism, including individual autonomy, then it is deemed intolerable and impermissible. To illustrate this point, Berger uses two court cases as examples, one in which religions “wins” and one in which religion “loses.”²⁷ As Berger explains, in the more straightforward case of *Multani*,²⁸ religion “wins” when the court decides that an Orthodox Sikh boy is allowed to wear a concealed ceremonial dagger (a *kirpan*) under his clothes (in a sheath, sewn into a cloth pouch, where no one will see it or even know that it is there). In the more complicated case of *B.R.*,²⁹ religion “loses” when the court decides that an infant will be given a blood transfusion even though it is against the parents’ faith as Jehovah’s Witnesses.³⁰ For Berger, these two examples respectively highlight the permissive and restrictive limits of liberal legal tolerance.

Berger argues that the law’s tolerance of religious difference ends when the practice in question is perceived to threaten liberal legal values. As Berger explains, in *Multani* the religious practice “does not touch the domain of public reason, and does not threaten the autonomy, choice, or equality of any others.”³¹ In other words, “tucked away inside the folds of young Multani’s clothing, religion does not threaten any of the values or structural commitments of the rule of law.”³² Conversely, in *B.R.* Berger explains that:

The parents had found the limit of legal tolerance at the border of individual autonomy and choice. [...] The message sent in *B.R.* is that, in the presence of religious difference that actually challenges the fundamental commitments of the Canadian constitutional rule of law, tolerance is at an end.³³

²⁷ Berger, “Limits of Legal Tolerance,” 260.

²⁸ *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256 (Can.).

²⁹ *B.(R.) v. Children’s Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 (Can.).

³⁰ Berger, “Limits of Legal Tolerance,” 260-261.

³¹ Berger, “Limits of Legal Tolerance,” 260-261.

³² Berger, “Limits of Legal Tolerance,” 261.

³³ Berger, “Limits of Legal Tolerance,” 261.

Here liberal law's tolerance (e.g., of religious difference) reaches its threshold when a particular action or behaviour threatens its fundamental commitments, including individual choice, autonomy, and equality. For Berger, which actions are tolerable (and which are not) is in part a function of whether they threaten the liberal legal worldview, a worldview that understands itself as "above" culture, or as an "impartial judge" of culture, but which fails to understand or acknowledge that it is actually a "culture" itself.

The idea that liberalism, and liberal legalism by extension, is a *culture* is a point picked up by both Brown and Berger. Brown's focus is more on liberalism as a culture (although she mentions liberal legalism too³⁴). According to Brown, there are three ways in which liberalism presents itself as "cultureless." First, liberal values (e.g. "equal rights, moral autonomy, individual liberty," etc.) are portrayed as "universal," as opposed to cultural values that are seen as "particular, local, and provincial."³⁵ Second, whereas liberalism prioritizes the individual (especially "maximizing individual freedom"), culture focuses on the "coherence and continuity of groups," which pits culture against liberal goals.³⁶ Third, liberalism believes that it has "master[ed] culture," including religion, so that culture and religion can be "enjoyed" as long as they are practiced in private. Thus, Brown argues that liberal law and politics today position "culture as its Other and also as necessarily antagonistic to its principles unless it is subordinated...."³⁷ By positioning itself as "above" culture, liberalism masks its own system of values and beliefs, which are falsely presented as "universal."

³⁴ For example: "Rather, the conflict itself exposes the non-universal character of liberal legalism and public life: it exposes its cultural dimensions." (Brown, *Regulating Aversion*, 173) Furthermore, on page 21 she records a list of principles that constitute liberal ideology, including "the rule of law," so when she is talking about liberal principles "liberal legalism" is included.

³⁵ Brown, *Regulating Aversion*, 21.

³⁶ Brown, *Regulating Aversion*, 21.

³⁷ Brown, *Regulating Aversion*, 21.

Presented as universal values, the principles of liberalism are seen as beyond reproach, but they merely represent a system of dominant *cultural* beliefs that revolve around the individual and individual liberty. Put simply, as Brown states, “liberalism *is* cultural,”³⁸ and both “the autonomy and the universality of liberal principles are myths....”³⁹ Brown elaborates, and continues to debunk liberalism’s “culturelessness,” in the following passage: “The double ruse on which liberalism relies to distinguish itself from culture—on the one hand, casting liberal principles as universal; on the other, juridically privatizing culture—ideologically figures liberalism as untouched by culture and thus as incapable of cultural imperialism.”⁴⁰ Thus, liberalism presents itself as “uniquely tolerant of culture from its position above culture,” suggesting that it is itself “a-cultural.”⁴¹ As we shall see when we turn to Berger’s work next, debunking the a-cultural status of liberalism extends to liberal *legalism*, a realm in which the challenge is often (similarly) to expose the false universality of the law’s claims.

Although Berger has a more specifically legal focus than Brown, he draws readers’ attention to a similarly troubling insight: how today’s dominant liberal incarnation of law projects itself as a neutral arbiter of cultural disputes and fails to reflect on the fact that it is a culture itself, complete with its own set of principles, values and beliefs. Berger frames the meeting of law and religion as a “cross-cultural encounter.”⁴² He explains that, in the context of legal relationships, multiculturalism is commonly understood as an area “over which law presides,” but “not one in which the law is itself one of the cultural players.”⁴³ When religion oversteps by challenging legal values, practices, and principles it will be brought back in line and

³⁸ Brown, *Regulating Aversion*, 22.

³⁹ Brown, *Regulating Aversion*, 23.

⁴⁰ Brown, *Regulating Aversion*, 23.

⁴¹ Brown, *Regulating Aversion*, 23.

⁴² Berger, “Limits of Legal Tolerance,” 246.

⁴³ Berger, “Limits of Legal Tolerance,” 249.

“made to conform to the rule of law’s culture.”⁴⁴ Thus, in the cross-cultural encounter between law and religion, law aims either to absorb or dispel values and principles that are regarded as threatening (i.e. not compatible) with its own system of beliefs.

Berger argues that liberal law refuses to accept incursions into its worldview from religion. He suggests that law is fixated on “its own centrality,”⁴⁵ so that “when religion makes a claim upon the law that is not digestible within legal frameworks, this homology means that the claim is in competition with law’s vision of the world.”⁴⁶ Accordingly, legal ideology that privileges “the language of rights constitutionalism” and terms like “autonomy,” “equality,” and “choice,” take over the conversation.⁴⁷ Ultimately, Berger concludes that if religion encroaches on the law in a way that would require it to “cede, reconsider, or revise its core cultural commitments,” law’s “posture of tolerance collapses into one that is assimilationist or conversionary.”⁴⁸ In the end, “the culture of law’s rule is structurally positioned and very much prepared to assert its dominance.”⁴⁹ What we learn from Brown and Berger is that liberal legalism is not only a culture, but also an authoritarian culture that extinguishes competing ideas. This observation is instructive for tolerated illegality, and, more specifically, for understanding what types of illegal actions are tolerable (or not). Often, which types of illegalities are (un)tolerated depends on whether deeply seated values are challenged or affirmed by the actions in question.

⁴⁴ Berger, “Limits of Legal Tolerance,” 260.

⁴⁵ Berger, “Limits of Legal Tolerance,” 267.

⁴⁶ Berger, “Limits of Legal Tolerance,” 267.

⁴⁷ Berger, “Limits of Legal Tolerance,” 274.

⁴⁸ Berger, “Limits of Legal Tolerance,” 276.

⁴⁹ Berger, “Limits of Legal Tolerance,” 276.

THESIS 3: *The State can strategically leave certain laws unenforced when it wants to appear lenient and arbitrarily enforce illegalities that are widely tolerated when it wants to target particular individuals or groups.*

State governments can also use tolerated illegality in strategic ways to bolster a sympathetic image while also retaining the ability to detain individuals they regard as deviant. Slavoj Žižek discusses how authoritarian regimes use the strategy of making almost everything illegal, so that it is impossible for citizens to get through the day without breaking a single law. The benefit of this strategy, from the state's perspective, is that the state and its representatives can seem lenient when they let people "get away" with things, but they also reserve the ability to arrest anyone at any time if they want to. As Žižek puts it, in this way the regime can, "appear merciful," while "at the same time wield a permanent threat to discipline its subjects...."⁵⁰ With so many laws in place, citizens are forced to commit illegalities, and when the state does not punish them for their transgressions, the state can claim to be generous. However, if the State sees certain individuals or groups as threatening, officials can always find some pretext to arrest them.

Žižek's example of an authoritarian regime that has illegalized almost everything may seem like an extreme example that is detached from Western life. However, consider the idea that certain minor offences—such as minimally speeding—are committed by many people on a daily basis. Most of the time, people are not punished for committing such indiscretions. However, relatively insignificant offences remain excellent ways for law enforcement officials to confront people that are construed as "dangerous" or "threatening." Here we can see how factors such as racism might come into play, and how cops could use petty speeding infractions to pull over, for example, young, black, male drivers. An authoritarian regime is not required to highlight the ways in which including certain laws in a legal system (laws that are generally

⁵⁰ Slavoj Žižek, "Tolerance as an Ideological Category," *Critical Inquiry* 34, no. 4 (2008): 675.

intended to go unpunished) allows the state to appear tolerant (when these laws are not enforced), but also target certain individuals or groups via profiling (e.g. classism/racism).

THESIS 4: *Tolerated illegalities may be purposefully built into bureaucratic systems so that the official holds all of the power and the fate of the individual hangs on whether or not the official will break the rules on his or her behalf.*

This thesis will be explained by means of two anecdotes, one general and abstract, the other a specific personal experience. In the first story, Slavoj Žižek entertains readers with his insights about the construction of the bureaucratic ruse. In the second, David Graber describes the nonsense he encountered and the frustration he felt dealing with a banking institution. Although each of these stories contains an element of humour, they also capture the Kafkaesque nightmare of bureaucratic institutions. Sometimes looking back at these administrative experiences can be somewhat funny. However, these encounters can also create feelings of anxiety, distress, and desperation.

First, in his usual comic style, Žižek tells a story about the traps that bureaucracies construct to wield power over people. In the following anecdote Žižek explains the “trick of bureaucracy:”

...bureaucracy corners the subject into a situation in which, in order to survive, he has to break the (explicit) Law—this violation is then tolerated, but also manipulated as a permanent threat. Whenever one deals with a true bureaucratic machine, one is sooner or later caught in a vicious circle (for the attestation *A* one needs the paper *B*; one cannot get *B* without *C*; and finally, of course, the circle is closed, *C* cannot be obtained without *A*...)—at this point, a bureaucrat displays his so-called human warmth, he mercifully makes an exception, breaks the vicious circle, and gives us the required attestation, although he never forgets to point out that, according to the rules, he should not do it...⁵¹

⁵¹ Slavoj Žižek, “Why Does the Law Need an Obscene Supplement?” In *Law and the Postmodern Mind: Essays on Psychoanalysis and Jurisprudence*, edited by Peter Goodrich and David Gray Carlson (Ann Arbor: University of Michigan Press, 1998): 79-80.

Zizek concludes by stating that “[b]ureaucracy literally feeds on this external and *a priori* indebtedness/guilt of the subject.”⁵² In these situations, the administration (governments, banks, hospitals, etc.) forces people into situations in which tolerated illegality is required, precisely so that bureaucrats can remind citizens that the institution holds the power either to help out and fix the situation—or not.

Second, most people have likely experienced frustrations dealing with bureaucracies in an effort to obtain, for example, a permit, insurance, or registration. In *Utopia of Rules*, Graeber recounts his aggravation dealing with the bank:

A few weeks ago, I spent several hours on the phone with Bank of America, trying to work out how to get access to my account information from overseas. This involved speaking to four different representatives, two referrals to nonexistent numbers, three long explanations of complicated and apparently arbitrary rules, and two failed attempts to change outdated address and phone information lodged on various computer systems. In other words, it was the very definition of a bureaucratic runaround. (Neither was I able, when it was all over, to actually access my account.)⁵³

For many, this story is all too familiar. Administrative processes occupy many hours of twenty-first century life, and the necessity of dealing with bureaucracies is essentially unavoidable. Bureaucratic procedures are founded on power relations that often leave the individuals forced to navigate these processes feeling helpless, angry, or even ashamed.

In Žižek’s example, the bureaucrat “makes an exception” and helps the individual out, but not before leaving this person with a sense of indebtedness toward the institution. In Graeber’s example, after multiple “long explanations of complicated and [...] arbitrary rules,” the bank representative does not make an exception, and Graeber cannot access his account. These tales suggest two possible outcomes for customers: some leave feeling guilty that they caused a rule violation, and others leave feeling frustrated that no one would break the (arbitrary)

⁵² Žižek, “Obscene Supplement,” 79-80.

⁵³ Graeber, *Utopia of Rules*, 15.

rules on their behalf. In both cases, tolerated illegality is implicated in bureaucratic power dynamics; whether the administrator engages in tolerated illegality or refuses to do so, the result is essentially the same—the individual is left feeling alienated by the encounter, and institutions continue to hold power over people.⁵⁴

THESIS 5: *Not only do those in positions of power often play by a different set of rules—and get away with more illegality—than others, but the perpetuation of these injustices also depends on widespread complicity.*

This is probably an intuitive argument, but one worth briefly addressing nonetheless: often the wealthy and powerful get away with more illegalities than others. In particular, financial institutions increasingly seem to, as Graeber puts it, “play by an entirely different set of rules.”⁵⁵ This thesis is helpfully illuminated by an experience retold by Graeber. While attending a conference on the “crisis in the banking system,” Graeber had the opportunity to chat, informally, with an economist from one of the Bretton Woods institutions. Graeber asked the economist why none of the bankers involved in the 2008 financial crisis have been found legally guilty of any crimes. Graeber recounts the conversation as follows:

OFFICIAL: Well, you have to understand the approach taken by U.S. prosecutors to financial fraud is always to negotiate a settlement. They don’t want to have to go to trial. The upshot is always that the financial institution has to pay a fine, sometimes in the hundreds of millions, but they don’t actually admit to any criminal liability. Their lawyers simply say they are not going to contest the charge, but if they pay, they haven’t technically been found guilty of anything.

⁵⁴ Moreover, as bureaucracies continue to proliferate, and administrative processes regulate most aspects of daily life, not only do people have more of these encounters, but they may also work for one of these institutions (either side of this dynamic has consequences for peoples’ psychology, disposition, and treatment of others). For an analysis of the bureaucratic dynamic—including its gendered dimensions—see Kathy E. Ferguson, *The Feminist Case Against Bureaucracy* (Philadelphia: Temple University Press, 1984).

⁵⁵ Graeber, *Utopia of Rules*, 24-25.

- ME: So you're saying if the government discovers that Goldman Sachs, for instance, or Bank of America, has committed fraud, they effectively just charge them a penalty fee.⁵⁶
- OFFICIAL: That's right.
- ME: So in that case...okay, I guess the real question is this: has there even been a case where the amount of money they had to pay was *more* than the amount of money they made from the fraud itself?
- OFFICIAL: Oh no, not to my knowledge. Usually it's substantially less.
- ME: So what are we talking here, 50 percent?
- OFFICIAL: I'd say more like 20 to 30 percent on average. But it varies considerably case by case.
- ME: Which means...correct me if I'm wrong, but doesn't that effectively mean the government is saying 'you can commit all the fraud you like, but if we catch you, you're going to have to give us our cut?'
- OFFICIAL: Well, obviously I can't put it that way myself as long as I have this job...⁵⁷

However, rather than leave the discussion on that note, Graeber adds a less intuitive twist to the story. He posits that a certain degree of society-wide complicity is required to perpetuate such a system of double standards. Moreover, for Graeber, this complicity is built into the essence of bureaucratic systems.

Graeber argues that the troubling aspect of institutional crimes like financial fraud is not only the double set of rules, but also the number of people who have to go along with the scheme to allow such crimes to transpire. He suggests that bureaucratic institutions, like banks, "create a culture of complicity."⁵⁸ He elaborates by explaining that this complicity exists within institutions and is cultivated by them. So, what ends up happening is that "loyalty to the organization is to some degree measured by one's willingness to pretend it [e.g. fraud, rule-

⁵⁶ Mark Migotti comments on the difference between "penalties" and "prices" in the article, "Paying a Price, Facing a Fine, Counting the Cost: The Differences that Make the Difference." He argues that often what we call "penalties" are actually "fees" for performing a certain behaviour. The difference is that whereas penalties apply to prohibited behaviour, fees are paid in order to go ahead and engage in a particular behaviour. (389-390) Sometimes what is labelled a "penalty" is actually just a sort of fee that must be paid to proceed as one wishes, including acting unethically. As Scott Woodcock points out, Graeber's anecdote relates to Migotti's article in that banks seem to be treating penalties like mere fees (i.e. as the "cost of doing business" rather than as penalties meant to have "punitive force"). (Mark Migotti, "Paying a Price, Facing a Fine, Counting the Cost: The Differences that Make the Difference," *Ratio Juris* 28, no. 3 (2015): 372-391)

⁵⁷ Graeber, *Utopia of Rules*, 25-26.

⁵⁸ Graeber, *Utopia of Rules*, 26.

breaking, etc.] isn't happening."⁵⁹ Ultimately, Graeber goes one step further in his analysis: the complicity required for bureaucratic institutions to continually get away with crimes like financial fraud requires a degree of greater societal complicity too, not just internal to the company, but beyond the company as well. As he puts it, "insofar as bureaucratic logic is extended to the society as a whole, all of us are playing along."^{60,61} What Graeber means by this is obviously not that everyone approves of crimes like financial fraud. Rather, a combination of other logics and reasons pervade, including: loyalty to the institution one works for (whichever institution it may be), willingness to follow institutional orders and ignore sketchy behaviour, occasional naiveté that institutions really are punished appropriately for their crimes, giving in to neoliberal reasoning that cultivates the economization of all things, and even belief in the necessity of bureaucracies for societal efficiency. Thus, overall, the problem is not only that the rich and powerful get away with more illegalities than others, but also that certain logics and ways of thinking perpetuate a culture in which such illegalities are possible (i.e. creating the conditions of possibility for financial crimes).

THESIS 6: *Tolerated illegality can sometimes be a "shibboleth;" knowing which laws to break signals that "you are one of us," whereas those lacking this knowledge are excluded.*

⁵⁹ Graeber, *Utopia of Rules*, 26.

⁶⁰ Graeber, *Utopia of Rules*, 26.

⁶¹ I was tempted to change Graeber's quotation here from "all" to "most." On the one hand, there is a sense in which people are not all similarly complicit in bureaucratic logic. As an analogous example, Christophe Bonneuil and Jean-Baptiste Fressoz point out in their text *The Shock of the Anthropocene*, we are not "all" complicit in climate change to the same degree. They write: "the Anthropocene presents an abstract humanity uniformly involved—and, it implies, uniformly to blame," (66) but an "average American, for example, consumes thirty-two times more resources and energy than an average Kenyan." (70) (Christophe Bonneuil and Jean-Baptiste Fressoz, *The Shock of the Anthropocene: The Earth, History, and Us* (Brooklyn, NY: Verso, 2016) On the other hand, in defense of Graeber, part of his point here relates back to Michael M'Gonigle's "logics" argument (see chapter 2). As M'Gonigle explains, the "logics behind the rules" that govern socio-legal/political systems "pervade the human world." (1-2) Often, even if people *think* that they are "outside" of the dominant ideology...they are not. We are all part of the contemporary neoliberal social structure; this structure shapes us all, but we do not all (re)produce it in the same way. (Michael R. M'Gonigle, "Logics as Law: Rethinking Social Regulation in the Precarious Age of Liberal Modernity (Short Law Review Version)," *DRAFT: citable and quotable only with written permission of the author* (2016))

Another part of tolerated illegality is the knowledge of which laws can, or should, be broken. Žižek turns to popular culture and uses a film to explain this thesis. He explores the idea of tolerated-illegality-as-shibboleth in his discussion of *The Duellists* (Ridley Scott, 1977). As Žižek explains, the movie is about two rival soldiers, one middle class and one upper class. The middle class soldier aspires to be accepted by the upper class officers, so he studies their code of conduct and mimics it, which results in awkward situations. The middle classman thinks that he is missing something in the code, and so he adheres to the instructions in the code even more vehemently. As Žižek explains, the problem with these sorts of middle class people is that “they misperceive the true cause of their failure,” which is “that the mysterious X that accounts for the true upper-classness cannot be pinpointed to a specific symbolic feature.”⁶² By contrast, the upper class soldier “constantly violates the explicit rules of the official code and thereby asserts his true upper classness.”⁶³ Knowing which laws to break in order to fit in cannot be taught by studying the rules but rather comes from belonging to the in-group and gaining insider knowledge of which rules are (not) really followed.

Sometimes when people join new groups they try to abide by laws and customs too literally and end up looking foolish or even insulting. Žižek notes that one of the most offensive things that one can do to locals is mimic their culture in an effort to show that you understand their customs and traditions. Such attempts often come across as “racist,” “clumsy” and/or “patronizing.”⁶⁴ Žižek explains that the “patronizing falsity of the visitor does not reside merely in the fact that he only feigns to be ‘one of us’—the point is rather that we establish a true contact with the locals only when they disclose to us the distance they themselves maintain toward the

⁶² Žižek, “Obscene Supplement,” 89.

⁶³ Žižek, “Obscene Supplement,” 89.

⁶⁴ Žižek, “Obscene Supplement,” 89.

letter of their own customs.”⁶⁵ Žižek’s suggestion is that the locals likely modified, modernized, or discarded their traditions long ago, and the visitor looks like a fool trying to enact archaic customs. Without being privy to this information, outsiders may follow the specifics of laws or customs when disregarding such practices is actually required for social inclusion.

THESIS 7: *Sometimes tolerated illegality is a way for legal and political officials to strategically depoliticize a controversial issue, or refuse to engage in a controversial debate, thus avoiding a genuine political confrontation.*

Because calling for tolerance is sometimes a means of depoliticizing controversy, continuing to permit a controversial illegality offers a way for political and legal officials to avoid conflict by neither legalizing/decriminalizing nor enforcing existing laws. To begin, tolerance can be “depoliticizing” in that it diffuses emotionally charged situations by avoiding, rather than engaging in, conflict. Part of Brown’s project in *Regulating Aversion* is to consider how tolerance today can be understood as “a strand of depoliticization in liberal democracies.”⁶⁶ For Brown, there is an important connection between the ideas of “tolerance” and “depoliticization.” As she explains, the term “depoliticization” connotes “removing a political phenomenon from comprehension of its historical emergence and from a recognition of the powers that produce and contour it.”⁶⁷ Tolerance carries a “fear of the political” and an anxiety about “politics and violence.”⁶⁸ Thus, calling for tolerance often aims to “reduce encounters with difference in the public sphere,” thereby depoliticizing formerly political spaces, suppressing

⁶⁵ Žižek, “Obscene Supplement,” 89-90.

⁶⁶ Brown, *Regulating Aversion*, 14-15.

⁶⁷ Brown, *Regulating Aversion*, 15.

⁶⁸ Brown, *Regulating Aversion*, 90.

debates about controversial political topics, and silencing those who have been wronged or who have legitimate concerns.⁶⁹

The strategy of tolerating or ignoring an illegality rather than having a true political confrontation does not necessarily make the problem disappear but rather sometimes intensifies it. When conflict is not dealt with directly it does not simply vanish, but rather the repression often causes it to manifest in hostile and aggressive ways. Brown explains that “the retreat from a political encounter with difference exacerbates the problem imagined to occasion it” and ultimately “intensifies our estrangement from one another and from public life as a field of engagement with difference.”⁷⁰ Furthermore, as it becomes increasingly difficult to engage in genuine political contestation with others, our hostility toward one another deepens, and so too does our perception that the “Other” is threatening and should be feared.

For many state and legal officials, contentious illegalities that enter the complicated realm of “conventional morality” are better left untouched (that is, tolerated or purposely ignored) rather than risk becoming involved in an emotionally charged and genuinely political confrontation. Politicians and legal officials may believe that tolerating or ignoring a controversial illegality is preferable to encouraging a public debate and taking a stance on a polarizing issue. Consequently, it is not surprising that attempts at depoliticizing situations by invoking tolerance commonly originate from those in powerful positions rather than those directly affected by the difficult or unjust situation (the ones who are advised “to tolerate” the disagreement).

⁶⁹ As Brown explains, tolerance often entails “a rejection of politics as a domain in which conflict can be productively articulated and addressed.” The popular belief is that it is better to tolerate what we do not like rather than engage in open contestation. (Brown, *Regulating Aversion*, 89)

⁷⁰ Brown, *Regulating Aversion*, 89.

The Canadian state and legal system's prolonged avoidance of adjudicating abortion is an example of maintaining the "tolerated illegality" status of a contestable issue for a significant amount of time before confronting the conflict directly. Abortion was illegal in Canada without exception prior to 1969, and in 1969 amendments were made to the *Criminal Code* that created "therapeutic abortion committees," which allowed abortions only if the case met certain requirements.⁷¹ Finally, as a result of the 1988 Supreme Court decision in *R. v. Morgentaler*, abortion was removed from the *Criminal Code*, and thus abortion was decriminalized in Canada. However, there is evidence that many illegal abortions were performed by trained, competent medical physicians in clinics and hospitals prior to 1969 and without a committee's approval (between 1969 and 1988), and that people also knew that these procedures were happening.⁷²

The media published information confirming that professional doctors were performing illegal abortions. A *Globe and Mail* article, published in 1966, quoted Dr. M. G. Tompkins, who said that "...an amendment to the Criminal Code to permit therapeutic abortions would only 'legalize what has been done and is being done'."⁷³ Furthermore, as Alphonse DeValk reported:

...the paper [*Globe and Mail*...] gave front page treatment to the disclosure by one of its regular contributors that Toronto's Women's College Hospital had performed twelve abortions during 1966. The article pointed out that only one of these twelve abortions could have been legal under the Criminal Code [...] Having thus established that respected people were doing abortions illegally...⁷⁴

Moreover, professional medical committees confirmed these ongoing illegal practices too. In a 1967 hearing conducted by the Standing Committee on Health and Welfare, representatives from the Canadian Medical Association (CMA) were asked if the main purpose of legal change was to

⁷¹ Stan Persky and Shelagh Day, *The Supreme Court of Canada Decision on Abortion* (Vancouver: New Star Books, 1988), 5.

⁷² Here I am not focusing on unsafe and unsterile 'back alley abortions', which unquestionably did happen, but rather on illegal abortions performed by physicians in clinics and hospitals.

⁷³ Alphonse De Valk, *Morality and Law in Canadian Politics: The Abortion Controversy* (Dorval: Palm Publishers, 1974), 23, citing: *Globe and Mail*, June 18, 1966. The editorial was reprinted in the *Ontario Medical Review*, (O.M.R., July 1966, p. 545).

⁷⁴ Alphonse De Valk, *Morality and Law in Canadian Politics*, 39.

make it “permissible for doctors to do what they have been doing?” The CMA representative replied: “I would say that is correct [...] ‘to end our life as lawbreakers’.”⁷⁵ These articles and reports confirm that people were aware that medical doctors were performing abortions against Canadian law.

Additionally, not only was defiance of the law by professional doctors known—it was often formally tolerated too. Dr. Donald Aitken (Registrar of the College of Physicians and Surgeons of Ontario in the early 1970s) said that doctors who were discovered to have performed an abortion procedure without a committee’s permission were not always charged with an offense. Furthermore, numerous physicians charged with performing an illegal abortion were reinstated. According to E.W. Pelrine, Dr. Aitken estimated that for every eight to ten doctors convicted, six to eight would be reinstated.⁷⁶ Although the media was reporting about physicians performing medical abortions, and physicians themselves were on record saying that such abortion procedures were happening, abortion continued to exist in the domain of tolerated illegality.

Moreover, evidence suggests that women were not punished for obtaining illegal abortions. Between 1969-1988, if a woman obtained an abortion without meeting the *Criminal Code*’s requirements, then she was liable for two years imprisonment.⁷⁷ However, despite this fact there is no record of a Canadian woman ever being prosecuted for seeking and obtaining an abortion.⁷⁸ As Pelrine notes:

If this society truly believes that women who abort are criminals (and until August 28, 1969, all such women in Canada were), then why have they not been sentenced as criminals [...]? The Kinsey research group in the U.S. studied 18,000 cases of abortion

⁷⁵ Alphonse De Valk, *Morality and Law in Canadian Politics*, 48.

⁷⁶ Eleanor Wright Pelrine, *Abortion in Canada* (Toronto: New Press, 1971), 59.

⁷⁷ Alister Browne and Bill Sullivan, “Abortion in Canada,” *Cambridge Quarterly of Healthcare Ethics* 14, no. 3 (2005): 287.

⁷⁸ Pelrine, *Abortion in Canada*, 59.

and found not one instance where the woman was prosecuted. In England, where until recently abortion carried a maximum penalty of life imprisonment for the mother, the woman was almost never prosecuted; and if she was, she received a suspended sentence. The same is true of Canada.⁷⁹

The women seeking out and obtaining abortions from medical professionals were not prosecuted, thus suggesting that, to a certain extent, such behaviour was legally tolerated despite being technically illegal.⁸⁰

The most famous figure to appear before the Court, and who was repeatedly acquitted, was Dr. Henry Morgentaler. From 1970-1988 Dr. Henry Morgentaler was acquitted at four different trials, and resisted the efforts of two successive Canadian governments to shut down his abortion clinics in three different provinces.⁸¹ Following his 1976 acquittal in Quebec, the provincial government in power at the time “barred further prosecutions of Morgentaler by declaring that the federal abortion law was unworkable.”⁸² This ban was put in place despite the unquestionable fact that Dr. Morgentaler was operating abortion clinics in Quebec, and that abortion procedures were still illegal at the time unless performed in a registered hospital, by a trained physician, with the permission of a therapeutic abortion committee. Not only did the Quebec government order law enforcement to leave Dr. Morgentaler alone, but the Premier of Quebec at the time, Rene Levesque, “created a network of abortion clinics throughout the province within the next few years and even hired Dr. Morgentaler to train other doctors in abortion techniques.”⁸³ Finally, in the famous 1988 Supreme Court of Canada case *R. v. Morgentaler*, the result of the trial was arguably the highest form of toleration of illegal activity possible at the level of the Courts—not only failure to convict, but changing the law. In what

⁷⁹ Pelrine, *Abortion in Canada*, 48.

⁸⁰ However, this claim is not to suggest that marginalized groups of women (e.g. those with lower socioeconomic status, visible minorities, etc.) did not suffer from unequal access to abortion procedures, or even threats of prosecution, in ways that more privileged women did not.

⁸¹ Persky and Day, *Canada Decision on Abortion*, 3-4.

⁸² Day and Persky, *Canada Decision on Abortion*, 7.

⁸³ Day and Persky, *Canada Decision on Abortion*, 7.

some at the time called, its “boldest Charter case decision to date”⁸⁴ the Supreme Court decided in a 5-2 ruling that Canada’s abortion law was unconstitutional because it did in fact violate a woman’s right to security of the person, and that this violation could not be justified.⁸⁵

The question is, with such evidence that illegal abortions were taking place in hospitals and that such procedures were repeatedly tolerated by legal authorities, why not legalize or decriminalize abortion rights sooner? In other words, what took so long? Part of the answer to this complicated question might be that, in an effort to defuse the heated political conflict between the “prolife” and “prochoice” camps, state and legal officials just tolerated or ignored the issue; consequently, from a political perspective, women could seek out abortions from medical professionals,⁸⁶ and the prolife camp had no formal law permitting abortion to oppose.⁸⁷ Thus, allowing abortion to remain in the realm of “tolerated illegality” for many years could be understood, in part, as a strategic choice by political and legal officials who were keen to tolerate—thus hopefully *depoliticizing*—abortion rather than join the debates and engage in political confrontation.

THESIS 8: *The “Cobain Effect” suggests that sometimes counter-cultural actions are reabsorbed back into mainstream culture and stripped of their political intentions.*

In *Capitalist Realism: Is There No Alternative?* Mark Fisher explains how revolutionary behaviour and attempts to dislodge hegemonic norms are sometimes absorbed back into mainstream culture. Fisher uses the example of the 1990s music band “Nirvana” and its lead singer Kurt Cobain. As Fisher explains:

⁸⁴ Day and Persky, *Canada Decision on Abortion*, 13.

⁸⁵ Karine Richer, “Abortion in Canada: Twenty Years After *R. v. Morgentaler* (P.R.B. 08-22 E)” *Parliamentary Information and Research Service (Library of Parliament)*, September 24, 2008. <https://lop.parl.ca/content/lop/ResearchPublications/prb0822-e.pdf>, 2-3.

⁸⁶ Although, obviously, not without tremendous obstacles, risks, sacrifices, discrimination, unequal access, health and financial concerns, and more.

⁸⁷ Although they could still contest the 1969 amendments.

‘Alternative’ and ‘independent’ don’t designate something outside mainstream culture; rather, they are styles, in fact *the* dominant styles, within the mainstream. No-one embodied (and struggled with) this deadlock more than Kurt Cobain and Nirvana. [...] Cobain knew that he was just another piece of the spectacle, that nothing runs better on MTV than a protest against MTV...^{88,89}

As Fisher succinctly concludes, here “even success meant failure” because one’s actions are directed back into the very ideology that one is protesting.⁹⁰ Accordingly, disruptive behaviour is branded as cool, edgy and “alternative” and it quickly becomes popular, which strips it of its original intention to provide social critique.

One example of how the “Cobain effect” works in relation to tolerated illegality is graffiti art. In the Canadian legal system, graffiti is a type of vandalism. Vandalism is prohibited under the sections pertaining to “mischief” in the *Criminal Code*. Part XI of the *Criminal Code*, “Wilful and Forbidden Acts in Respect of Certain Property,” addresses “mischief” in section 430(1), which states the following:

Mischief

430. (1) Every one commits mischief who willfully

- (a) destroys or damages property;
- (b) renders property dangerous, useless, inoperative or ineffective;
- (c) obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property; or
- (d) obstructs, interrupts or interferes with any person in the lawful use, enjoyment or operation of property.⁹¹

However, the concept of vandalism is “far from clear” and “varies considerably from author to author;” it covers a wide range of different behaviours (“from the daubing of graffiti on a wall to the pillaging of a public building”) committed with a variety of motivations (“games, pranks,

⁸⁸ Mark Fisher, *Capitalist Realism: Is There No Alternative?* (Winchester: Zero Books, 2009), 9.

⁸⁹ As Scott Woodcock points out, perhaps an even stronger example here would be the band *Rage Against the Machine*. With their mainstream popularity, and lyrics such as: “Violence on all sides; embrace it if need be,” as Woodcock puts it: “that’s some pretty incendiary stuff for mainstream culture to be singing along to.”

⁹⁰ Fisher, *Capitalist Realism*, 9.

⁹¹ Criminal Code of Canada, R.S.C., ch. C-46, s. 430 (1985) (Can.).

reactions of frustration and ideological protest,” etc.).⁹² Vandalism involves many things which graffiti is not; whereas vandalism entails wilful damage to property (such as breaking, burning, or rendering non-functional), graffiti, from the Italian word “*sgraffio*” meaning “scratch,” typically involves writing and drawing with spray paint.⁹³

One of the difficulties with the current provisions against graffiti is that they conflate all forms of graffiti into one category and condemn it all. Although the State and the law commonly portray graffiti as dangerous, gang-related, or hateful, much of graffiti art is a combination of personal, political and/or artistic expression. As Jeff Ferrell puts it, those “who shape public perceptions of urban graffiti” (such as “local and national media, anti-graffiti campaigners,” etc.) “intentionally and unintentionally muddy the boundaries between types of graffiti and graffiti writing, confusing one with the other in their condemnations of all graffiti as vandalism and crime.”⁹⁴ In fact, graffiti has an interesting history as a creative art form that was born out of the desire to express frustration with racism, oppression, and socio-economic inequality.

Part of graffiti’s origin story involves the birth of the “hip-hop” movement in the 1970s and 1980s.⁹⁵ The hip-hop movement included three parts: visual art (graffiti), music (mixing, scratching and rapping) and dance (“B-boys” and break-dancing).⁹⁶ What linked these three aspects of hip hop was the desire to create art despite having few resources. Hip hop music, visual art, and dance emerged as ways for people to express themselves without requiring much equipment—a simple turntable or can of spray paint could do the trick.⁹⁷ Marginalized and

⁹² J. Sélosse, “Vandalism: Speech Acts,” in *Vandalism: Behaviour and Motivations*, ed. by Claude Lévy-Leboyer (Amsterdam: Elsevier Science Publishers, 1984), 39.

⁹³ Nicholas Ganz, *Graffiti World: Street Art from Five Continents*, ed. by Tristan Manco (New York: Harry N. Abrams, 2004), 8.

⁹⁴ Jeff Ferrell, *Crimes of Style: Urban Graffiti and the Politics of Criminality* (New York: Garland Publishing, 1993), 5.

⁹⁵ Ferrell, *Crimes of Style*, 5-6.

⁹⁶ Ferrell, *Crimes of Style*, 6-7.

⁹⁷ Ferrell, *Crimes of Style*, 8.

racialized groups often used graffiti as a form of political speech, creating “something out of nothing” and using it as a medium to express frustration with systemic injustices.

However, as per the “Cobain effect” described by Fisher, graffiti as a creative and rebellious action and as a form of resistance is sometimes reabsorbed back into the mainstream. As the graffiti art movement grew in the United States, and the style and sophistication of the work produced increased, graffiti art gained more mainstream attention. By the late 1970s and early 1980s, the works of prominent graffiti artists were being displayed in galleries.⁹⁸ Art galleries and media sources began to recognize graffiti as art, and to provide positive feedback. As Ferrell notes: “top graffiti artists were exhibiting in shows which integrated their works with those of other young and alternative artists, enjoying recruitment into established New York City galleries.”⁹⁹ Additionally, graffiti artists began to receive “increasingly positive media attention—including in-depth articles in the *Village Voice* and other publications.”¹⁰⁰ The work of “alternative” artists (the label highlighted by Fisher) moved into established galleries and lessened the potential political potency of graffiti art. Increased positive media attention and recognition helped transform graffiti from an illegal action and form of political speech to a popular art form integrated into clothing designs, advertising campaigns, corporate logos, museum galleries, and more.

An additional way that graffiti has been stripped of its political possibility is that some cities have created “legal graffiti walls”—spaces designated specifically for graffiti art. A website called “legal-walls.net” includes a map of well over 1000 legal graffiti walls from around the world. The City of Ottawa, Canada’s national capital, has three such legal graffiti walls. The City defines a legal graffiti wall as a “free space” where “graffiti is permitted and

⁹⁸ Ferrell, *Crimes of Style*, 7-9.

⁹⁹ Ferrell, *Crimes of Style*, 9.

¹⁰⁰ Ferrell, *Crimes of Style*, 9.

encouraged.” Two of Ottawa’s three legal graffiti walls are found in wholesome, family oriented locations—an “Education Centre” and a “Recreation Complex”—where messages are implicitly censored by the social norms and pressures that accompany being in close proximity to family establishments.¹⁰¹ Officially designated “graffiti walls” are an example of Fisher’s “Cobain effect” because they transform graffiti art from a potential form of political speech to a controlled, contained, and publically monitored (therefore *depoliticized*) activity.

THESIS 9: *Power relations exist prior to encounters between legal subjects and officials, and persist after the interaction is over. Thus, not only do power relations affect whether or not illegalities are tolerated, but officials’ decisions about whether or not to tolerate subjects’ illegalities also affect future power relations.*

When thinking about how power is channeled through decisions regarding toleration, it is useful to take a step back and consider how one understands and theorizes “power.” Foucault advises us that when discussing power it is helpful to “ask oneself what contents one has in mind when using this grand, all-embracing, and reifying term....”¹⁰² Indeed, thinking critically about what one means by power and subjectivity can help avoid oversimplifications. Wendy Brown is instructive here because her discussion about the origin of the word “power” draws attention to how proceeding via the etymology of “power” alone may result in significant oversights in one’s analysis. Brown explains that “power” comes from the Latin word *potere*, which means “to be able.” She notes that the Latin root highlights the idea of power as a “quality” or “ability,” and it suggests that power is something we can acquire and possess. However, as Brown points out, the Latin root obscures “the significance of power’s dispersion, circulation, and microphysical mechanics, its often automatic rather than intentional workings, and its detailed imbrication with

¹⁰¹ Graffiti Management Program, “Graffiti and Mural Program,” City of Ottawa, accessed October 2, 2015, <http://ottawa.ca/en/residents/water-and-environment/green-living/working-together-stop-graffiti>.

¹⁰² Michel Foucault, “The Subject and Power,” in *Essential Works of Foucault 1954-1984, Volume III: Power*. Translated by Robert Huxley et al., ed. by James D. Faubion (New York: New York Press, 2000), 336.

knowledge, language, and thought.”¹⁰³ In order to think about power, toleration, and illegality one must think about power not as a possession whose ownership can be transferred from one person to the next, but rather as an ongoing and relational process that produces and shapes individuals and relationships.

It should be fairly clear that those in the position of choosing whether to tolerate an illegality have greater relative power than those who have been accused of breaking the law and must await judgment. This type of power relation—where the “official” has the power to decide the fate of the alleged “perpetrator”—is more explicit than the internal form that power takes within each individual. In *The Psychic Life of Power*, Judith Butler investigates how power operates within peoples’ psyches and influences them to self-regulate their behaviour. In her discussion, Butler brings together Foucauldian theorizations of power/subjectivity, and psychoanalytic theory to answer the question: “what is the psychic form that power takes?”¹⁰⁴

Butler’s investigation of this question begins with the idea of “subjection.” “Subjection,” she explains, “signifies the process of becoming subordinated by power as well as *the process of becoming a subject*” (emphasis added).¹⁰⁵ This dual significance contained within the idea of subjection creates a curious tension. On the one hand, subjection involves the idea of others having power over us. On the other hand, subjection includes our own personal transformation into subjects. Butler explains the paradoxical situation whereby power both subordinates and produces the subject as a process of dedifferentiation.¹⁰⁶ Intuitively, it may seem that the powers that subordinate the subject are “external” (such as the officer who polices one’s behaviour) and

¹⁰³ Wendy Brown, “Power After Foucault,” in *The Oxford Handbook of Political Theory*, ed. by John S. Dryzek, Bonnie Honig, and Anne Phillips (Oxford: Oxford University Press, 2008), 65.

¹⁰⁴ Judith Butler, *The Psychic Life of Power: Theories in Subjection* (Stanford: Stanford University Press, 1997), 2.

¹⁰⁵ Butler, *Psychic Life of Power*, 2.

¹⁰⁶ I take the word “dedifferentiation” from Mark Zion, who took it from Pierre Schlag (who probably took it from someone else) to describe a situation where people think that two things are distinct, but, in fact, they never were separate.

the power that produces the subject as an individual are “internal” (I choose clothing that expresses my individuality). However, Butler’s insight is that there is no boundary between the “external” and the “internal,” and much of what we think of as being “internal” has in fact been absorbed into our psyche from the “external” world. As Butler explains, “power that at first appears as external, pressed upon the subject, pressing the subject into subordination, assumes a psychic form that constitutes the subject’s self-identity.”¹⁰⁷ Part of how subjects are produced involves transporting “external” ideas from the world around them, including ideas about what constitutes “proper” image and conduct (how we ought to look and act), what is broadly considered “normal” and “abnormal,” how the world perceives us, and how we ought to perceive others.

When it comes to social norms, legal authority, and moral values, popular notions of “right” and “wrong” are also internalized so that people police their own conduct. As Butler puts it, “[t]he master, who at first appears to be ‘external’ to the slave, reemerges as the slave’s own conscience.”¹⁰⁸ Although it may seem that the conscience is an internal idea, it is actually the realm in which there is no “internal” or “external” because the two are indeed one. The most challenging reality with which to come to terms is that these internalized commands are so easily naturalized by individuals, producing thoughts, beliefs, and forms of self-regulation. Butler explains this idea as follows: “[a] power *exerted on* a subject, subjection is nevertheless a power *assumed by* the subject, an assumption that constitutes the instrument of that subject’s becoming.”¹⁰⁹ Within individuals’ psyches lies the summation of their learned information, teaching them not only about who they are as individuals and how they ought to behave, but also about their perceived place in the world.

¹⁰⁷ Butler, *The Psychic Life of Power*, 3.

¹⁰⁸ Butler, *The Psychic Life of Power*, 3.

¹⁰⁹ Butler, *The Psychic Life of Power*, 11.

How are Butler's insights about the psychic life of power relevant to tolerated illegality? To begin, her work suggests that if we commence our analysis of power at the time of the "tolerated illegality encounter" (i.e. the confrontation between the accused and the legal official) then we overlook the forms of power that each subject has internalized long before the encounter. This oversight could be significant because deep-seated influences might affect the outcome of the situation more than the specifics of the situation itself. For example, a police officer's overall understanding of her role, image of others, and attitude toward "law and order" might dictate her actions more than the details related to the individual involved, legal violation(s) in question, and particular context (e.g. systemic inequalities that may have contributed to the incident). That is, if we analyze a "tolerated illegality situation" from the perspective of a police officer, she might see herself as the embodiment of authority—a simple extension of the state—and the context of the specific situation she is facing might be irrelevant to her. Furthermore, stereotypes pertaining to race, class, gender, and other axes of identity may be powerful influences within the psyche of the subject. Intentionally or not, the police officer may see herself as superior and legally and/or morally right, whereas she may perceive the accused as inferior or even threatening based on how he/she has internalized prevailing stereotypes. Note how all of these complex psychological forces are set in motion long before the interaction between the actors involved. Moreover, the process and outcome of the interaction itself feeds back into each individual's internal conception of herself as a subject (i.e., how much relative power she has, what place she holds in the social hierarchy, etc.), as well as wider societal norms and patterns of power relations. Indeed, the outcome of the encounter between the accused and the official may violate their expectations, or reinforce them, but either way, the

interaction will affect their thinking, as well as how they behave in related situations in the future.

THE ROAD SO FAR...¹¹⁰

Analytical philosophy is partial to unifying frameworks that suggest concepts have a sort of integrity to them. In contradistinction to this view, this chapter has aimed to illuminate different dimensions of tolerated illegality, many of them undiscussed in the previous chapters. In doing so, this chapter has reinforced the idea that Foucauldian notions are “dynamic abstractions” with meanings that can and do change.¹¹¹ The formal legality framework (outlined in chapter 1 and critiqued in chapters 1 and 2) is unable to account adequately for the complexity of a socio-legal phenomenon like tolerated illegality. Only by resisting the temptation to streamline an argument about tolerated illegality can we begin to understand its multifacetedness, as well as its social, legal, and political implications. Chapter 3 (the dispossession of Indigenous peoples of their lands as Canada’s foundational tolerated illegality) bridges this chapter with the first two by beginning to introduce greater complexity and uncertainty into the analysis. By starting to think about the different ways in which power and tolerance influence legality and illegality, chapter 3 helped spark many of the issues explored here. Understanding that tolerance is not the liberal virtue it seems, that bureaucracies manipulate people through strategically enforcing or breaking regulations, that the rich and powerful play by their own rules and encourage complicity, and more, has helped foster a deeper understanding of tolerated illegality. The next and final chapter of the thesis explores yet another frontier of tolerated illegality: how it

¹¹⁰ As an avid fan of the television series *Supernatural*, I had to include the subtitle, “The Road So Far,” which is the caption the show uses to provide its viewers with recaps (rather than, for example, “Previously on Supernatural.”)

¹¹¹ Mariana Valverde, “Specters of Foucault in Law and Society Scholarship,” *Annual Review of Law and Social Science* 6 (2010): 52-53.

emerges in the realm of popular culture through television and movie series about superheroes. This chapter continues in the mode of critique and strives to expose the latent ideology embedded in superhero narratives, as well as what these narratives suggest about popular assumptions regarding the law and the State. ★

CHAPTER 5: THE FINAL FRONTIER – SUPERHEROES AND TOLERATED ILLEGALITY

Costumed superheroes ultimately battle criminals in the name of the law—even if they themselves often operate outside a strictly legal framework. But in the modern state, the very status of law is a problem.¹

Even characters that are supposedly defined by their ability to break free of existing systems and ideologies are thus continuously made a part of the very systems from which they offer the illusion of escape.²

Perhaps the best place to start this last chapter of the thesis is to answer the questions: why study law and television/film, and why turn to superheroes? Superheroes are often seen to operate “above” or “beyond” the law because they seek some sort of resolution portrayed as “justice.” Accordingly, thinking through superhero mythology can offer significant insights about popular cultural attitudes regarding tolerated illegality. Furthermore, there is a notable dearth in law and film scholarship with respect to TV (particularly given the ascendancy of television and *Netflix*), as well as a shortage of superhero analyses in legal and political studies (especially in light of superheroes’ surging popularity on the small and large screens). Thus, I will address these openings by turning my attention to superhero narratives, with special attention to Netflix’s *Daredevil* series, and consider how these superhero shows crystallize popular perceptions of legality, illegality, and justice.

Within the relatively small faction of scholars writing on law and film,³ even fewer write

¹ David Graeber, *The Utopia of Rules: On Technology, Stupidity and the Secret Joys of Bureaucracy* (Brooklyn: First Melville House, 2015), 213.

² Dan Hassler-Forest, *Capitalist Superheroes: Caped Crusaders in the Neoliberal Age* (Winchester, Zero Books: 2012), 43.

³ As Orit Kamir explains in “Cinematic Judgment and Jurisprudence,” published in 2005, law and film is a “new field” and “can be viewed as a recent offshoot of the more established and familiar disciplines ‘law and society’ and ‘law and literature’.” (27) Although Kamir’s chapter is now twelve years old, the field of law and film—and law and television—remain relatively new compared to the established fields cited above. Moreover, as will be discussed, law and television is even more inchoate than law and film studies. (Orit Kamir, “Cinematic Judgment and

on television. The Law and Film movement suggests that analyzing law through film helps us understand both the legal ideas viewers are consuming, as well as the widely held public beliefs about law that influence film narratives.⁴ Peter Robson and Jessica Silbey note that television is “exceptionally powerful in shaping expectations and desires about law and justice,” but that it has “hitherto been underrepresented in the published law and society scholarship.”⁵ They explain that the lack of television analysis in research on law and popular culture is “ironic” because the rise of television has made it today’s “dominant source of entertainment and information.”⁶ Additionally, given that many more people are currently opting to stay home and watch television or *Netflix* rather than go to movie theatres (where average tickets prices are over \$10.00 CAD per person, per film⁷), legal scholars advocate for more academic work analysing TV shows. Whereas since the 1920s movies have been the public’s primary source of “mass entertainment,” Robson and Silbey remark that going to the movies today is “a luxury” reserved primarily for “a relatively small population of Western audiences.”⁸ Accordingly, many people are foregoing trips to the movie theatre in favour of staying home and watching TV. Given the prominence of legal dramas on television, as well as the significant role of “law” in many series not strictly considered “legal” in nature, it is worthwhile for law and society scholars to turn their attention to television.

Jurisprudence: A Woman’s Memory, Recovery and Justice in a Post-Traumatic Society (a Study of Polanski’s Death and the Maiden),” in *Law on the Screen*, ed. by Austin Sarat, Douglas and Martha Umphrey (Princeton: Princeton University Press, 2005))

⁴ As Jessica Silbey puts it in “Truth Tales and Trial Films,” it is “inevitable at this point in our cultural history that law and popular culture are intertwined.” (Jessica Silbey, “Truth Tales and Trial Films,” *Loyola Law Review of Los Angeles* 40, no. 2 (2007): 551)

⁵ Peter Robson and Jessica Silbey, “Acknowledgements,” in *Law and Justice on the Small Screen*, ed. by Peter Robson and Jessica Silbey (Oxford: Hart Publishing, 2012).

⁶ Peter Robson and Jessica Silbey, “Introduction,” in *Law and Justice on the Small Screen*, ed. by Peter Robson and Jessica Silbey (Oxford: Hart Publishing, 2012), 2.

⁷ Statista: The Statistics Portal. “Average movie ticket price in the United States and Canada from 2001 to 2016 (in U.S. dollars),” *Statista: The Statistics Portal*, accessed June 15, 2017, <https://www.statista.com/statistics/271858/average-movie-ticket-price-in-the-us-and-canada/>.

⁸ Robson and Silbey, “Introduction,” 2.

Some argue that the superhero film is “the dominant genre” of Hollywood cinema in the 21st century, with over 50 major superhero movies produced between 2002 and 2012, and there is evidence that this trend will continue in the future.⁹ On the small screen, current popular superhero series include: *Arrow*, *The Flash*, *Supergirl*, *Gotham*, *Agents of S.H.I.E.L.D.*, *Daredevil*, *Jessica Jones* and *Luke Cage* (to name a few) and multiple new series are scheduled for production.¹⁰ In other words, it is “a wonderful time to be a TV-binging comic book fan.”¹¹ Because superhero series have the ability to “shape as well reflect public opinion,”¹² critical theorists across the humanities and social sciences are calling for more scholarly work on superheroes in order to better understand this popular phenomenon—and its implications.

In 2014, the journal of *Political Science and Politics* published a special issue featuring a symposium on “The Politics of the Superhero.” Matthew J. Costello and Kent Worcester, authors of the introductory piece to the symposium, argue that superheroes “mirror, comment on, and sometimes parody the kinds of ideas, movements, policies, and institutions that interest political scientists”—and legal scholars too (I would add).¹³ Although Costello and Worcester note that scholars have published academic work on superheroes,¹⁴ they argue that thus far superheroes are more often the subject of “fan culture” than scholarly debate, and superhero articles are commonly written for “general readers, rather than students and academics.”¹⁵ Costello and Worcester conclude by remarking that the existing literature on politics and superheroes does

⁹ Hassler-Forest, *Capitalist Superheroes*, 3.

¹⁰ Rob Leane, “50 Upcoming Comic Book TV Shows, and What to Expect from Them,” *Den of Geek*, September 26, 2016, <http://www.denofgeek.com/uk/tv/comic-book-adaptations/33601/50-upcoming-comic-book-tv-shows-and-when-to-expect-them>.

¹¹ Leane, “Comic Book TV Shows.”

¹² Matthew J. Costello and Kent Worcester, “The Politics of the Superhero—Introduction,” *Political Science and Politics* 47, no. 1 (2014): 86.

¹³ Costello and Worcester, “The Politics of the Superhero,” 85.

¹⁴ Costello and Worcester, “The Politics of the Superhero,” 87. (For list of scholars who have produced such research, see literature review provided by Costello and Worcester on pages 86-87).

¹⁵ Costello and Worcester, “The Politics of the Superhero,” 86.

“[touch] on political themes,” but has “largely neglected to draw on or contribute to debates in political science.”¹⁶ Thus, there is an opportunity here for legal and political scholars to study these superhero characters, their messages, and meanings.

Dan Hassler-Forest takes up Costello and Worcester’s challenge by analyzing twenty-first century superhero movies and TV shows in his text, *Capitalist Superheroes*. Part of Hassler-Forest’s project is to theorize and critique the “resurgence” of superhero movies since September 11th, 2001.¹⁷ He connects the rise of the superhero film to present-day capitalist/neoliberal ideology, as well as desires to reproduce narratives that portray America simultaneously as traumatized victim/global superpower. He suggests that one way to approach superhero films as texts is to understand them “as mechanisms that reflect ideological assumptions by providing narratives that systematically limit the viewer’s choices.”¹⁸ We can see these ideological assumptions at work when we consider not only which arguments and ideas are included in superhero narratives, but, importantly, which are not. Here we may observe what Hassler-Forest calls an “ideological manipulation through limitation” reminiscent of the mantra that “There Is No Alternative” to capitalism.¹⁹ Following Hassler-Forest, I suggest that the repetition of certain narratives found in superhero movies and TV shows further entrenches existing neoliberal legal orders, creates docile political subjects,²⁰ and limits our ability to imagine our way out of the

¹⁶ Costello and Worcester, “The Politics of the Superhero,” 87.

¹⁷ Hassler-Forest, *Capitalist Superheroes*, 57.

¹⁸ Hassler-Forest, *Capitalist Superheroes*, 144.

¹⁹ Hassler-Forest, *Capitalist Superheroes*, 144.

²⁰ I take the idea of docile political subjects from Michel Foucault. In Foucault’s *Discipline and Punish*, one of the prison’s undisclosed goals is to create “docile bodies.” (135) For Foucault, a docile body is one that “may be subjected, used, transformed, and improved.” (136) Foucault connects the idea of “docility” (136) with the idea of “disciplinary methods.” (137) The type of disciplinary methods that he has in mind are not exclusive to the prison system, but rather quite the opposite: they can be found everywhere from monasteries, armies and workshops (137) to schools, hospitals, and military organizations (138). Importantly, disciplinary methods are not only used to promote skills but, more significantly, to make people (bodies) more obedient and thus more useful (and, as Foucault reminds readers, vice versa). (137-38) However, whereas Foucault connects productivity with docility and usefulness, I suggest that today a lack of political engagement can be understood as a different kind of docility and usefulness; populations (in general) are “subjected, used, [and] transformed” through the dominant ideology,

“cognitive box”²¹ of neoliberal legality.²² Moreover, I conclude that whereas superhero shows *seem* like an ideal site to explore tolerated illegality, what these shows actually offer are examples of *intolerable* illegality and superheroes who ultimately reinforce law and order.

This chapter will proceed as follows. The first section will draw on the work of Rebecca Johnson and discuss methodological approaches to the study of law and film/television, with a particular focus on affect and how shows make viewers *feel*, which cannot be disentangled from how they think and imagine. The second part comprises the majority of the chapter, and interweaves an analysis of my case study, Netflix’s *Daredevil* (Season 2), with an analysis and critique of the superhero genre. This section examines four key scenes from *Daredevil* and draws on the work of Dan Hassler-Forest in *Capitalist Superheroes* to consider the implications of these scenes in terms of the intensification of ideology. This section also traces important connections across two genres: superhero stories and Westerns. Lastly, building on part two, the chapter concludes with a final discussion about superheroes and tolerated illegality. This final discussion recapitulates my claim that superhero shows offer key insights into tolerated illegality, but these insights are counter to my initial assumption; rather than depicting extra-legal behaviour, these heroes tend to reinforce legal norms and the status quo, highlighting the limits of vigilantism, not law.

overwork, distractions, and more to be politically disengaged, allowing the neoliberal status quo to carry on relatively unopposed. (Michel Foucault, *Discipline & Punish: The Birth of the Prison*, 2nd ed. Translated by Alan Sheridan. (New York: Vintage Books, 1995), 135-138)

²¹ Here I borrow from and adapt Leanne Simpson’s claim that we need to “imagine our way out of the cognitive box of imperialism.” (Leanne Simpson, *Dancing on our Turtle’s Back: Stories of Nishnaabeg Re-Creation, Resurgence and a New Emergence* (Winnipeg: Arp Books, 2011), 146)

²² As discussed in Chapter 2, I follow Wendy Brown’s understanding of neoliberalism as: “a peculiar form of reason that configures all aspects of existence in economic terms,” (17) or, in other words, the “economization of everything and every sphere, including political life.” (40) Within today’s neoliberal order, *homo sapiens* are transformed into “*homo oeconomicus*,” where each person becomes a “governed bit of human capital.”²² Within this calculated social ordering, significant deviations from the rule of law are not only tolerated, but often encouraged, especially if the deviations are linked to increasing profits. (Wendy Brown, *Undoing the Demos: Neoliberalism’s Stealth Revolution* (New York: Zone Books, 2015), 17 & 40)

I. METHODOLOGY: LAW, TELEVISION, AND AFFECT

For the past decade Rebecca Johnson has used film as one of her primary texts to teach students about legal theory, and she has developed a helpful methodology for studying law through film. Johnson's approach to studying film as a "text" includes three "axes."²³ The first axis is the "narrative structure," which focuses on the story, and draws on questions shared by literature and film analyses regarding "the characters, the implied narrator, the point of view, the setting, the genre and its expectations, the implied trouble, and more."²⁴ The second axis asks questions about viewer response and "spectatorship." This axis considers the film's audience, who might seek out and watch the film, and viewers' experiences of watching.²⁵ Johnson's third axis of analysis centers on "affect"²⁶ generated by the "cinematic medium."²⁷ This final axis looks at the audience's "knowing;" that is, what do they come to know and how do they come to know it? This process of knowing is not only about the information that viewers are presented with by the film, but, more importantly, what they see, hear, and *feel*. This investigation into affect and the audience raises questions about how "just" and "unjust" situations are constructed within the film, as well as how these scenarios resonate on an emotional level with viewers.²⁸

For Johnson, the third axis of analysis has the potential to unlock the most valuable insights. Rather than disregard what people feel when they watch films and TV shows, Johnson

²³ Interestingly, "axes" is the only word in English that can be the plural of three different singular noun forms—ax, axe, and axis. Here I am referring to the plural of "axis."

²⁴ Rebecca Johnson, "Television, Pleasure and the Empire of Force: Interrogating Law and Affect in *Deadwood*," in *Law and Justice on the Small Screen*, ed. by Peter Robson and Jessica Silbey (Oxford: Hart Publishing, 2012), 36.

²⁵ Johnson, "Empire of Force," 36.

²⁶ Eve Kosofsky Sedgwick acknowledges that the "common usage" is to use "'affect' and 'emotion' interchangeably." (24) That being said, drawing on the work of Silvan Tomkins, Sedgwick also notes that some scholars (like Tomkins) focus on "affects" (plural) in a different sense. As Sedgwick explains: "For Tomkins, a limited number of affects—analogueous to the elements of a periodic table—combine to produce what are normally thought of as emotions, which, like the physical substances formed from the elements, are theoretically unlimited in number." (24) In this section, I am adopting the common practice of using emotion and affect in a transposable way. (Eve Kosofsky Sedgwick, *Touching Feeling: Affect, Pedagogy, Performativity* (Durham: Duke University Press, 2003))

²⁷ Johnson, "Empire of Force," 37.

²⁸ Johnson, "Empire of Force," 37.

invites viewers to position their emotional responses at the heart of the investigation. She argues that “complicated emotions and resonances” can serve as “a point of entry for a discussion” in the study of law and film.²⁹ Because affect is one of television’s central “tools of persuasion,” the way TV shows make viewers feel can reinforce or disrupt dominant ways of thinking, and open or close imaginative alternatives to present-day norms. Accordingly, scholars interested in the field of law and popular culture might consider engaging with television’s use of affect and its ability to influence people’s ways of “thinking, talking and imagining law.”³⁰

Indeed, whereas other legal scholars might stop their analyses after considering a film’s plot, characters and intended audience, Johnson is part of a small group of scholars who support an affect-driven analysis of law through film.³¹ She notes that legal scholars are usually more comfortable with her first two axes than the third one, and that they often find it difficult to include affect in their analyses. As Johnson puts it, “[p]art of the challenge is that discussions of affect slide easily into discussions of feeling and emotion, and law has long attempted to police the [purported] boundary between reason and emotion.”³² By placing affect in the foreground, critical theorists are better able to illuminate how shows create these affective moments, why these moments resonate with audiences, and what the implications of these choices and responses might be.

Thus, an instructive lesson from Johnson’s methodology is to take seriously how films and television shows orchestrate affective moments and to question what viewers’ emotional responses might mean. As Johnson reminds us, most viewers find TV watching pleasurable, and

²⁹ Johnson, “Empire of Force,” 34.

³⁰ Johnson, “Empire of Force,” 34.

³¹ Orit Kamir also notes the significance of affect in film, remarking that films reach “enormous audiences and, combining narrative and appealing characters with visual imagery and technological achievements, stir deep emotions and leave deep impressions.” (Orit Kamir, “Cinematic Judgment and Jurisprudence,” 30)

³² Johnson, “Empire of Force,” 37-38.

it is important to reflect on “how these pleasures are constructed,” as well as “the ways we are invited to think and feel.”³³ She concludes with the “challenge” facing those who wish to study law through film: “to explore the place of *affect*—of how we come to *feel*—in the filmic and televisual texts that brings us to judge our own world in a particular fashion.”³⁴ Like Johnson, Hassler-Forest is also interested in what makes cinematic narratives, and in his case superhero narratives in particular, “pleasurable” to mass audiences.³⁵ For Hassler-Forest, superhero movies can “teach us a great deal about what global audiences have been taught to find pleasurable and—perhaps—why.”³⁶ Indeed, justice and injustice are not just ideas, but also emotions that are keenly felt, and the way that viewers respond to particular shows, and moments within those shows, conveys much about dominant ideology.³⁷

II. NETFLIX’S *DAREDEVIL* AND IDEOLOGICAL CRITIQUE

I will begin this section by providing my reasons for choosing to analyze Netflix’s *Daredevil*, Season 2, as well as an abridged summary of the series. Firstly, *Daredevil* (season 2) is a relatively recent example of the superhero television series genre (premiering in March 2016) and so hopefully analyzing this series will suggest relatively current insights about popular attitudes and ideologies surrounding the topics of legality and illegality. Secondly, this series has

³³ Johnson, “Empire of Force,” 38.

³⁴ Johnson, “Empire of Force,” 38.

³⁵ Hassler-Forest, *Capitalist Superheroes*, 13 (citing Jeffords).

³⁶ Hassler-Forest, *Capitalist Superheroes*, 13.

³⁷ Describing her own approach to law and film studies, Silbey confesses that her “particular preoccupation” is “trial films specifically” because she wants to investigate “the jury trial and its embodiment on screen.” (558) By contrast, coming from a legal studies/mutant philosopher background, my particular preoccupation is with notions of law, order, and justice that correspond more to ideology than any forms of easily identifiable law (e.g. courtroom dramas, case law, statutes, etc.). For this reason, it makes sense that whereas Silbey’s interest is in courtroom dramas, mine is in superheroes. Offering a more indirect and abstract relationship to law than trial films, superhero shows mirror, shape, and comment on audience’s attitudes towards legal systems; that is, these shows address beliefs about law’s influence on social order and control, as well as its perceived abilities and inabilities to achieve “justice.” (Silbey, “Truth Tales and Trial Films.” 558)

proven to be fairly popular with viewing audiences.³⁸ Finally, I hoped that Daredevil's career as a lawyer would add a dimension to my analysis of tolerated illegality by highlighting the perceived limits of the legal system and the need for superheroes to take matters into their own hands.

Season 1 introduces the main character, Matt Murdock, and his superhero alter ego, Daredevil. Matt became blind as a child when he intervened in a chemical spill accident to save a bystander. Matt was raised alone by his father, a professional boxer, and they had a loving father-son relationship. However, life in "Hell's Kitchen" (their area of New York) was dominated by crime. Mobsters began paying Matt's father to lose boxing matches so they could profit through gambling. One night Matt passionately encouraged his father to win his upcoming fight, telling his father that he believed in him (young Matt did not know about the payoffs). As a result, his father decided to disobey the mobsters and defiantly knock out his opponent. Following the fight, Matt's father was murdered, and Matt was left an orphan.

After becoming an orphan, Matt was approached by a mysterious man named "Stick," who was also blind, and who offered to train Matt to fight. Initially Matt was hesitant to trust Stick, but Matt eventually accepted Stick's teachings and learned how to heighten all his other senses (especially hearing) and "see" in a different way. Stick ultimately abandoned Matt because he had become too attached to the boy and viewed personal attachment as a weakness. Matt went on to attend law school, where he met his best friend, Franklin "Foggy" Nelson (another main character). After law school, Matt convinced Foggy not to work at a large law firm, but rather to join him and open an independent law firm called *Nelson and Murdock* in the heart of Hell's Kitchen. Early in season 1, audiences are also introduced to Karen Page when she

³⁸ *Daredevil* received decent ratings and reviews (the combined average score from critics of season 1 and 2 combined on the "Metacritic" website was 71.5/100), but, more importantly, audiences enjoyed the show (the combined average user-score on Metacritic is 8.55/10). (Metacritic, "Marvel's Daredevil: Season 1 & 2," *Metacritic*, accessed July 11, 2016, <http://www.metacritic.com/tv/marvels-daredevil>)

is framed for murder. Matt/Daredevil knows that she was framed, and convinces Foggy that *Nelson and Murdock* should defend her as their first client. After Daredevil saves her life from an attack (by those trying to frame her), and Nelson and Murdock successfully clear her name, Karen joins *Nelson and Murdock* as their administrative assistant.

Daredevil season 2 introduces a second superhero, Frank “The Punisher” Castle, whose methods conflict with Daredevil’s approach. Whereas Daredevil believes that his role is to apprehend criminals and then turn them over to legal authorities, The Punisher believes that the law allows criminals to go free and therefore they need to be executed. The Punisher’s beliefs derive from his life story. He is a military veteran, and shortly after returning from duty his family was killed, and he cheated death himself. The circumstances of his family’s death begin as a mystery and the story is gradually revealed throughout the season.

Audiences learn that the police organized a “sting operation,” in which an undercover agent coordinated a drug deal between three of Hell’s Kitchen’s leading gangs. The plan was for the deal to take place at a public park, but the police decided not to clear civilians from the park in order to avoid making the gangs suspicious. Ultimately, the deal failed, and a shoot-out between the three gangs ensued. Castle was at the park with his family—a wife and two young children—who were all shot and killed on site, and Castle was shot in the head. Castle, however, did not die, and was taken to the hospital in a coma. In an effort to hide the fact that the shoot-out was the result of a drug deal orchestrated by the police, District Attorney Samantha Reyes (who led the failed sting operation) attempted to have Frank killed to eliminate all witnesses. However, when the hospital removed Castle’s life support, his heart stopped, but then miraculously restarted and he woke up from his coma. Since that moment he has been on a quest for answers

about the truth of what happened that day, and a mission of vengeance to punish those who contributed to his family's deaths.

When The Punisher enters Hell's Kitchen and begins executing members of the three gangs who were involved in the shootout at the park, Karen, Foggy, and Matt/Daredevil do not know who he is or what happened to him. Matt/Daredevil sees Frank/The Punisher as someone who needs to be stopped (by Matt's logic, no one should be able to take a life without being apprehended by the law). Eventually, Frank/The Punisher is captured by a group of gangsters (which was bound to happen because most of the major gangs in Hell's Kitchen had been trying to stop him since his killing spree began). The gangsters torture Frank/The Punisher (and his dog) until Matt/Daredevil comes to save him. Because of The Punisher's weakened physical state, Daredevil must help him to safety. Once they are a reasonable distance away, Frank opens up to Daredevil about his family's murder and tells the heartbreaking story of his last night with his children. Daredevil listens, but still calls the police to come and apprehend The Punisher, and when the police arrive Frank does not put up a fight. Daredevil tells the police to take the credit for apprehending The Punisher and to leave Daredevil out of the story.

Meanwhile, Karen has gained an interest in The Punisher and believes that there is more to him than the public knows (the media has branded The Punisher as a crazed killer, and no one knows about Frank's identity or his family's murder). Slowly, Karen pieces together Frank's story, and even visits the house where he used to live with his family. When it comes time for The Punisher's trial, Karen and Matt realize that he is not receiving fair legal representation, and that the district attorney (who, unbeknownst to everyone, previously had Frank removed from life-support) wants to paint him as an uncomplicated villain. The prosecution has embellished his crimes by creating fictitious charges in states that have the death penalty, and omitted

information to hide the truth. Karen and Matt decide that *Nelson and Murdock* should represent Frank/The Punisher in court and convince Foggy to join them and take the case. Although there are more details to Season 2 than I included in this summary, this will suffice for the purposes of my analysis.

Significant Scenes from Netflix's Daredevil, Season 2

The following analysis is guided by Johnson's suggestion that it is important to "explore the place of *affect*—of how we come to *feel*—in the filmic and televisual texts"^{39,40} as well as her observation that these texts have the ability to open up or foreclose ways of "thinking, talking, and imagining law."⁴¹ With Johnson's approach in mind, I will analyse four significant scenes from *Daredevil* season 2: (1) the assertion that, "It's the Goddamn Wild West out there;" (2) Karen Page's story entitled, "What is it to be a hero?;" (3) Frank "The Punisher" Castle's claim that, "Your Way is Bullshit;" and (4) the idea of someone "who prevents lives from needing to be saved at all." Each of these scenes gets us closer to understanding how superhero narratives are complicit in maintaining legal norms and conventions (even while seeming to challenge them) and also promote docile subjectivity.

1. "It's the Goddamn Wild West out there."

Both Superhero and Western films hold tremendous sway in the popular imaginary. Ruth Buchanan and Johnson describe the Western as "the most loved genre in American popular

³⁹ Johnson, "Empire of Force," 38.

⁴⁰ Here, again, it is important to note that Johnson is participating in a conversation about Law & Film, and responding to law's tendency to erase emotion.

⁴¹ Johnson, "Empire of Force," 34.

culture,”⁴² while Dan Hassler-Forest argues that the superhero movie has become, “the dominant genre in 21st-century Hollywood cinema.”⁴³ The significance of the connection between the western genre and the superhero genre is twofold. First, given their popularity, both genres participate in what Buchanan and Johnson describe as “constructing as well as reflecting upon our nomos,”⁴⁴ which means that they ought to be taken seriously as “jurisprudential texts.”⁴⁵ Second, there is something interesting, if not also disturbing, in the idea that some of the more overt and problematic traits of old Western films carry on through today’s superhero movies and TV series. The explicit themes of racism and colonialism/imperialism,⁴⁶ as well as the simple binary construction of “good” and “bad,” persist in today’s superhero stories. These racist and imperial ideas and false dichotomies continue to suggest that those in power in the global West are the legal and moral authorities (guardians of freedom, security, and the “rule of law”) and may grant themselves exemptions from the rules (whenever they deem it necessary). Throughout this chapter I will continue returning to this comparison between the superhero and Western genres.

Both the Superhero and Western genres share a setting that can be described as “lawless,” such as a morally/legally compromised town or city. Set in the “Wild West,” Western films often depict a town where “there is no law” (a claim which, upon further analysis, cannot usually be substantiated) or where the “official law” has diminished authority. For example, as Johnson

⁴² Ruth Buchanan and Rebecca Johnson, “The ‘Unforgiven’ Sources of International Law: Nation-Building, Violence, and Gender in the West(ern),” in *International Law: Modern Feminist Approaches*, ed. by Doris Buss and Ambreena S. Manji (Portland, OR: Hart Publishing, 2005), 134.

⁴³ Hassler-Forest, *Capitalist Superheroes*, 3.

⁴⁴ As described by Robert Cover in “Nomos and Narrative,” a “nomos” is a “normative universe” (4) full of orientations to “right and wrong,” “lawful and unlawful,” “valid and void,” and so on. (Robert M. Cover, “The Supreme Court, 1982 Term—Foreword: *Nomos* and Narrative,” *Harvard Law Review* 97, no. 4 (1983))

⁴⁵ Buchanan and Johnson, “The ‘Unforgiven’ Sources,” 134.

⁴⁶ As Dan Hassler-Forest puts it, the characters in superhero films, “display an attitude towards other cultures and ethnicities that is usually patronizing at best, and openly racist at worst.” (Hassler-Forest, *Capitalist Superheroes*, 260)

notes, in the HBO series *Deadwood* (which is considered a Western) one of the characters asks at the outset whether it is true that there is “[n]o law at all in Deadwood?” and his suspicion is confirmed.⁴⁷ However, as Johnson points out, there is indeed “law” in *Deadwood*, but instead of “juridical law,” it is the law of “power, economy, and the market.”⁴⁸ Significantly, Johnson relates the type of law that rules the settler camp of *Deadwood* to “the law of Locke and Hobbes,” rooted in “a sort of pre-founding moment.”⁴⁹ In a different work, Johnson and co-author Buchanan make a similar observation when they argue that the “origin myth” found in Western films is related to “Hobbes’ account of the transition from a ‘state of nature’ to sovereignty.”⁵⁰ This idea that the Western is set in a pre-law State, akin to Hobbes’ state of nature, is an idea that carries over to certain popular superhero franchises, including *Daredevil*, with important implications.

Like the Western, some superhero stories begin in a setting where crime has taken over the city, and official legal authorities do not have control. Anthony Peter Spanakos⁵¹ argues that comic book heroes “often have their origins in noir depictions of failed or failing states.”⁵² He goes on to offer that the dangerous city setting that seems to necessitate the superhero’s intervention, “recall[ing] Hobbes’s description of a state of nature and Leviathan as resolution.”⁵³ Spanakos focuses on the comic book series *Daredevil* (which inspired the Netflix series) and argues that Hell’s Kitchen “often looks like a Hobbesian state of nature.”⁵⁴ Indeed, although Spanakos later goes on to argue that Hell’s Kitchen more accurately resembles the “weak,

⁴⁷ Johnson, “Empire of Force,” 41.

⁴⁸ Johnson, “Empire of Force,” 42.

⁴⁹ Johnson, “Empire of Force,” 42.

⁵⁰ Buchanan and Johnson, “The ‘Unforgiven’ Sources,” 135.

⁵¹ Spanakos is a contributor to the aforementioned symposium on “The Politics of the Superhero.”

⁵² Peter Spanakos, “Hell’s Kitchen’s Prolonged Crisis and Would-Be Sovereigns: *Daredevil*, Hobbes, and Schmitt,” *Political Science and Politics* 47, no. 1 (2014): 94.

⁵³ Spanakos, “Hell’s Kitchen’s Prolonged Crisis,” 94.

⁵⁴ Spanakos, “Hell’s Kitchen’s Prolonged Crisis,” 95.

liberal, democratic states”⁵⁵ described by the “Hobbes-inspired” Carl Schmitt,⁵⁶ he nonetheless acknowledges that Hell’s Kitchen “meets much of the criteria for a Hobbesian state of nature.”⁵⁷ One might consider *Batman*’s “Gotham City,” or *The Green Arrow*’s “Star City” also as examples of this type of setting. As we shall see, by setting the superhero narrative in a failed state, the superhero is seen to catalyze revolutionary change when what the hero really does is restore the “status quo.”

In season 2 of Netflix’s *Daredevil* there are two references to the “Wild West.” The first is by Sergeant Brett Mahoney, a police officer who happens to be Foggy’s childhood acquaintance and who has developed a tentative rapport with Daredevil (though he does not know Daredevil’s true identity). Daredevil arrives at a crime scene and asks Mahoney what happened. Mahoney tells him that The Punisher is tearing the city apart, assassinating members of the three gangs who were involved in the park shootout, and that the gangs, in turn, are out to kill The Punisher. Mahoney stresses: “It’s the goddamn Wild West out there.”⁵⁸ The second reference is made by District Attorney Samantha Reyes (who we later learn orchestrated the sting operation that resulted in the murder of Castle’s family) at Frank Castle/The Punisher’s trial. During the prosecution’s opening remarks, Reyes states:

He [Castle] took the law into his own hands. Acted as judge, jury, and most violent executioner. You will hear that the defendant’s victims were criminals. But the victims are not on trial here today. And justice does not belong in the hands of a man like Frank Castle. This isn’t the Wild West. Justice is served here, in a court of law. And it is up to each of you to take back the city from lawless vigilantes.⁵⁹

⁵⁵ Spanakos, “Hell’s Kitchen’s Prolonged Crisis,” 97.

⁵⁶ Spanakos, “Hell’s Kitchen’s Prolonged Crisis,” 94.

⁵⁷ Spanakos, “Hell’s Kitchen’s Prolonged Crisis,” 97.

⁵⁸ Doug Petrie, Marco Ramirez, and Drew Goddard, “Penny and Dime,” *Netflix’s Daredevil*: Season 2, episode 4, directed by Peter Hoar, produced by Marvel Television and ABC Studios (Los Gatos, CA: Netflix, Inc., 2015).

⁵⁹ Doug Petrie, Marco Ramirez, and Drew Goddard, “Semper Fidelis,” *Netflix’s Daredevil*: Season 2, episode 7, directed by Ken Girotti, produced by Marvel Television and ABC Studios (Los Gatos, CA: Netflix, Inc., 2015).

These two quotations not only connect this superhero series to the Western genre, but also highlight divergent perspectives on the law, corresponding to different positions of social power. Mahoney is a street cop who is attuned to the fact that life in Hell's Kitchen is dominated by crime and the rules of the street. He is frequently confronted with a situation that he compares to the "goddamn Wild West" in which criminals, gangs, and so called "vigilantes" fight on a nightly basis. Conversely, Reyes works in her cushy office and makes occasional courtroom appearances. As audiences find out, she has committed moral and legal offenses to gain her position of power, and intends to become the future mayor of Hell's Kitchen. When Reyes says, "This is not the Wild West," she is suggesting that legal institutions are more evolved than the "Wild West" and that the legal system is the channel through which justice is achieved (a system she frequently manipulates).

It is also worth noting how the show encourages viewers to *feel* about these two characters and how the audience's feelings toward them influences which one is seen as truthful. Orit Kamir reminds readers that the cinematic choices made in the construction of the film (or television show) profoundly influence viewers' judgments throughout the show. One of the most persuasive tactics used to affect viewers' judgments is "[m]anipulation of viewer identification with on-screen characters."⁶⁰ Reyes ends up being one of the antagonists of Season 2. At first she just seems off-putting (power-hungry and abrasive), but viewers later learn that she has repeatedly set up her employees to take the blame for her failed schemes; moreover, she was in charge of the police operation that led to the death of Frank Castle/The Punisher's family, and she instructed the hospital to remove Frank's life support (although he survived). So when Reyes says that Hell's Kitchen is not the Wild West and justice happens in a Court of Law, the show

⁶⁰ "Kamir, "Cinematic Judgment and Jurisprudence," 29.

has already constructed her as a villain. Accordingly, the audience has been conditioned not to identify with her, and thus not to trust her views. Alternatively, viewers have come to know and like Mahoney since Season 1. He is portrayed as a “cool black guy” (there is really no other way to put it), who is very “real,” and simultaneously works as a humble street cop while also rejecting “the man;” in other words, although, in a sense, he may represent the law, he is still one of “the people” and has little power in relation to mobsters, vigilantes, or district attorneys.⁶¹ Because viewers know and like Mahoney, his perspective that it *is* the “goddamn Wild West” seems like the truth.

Setting heroic tales in failed or failing states is a crafty strategy for Western and superhero stories alike because of the implications this setting has on the “social transformation” that either takes place within the story or that is foreclosed at the story’s end. Essentially, by starting with a fictional failed state, the narrative can move toward (socio-legal-political) “progress” by concluding with a situation that resembles our nonfictional (neoliberal) present. Basically, the trick is to manipulate depictions of “progress” by moving the starting line back. As mentioned earlier in the chapter, *Daredevil*’s “Hell’s Kitchen,” *Batman*’s “Gotham City,” or *The Green Arrow*’s “Star City” might serve as examples of this type of setting. The recent and acclaimed *Wonder Woman* film also sets its story amidst conflict and turmoil (WWII). The result is that the “change” at the film’s conclusion is the reestablishment of order after the war. Whether the example is a corrupt city, or a state of war, the “resolution” at the end of the show *feels* like progressive change, but it is merely a restoration of the naturalized conditions of the mainstream audience’s existence. Indeed, this sneaky move can even be observed in “edgier”

⁶¹ The show establishes that Mahoney and Foggy know each other from high school, but they are more like acquaintances than friends. Whenever Foggy comes to Mahoney in his capacity as a lawyer and tries to get Mahoney to divulge police information, Mahoney is usually irritated or annoyed, and gives Foggy a hard time before ultimately conveying the requested information.

superhero stories. For example, the film version of *V for Vendetta*, a movie many people believe to be more subversive than other superhero movies, is ultimately guilty of presenting what Hassler-Forest calls “an illusion of revolutionary politics.”⁶² In *V for Vendetta* (an insightful graphic novel transformed into a Hollywood film^{63,64}), the film’s setting within a fascist regime makes it seem like the only alternative to the neoliberal present is fascism, and we would be better off appreciating what we have. Although the film’s ending suggests a type of solidarity, with all of the participants in the mob removing their Guy Fawkes masks simultaneously, the reality is that these people are all spectators who passively watch a building explode, which was an act of rebellion orchestrated by three individual people (V, Evie, and Inspector Finch). There is a suggestion that the fascist regime has fallen; there is no suggestion that the replacement regime will be any different from the neoliberal, (un)representative, (post)democratic structure of the twenty-first century (a structure in which people are governed, but not really involved in their government) in any emancipatory way. In all likelihood, the masses will “restore the original democratic/capitalist order that had been upset by the fascist dictatorship.”⁶⁵ Returning to the central point, by situating superhero tales in settings that obviously lack conventions of “law and order,” the social transformation that takes place seems “revolutionary;” however, upon closer

⁶² Hassler-Forest, *Capitalist Superheroes*, 108.

⁶³ As Hassler-Forest reports, *V for Vendetta* author Allan Moore demanded that his name be removed from the opening credits of the movie because his graphic novel had been transformed into “a Bush-era parable by people too timid to set a political satire in their own country.” (Moore 2006, cited in Hassler-Forest, *Capitalist Superheroes*, 100). Later on, Hassler-Forest also notes: “While the character of V in the comic book voices an extremely radical anarchist political agenda, his revolution in the film is ultimately—and bizarrely—apolitical in nature.” (Hassler-Forest, *Capitalist Superheroes*, 108)

⁶⁴ Linda Hutcheon explains that “adaptation” is a difficult concept pinpoint because “we use the same word for the process and the product.” (15) Adaptation as a product is more straightforward, but adaptation as a process is somewhat elusive. From the “adapter’s perspective,” Hutcheon explains that adaptation is, “an act of appropriating or salvaging, and this is always a double process of interpreting and creating something new.” (20) In this sense, the *V for Vendetta* movie is both an interpretation of the graphic novel as well as a different creation altogether—something both familiar and unfamiliar—and thus something new. The same can be said of the *Daredevil* comic book series and the *Daredevil* Netflix series, which is the subject of my interest and critique throughout this chapter. (Linda Hutcheon, *A Theory of Adaptation* (New York: Routledge, 2006))

⁶⁵ Hassler-Forest, *Capitalist Superheroes*, 103.

inspection, the perceived changes that occur within the film ultimately lead us back to the struggles of the present.

There is a common misperception that superheroes change the world for the better. Although TV and film narratives often instruct viewers to believe that superheroes make the world a “better place,” what we almost never see are *any actual changes*. In fact, it is the villains who “[attempt] to change the way the world is organized” and the heroes who “[are] dedicated to keeping it as it was.”⁶⁶ Furthermore, by offering an illusion of revolutionary politics rather than depicting either a revolution or politics, audience members do not “engage [...] with the issues the text supposedly critiques.”⁶⁷ Thus, rather than being forced to confront, for example, Capitalism’s entrenched class division and increased social alienation (after all, those watching these superhero stories can either afford the luxury of going to the movies or owning a computer), viewers can enjoy the façade of political struggle and avoid thinking about current political realities.

2. *Karen Page & Docile Subjects*

As I have already suggested, there is a lineage from Westerns to the superhero genre that dominates contemporary small and large screens. Hassler-Forest affirms this observation,⁶⁸ and notes that one similarity between the cowboy heroes of old Western movies and the superheroes of today’s films and TV shows is that both depict masculine saviours protecting feminized populations portrayed as helpless bystanders.⁶⁹ Buchanan and Johnson argue that Western films often draw on the construction of masculine heroes and feminized victims to garner support for

⁶⁶ Hassler-Forest, *Capitalist Superheroes*, 91.

⁶⁷ Hassler-Forest, *Capitalist Superheroes*, 108.

⁶⁸ Hassler-Forest, *Capitalist Superheroes*, 6

⁶⁹ Hassler-Forest, *Capitalist Superheroes*, 12.

the violence depicted in the concluding heroic intervention.⁷⁰ By the time viewers reach the end of the film, they accept the hero's violent actions because of how they "have been positioned as complicit in his actions."⁷¹ For Buchanan and Johnson, this same logic manifests outside of the film world and can be observed in international humanitarian interventions. In such cases, most onlookers from the global West do not question the justness of "humanitarian interventions" because they "have been positioned to identify with the heroic intervenors on behalf of the feminised and presumed-to-be-helpless victims."⁷² This trend suggests that ordinary citizens are unable to help themselves or act collectively without "heroes," thus encouraging passive and docile subjects and creating the need for heroic interventions.⁷³

⁷⁰ Like the Western genre that informs it, the Superhero genre tends to be male dominated in terms of its heroes—and more. An underexplored topic in this chapter is the gendered dimension that becomes (more) visible by analyzing law and film in tandem. An example of this type of analysis can be found in Rebecca Johnson's article, "Law and the Leaky Woman." In this piece, Johnson uses a personal story of an *un-tolerated* illegality to launch her analysis of the ways in which law and popular culture gender "public" spaces to exclude women. She uses a lived experience of being asked to leave a pub because her infant son (who was still breastfeeding at the time) was "underage." (184) This so-called "illegality" (disputable) was very much *un-tolerated* as Johnson and company "found [themselves] on the street." (184) This experience led Johnson to take a closer look at the ways in which law and popular culture interact to frame certain spaces as off limits to women. Through her reading of the film *Unforgiven* (Clint Eastwood, 1992) she argues that the saloon is associated with "liquor and sexuality," and the space of the saloon is one of "sexual negotiation" and "inherent risk." (190) By contrast, the "right kind" of woman is in her "proper place:" "the space of the home." (193) This type of "good woman" is key to the production of a "good man," one who will "do what needs to be done" and commit a wrong (to be sure), but one that "can be justified." (193) (Rebecca Johnson, "Law and the Leaky Woman: The Saloon, the Liquor Licence, and Narratives of Containment," *Continuum: Journal of Media & Cultural Studies* 19, no. 2 (2005))

⁷¹ Buchanan and Johnson, "The 'Unforgiven' Sources," 157.

⁷² Buchanan and Johnson, "The 'Unforgiven' Sources," 157.

⁷³ In "Staying with the Trouble: Anthropocene, Capitalocene, Chthulucene," part of Donna Haraway's critique of the term "Anthropocene" is that the "anthropos" is "too much of a parochial fellow; he is both too big and too small for the needed stories." (page 35, footnote 7) Haraway is concerned not only with the stories we tell, but also *what stories tell stories*. The Anthropos story is a "prick tale," a man-made tragedy about one real actor, one real world maker, one real hero. All others in the prick tale are props, plot space, or prey. There is no room in the Anthropos narrative for what Haraway affectionately calls "companion species," friendships between and across species divides, a process of "*becoming-with*." (47) Haraway offers an alternative to the narrative of "human exceptionalism" in the Anthropos tale by turning to Ursula Le Guin's "carrier bag theory of storytelling." (46) In this model of storytelling, theories and stories are "capacious bags for collecting, carrying, and telling the stuff of the living" (46). (Donna Haraway, "Staying with the Trouble: Anthropocene, Capitalocene, Chthulucene." In *Anthropocene or Capitalocene? Nature, History, and the Crisis of Capitalism*, ed. by Jason W. Moore (Oakland, CA: PM Press, 2016))

In "The Carrier Bag Theory of Fiction," Le Guin talks about how audiences love a story with action, and with a hero, because heroes are powerful. Even though many stories seem to include other thoughts and characters, "they have all been pressed into service in the tale of the Hero. But it isn't their story. It's his." (150) Le Guin has an aspiration for what the category of the "novel" could be. She explains that, "the natural, proper, fitting shape of the

Similarly, Hassler-Forest also notices this trend in popular superhero series.⁷⁴ *V for Vendetta* and *Batman Begins* offer two examples of superhero films that reinforce docile political subjectivity. The most significant similarity between the two films, according to Hassler-Forest, is the “reliance on a highly masculine superhero figure whose intervention is required in order to effect political change in a troubled society.”⁷⁵ Without assistance from heroes, “individual subjects are clearly unable to act, or even to understand the true nature of their predicament.”⁷⁶ For example, in *Batman Begins*, the “ordinary citizen” rarely makes an appearance in the films, and when he/she is shown, it is usually in a “monstrous, uncontrollable mob,” rather than in a depiction of “social solidarity.”⁷⁷ In the Hollywood adaptation of *V for Vendetta*, the ordinary citizens are presented as “gullible, easily-controlled subjects.”⁷⁸ Because they are portrayed as an “easily manipulated mass” and largely “unaware” of the political conspiracies around them, the solution offered to the political crisis is “the indestructible moral leadership of a single enlightened subject.”^{79,80} The population at the end of *V for Vendetta* is once again reduced to a horde of passive spectators watching the fireworks.⁸¹ Whether in Westerns, superhero films, or international humanitarian interventions, those positioned to be in need of rescuing or saving are frequently portrayed as “feminized” and “helpless” victims. This trend emerges in *Daredevil*

novel might be that of a sack, a bag. A book holds words. Words hold things. They bear meanings. A novel is a medicine bundle, holding things in a particular, powerful relation to one another and to us.” (152-153) She notes that, “the Hero does not look well in this bag. He needs a stage or a pedestal or a pinnacle. You put him in a bag and he looks like a rabbit, like a potato.” (153) (Ursula K. Le Guin, “The Carrier Bag Theory of Fiction,” in *The Ecocriticism Reader: Landmarks in Literary Ecology*, ed. by Cheryll Glotfelty and Harold Fromm (Athens, Georgia: University of Georgia Press, 1996))

⁷⁴ Hassler-Forest, *Capitalist Superheroes*, 6.

⁷⁵ Hassler-Forest, *Capitalist Superheroes*, 107.

⁷⁶ Hassler-Forest, *Capitalist Superheroes*, 107.

⁷⁷ Hassler-Forest, *Capitalist Superheroes*, 98.

⁷⁸ Hassler-Forest, *Capitalist Superheroes*, 103.

⁷⁹ Hassler-Forest, *Capitalist Superheroes*, 103.

⁸⁰ As Scott Woodcock adds, AMC’s *The Walking Dead* is guilty of a similar offense; repeatedly, it is the white male cop who claims leadership over the group and asserts that he will make final decisions rather than putting group decisions to a vote.

⁸¹ Hassler-Forest, *Capitalist Superheroes*, 109.

(season 2) in Karen Page’s newspaper article, “What is it to be a hero?” Although Karen’s story initially seems to empower subjects (both within the series, and as members of viewing audiences), it actually reinforces the idea of docile political subjectivity.

Although Karen Page is not one of the superheroes depicted in Netflix’s *Daredevil* series, viewers are positioned to identify with her right from the opening of season 1. Audiences first meet Karen Page in season 1, episode 1. The first time viewers see Karen, they do not know who they are looking at. The first shot we see is of a person on his/her knees (gender unidentified, but, given the hem line and hairless legs, one assumes a woman) holding a blood-soaked knife (see figure 1 below). The tip of the knife is facing the floor, and droplets of blood are running off the end of the knife and hitting the carpet with a dripping sound, as depicted below:



Figure 1: The first time audiences see Karen Page (*Netflix’s Daredevil*, Season 1, episode 1, 2015).⁸²

As the camera pans upward, we hear terrified gasps (hyperventilation), then we see a blood-stained hand holding a knife, then finally the shot pans up to Karen’s face. The subsequent shot

⁸² Steven S. DeKnight and Drew Goddard, “Into The Ring,” *Netflix’s Daredevil*: Season 1, episode 1, directed by Phil Abraham, produced by Marvel Television and ABC Studios (Los Gatos, CA: Netflix, Inc., 2015).

shows a view looking down on the grisly scene from the ceiling. A dead man lies on the carpet in the centre of the room (his shirt is soaked in blood, and blood is pooling beneath him), and Karen kneels beside him (also covered in blood) holding the bloody knife. The significance of this introduction to Karen Page is that the scene benefits from its associations with the horror genre, and the relationship between horror audiences and slasher films' female protagonists.

The scene that introduces audiences to Karen very much resembles a horror scene, from the bloody knife, to the dead body, to the orchestral strings creating a frenetic and tension-heightening sound sequence.⁸³ The construction of this scene is no accident, and from the beginning it links Karen to the horror archetype of the "Final Girl." In *Men, Women, and Chainsaws*, Carol Clover investigates how adolescent males (horror's primary audience) come to identify with the heroine of the opposite gender. Clover argues that cross-gender identification is constructed by making the Final Girl a "masculine female" who out-wits and out-lasts the other characters. Moreover, adolescent males who may experience cruelty and bullying are able to identify with the heroine's pain and anguish in a cathartic way, allowing her to weep and cry out on their behalf without threatening their masculinity.⁸⁴ Although Karen is only a distant relative of the Final Girl (perhaps a second cousin?), her character nonetheless benefits from this cultural association, which allows audiences (in particular, adolescent male superhero fans) to relate to Karen's character.^{85,86}

⁸³ Horror films often use knives as phallic objects, piercing and penetrating bodies. Such objects can also help to blur gender boundaries by either portraying the male killer wielding a knife as sexually frustrated, or the female victim-turned-hero as endowed with masculinity because she has the knife. (Carol J. Clover, *Men, Women, and Chainsaws: Gender in the Modern Horror Film* (Princeton, NJ: Princeton University Press, 1992), 46-49) In Figure 1, the message is unclear because on the one hand Karen possesses the knife, but on the other hand we learn that she did not, in fact, stab anyone with it.

⁸⁴ Clover, *Men, Women, and Chainsaws*, 35-64.

⁸⁵ Karen contrasts with the Final Girl because she is quite feminine (long wavy hair, almost always in skirts, common female name), whereas the Final Girl often appears boyish and has a gender-neutral name like "Max" or "Alex." (Clover, *Men, Women, and Chainsaws*, 40). However, in many ways Karen also fits the archetype because she hangs out with the boys (Foggy and Matt), plays pool, drinks beer, and so on. She is also ambitious (chasing down tips and

In the season 1, episode 11, Karen is attacked and kidnapped (by the same criminal syndicate that framed her for murder in episode 1, and later tried to kill her). During the scenes that we see of Karen and her captor (Wesley, the villain's right-hand man), they are sitting across from each other at a metal table. This meeting becomes Karen's chance not only to protect her friends from Wesley's threats, but also to exact revenge against a former tormentor. For the majority of the dialogue, Karen and Wesley are shown from a neutral point of view; we see shots of both of them at the table, and shots of each one individually, but these individual shots are not from the perspective of the other (we do not see either character straight-on as we would if we were sitting across from them). All of the sudden, Wesley's cell phone rings from his waist band and he looks down at it, taking his eyes off Karen. Karen seizes this opportunity to grab the gun that Wesley left on the table. The camera shot when Karen fires the gun into Wesley's chest is the only shot throughout the encounter that we see from Karen's perspective, and indeed it is as if we, the audience, are the ones holding the gun (see figure 2 below). Thus, Karen retains a connection to the Final Girl (enacting revenge on her previous tormentor), and audience identification with Karen is intensified (we relish her revenge, and we see the fatal gunshot from her point of view).⁸⁷

story leads) and becomes increasingly brave as the series progresses (scaring less easily and even welcoming dangerous situations).

⁸⁶ Referring to Carol Clover's work, in "Horror Films and the Argument from Reactive Attitudes," Scott Woodcock draws attention to the "fluid nature of film audiences' identification with characters" (321) and the "curiously elastic" phenomenon of viewer identification. (321) Indeed, I suspect that although some viewers may identify with the show's hero (in this case Matt Murdoch/Daredevil), many will relate to Karen's character, who is heroic, but also vulnerable, and who shifts from victimization to revenge (without "superhero powers"). (Scott Woodcock, "Horror Films and the Argument from Reactive Audiences," *Ethical Theory and Moral Practice* 16, no. 2 (2013))

⁸⁷ Moreover, as Orit Kamir explains in *Framed*, films use tools like showing the action from a particular character's point of view or "positioning her as the most dominant, sympathetic on-screen character" to create participatory identification. (Orit Kamir, *Framed: Women in Law and Film* (Durham: Duke University Press, 2006), 280)



Figure 2: Karen shoots Wesley...and we (the audience) are left holding the gun (*Netflix's Daredevil*, Season 1, episode 11, 2015).⁸⁸

In addition, Kamir notes that another means of promoting audience identification with a particular character is by “closely aligning the viewer’s point of view with hers,” and Karen’s character embodies this tactic as well.⁸⁹ As an assistant at *Nelson and Murdock*, Karen demonstrates a talent for gathering information and putting cases together. When Matt (i.e., Daredevil, though she does not know it) compliments her work, and asks her if she has ever thought about going to law school, she replies, “I don’t know if law school is really the best fit for me. I guess there’s just something about the rules and the loopholes that just feels like the truth gets lost too often.”⁹⁰ Thus, Karen establishes herself as someone who “gets it”—she will work with *Nelson and Murdock* and help them in their capacity as lawyers, but she is aware of

⁸⁸ Steven S. DeKnight and Drew Goddard, “The Path of the Righteous,” *Netflix’s Daredevil*: Season 1, episode 11, directed by Nick Gomez, produced by Marvel Television and ABC Studios (Los Gatos, CA: Netflix, Inc., 2015).

⁸⁹ Kamir, *Framed*, 280.

⁹⁰ Doug Petrie, Marco Ramirez, and Drew Goddard, “Semper Fidelis,” *Netflix’s Daredevil*: Season 2, episode 7, directed by Ken Girotti, produced by Marvel Television and ABC Studios (Los Gatos, CA: Netflix, Inc., 2015).

the problems with the legal system, and she does not believe that legal options guarantee justice (this idea, coming from Karen, also garners viewer support for *The Punisher*). By voicing the popular audience perspective, she affirms and reinforces what viewers are thinking and *feeling*.

Consequently, by the time we reach season 2, the show has already put in a significant amount of work nudging audiences toward identifying with Karen, and she ends up being the greatest ideological vessel of the show. She perpetuates a type of logic, shared by most superhero stories, that reinforces docile political subjectivity; people are encouraged to believe that extraordinary individuals will save the world, so there is no need to act—we just need to have “hope.”⁹¹ Season 2 concludes with a voiceover from Karen Page who is reading the final version of the article that she wrote for *The Daily Bugle* newspaper.⁹² The story is entitled, “What is it to be a hero?” and it reads as follows:

What is it, to be a hero? Look in the mirror and you’ll know. Look into your own eyes and tell me you are not heroic, that you have not endured, or suffered, or lost the things you care about most. And yet, here you are, a survivor of Hell’s Kitchen, the hottest place anyone’s ever known, a place where cowards don’t last long, so you must be a hero. We all are, some more than others, but none of us alone. Some bloody their fists trying to keep The Kitchen safe. Others bloody the streets in the hope that they can stop the tide, the crime, the cruelty, the disregard for human life all around them. But this is Hell’s Kitchen; angel or devil, rich or poor, young or old, you live here. You didn’t choose this town—it chose you. Because a hero isn’t someone who lives above us, keeping us safe. A hero is not a god, or an idea. A hero lives here, on the street, among us, with us, always here but rarely recognized. Look in the mirror, and see yourself for what you truly are: you’re a New Yorker, you’re a hero. This is your Hell’s Kitchen. Welcome home.⁹³

⁹¹ This idea that having “hope” will save us from our greatest global problems is promoted in its most blatant and unsophisticated form in the CBS series *Supergirl*. In Season 1, episodes 19 and 20, “hope” is suggested as a remedy to climate change. The “villains” of the show are the ones who care that human beings are destroying the planet. Their views are discredited because of their tactics—they use violent means, which cannot be tolerated. While the city of Metropolis is being brainwashed by the villains, media mogul Cat Grant (who escapes the brainwashing mechanism) broadcasts Supergirl’s speech throughout the city as a “beacon of hope.” This speech is allegedly so moving that it causes the public to snap out of the villain’s spell and come to their senses—not about the fact that the villains are correct and people have destroyed the planet beyond repair, but rather about the fact that the villains are “bad guys” and that “hope” can save the day.

⁹² Technically, this is not the “conclusion” because there is one scene that follows the voiceover: the scene where Matt finally tells Karen that he is Daredevil.

⁹³ Doug Petrie, Marco Ramirez, and Drew Goddard, “A Cold Day in Hell’s Kitchen,” *Netflix’s Daredevil: Season 2*, episode 13, directed by Peter Hoar, produced by Marvel Television and ABC Studios (Los Gatos, CA: Netflix, Inc., 2015).

Initially, it appears that Karen's final story is empowering because it suggests that residents of Hell's Kitchen (and New York generally) should view themselves as heroic. In other words, they do not need superheroes to save them—they only need to look to themselves. However, upon a closer and more critical examination, there are three difficulties with this superficial reading of Karen's story, and each will be discussed in turn.

First, the people of New York are encouraged to see themselves as heroes merely for living in Hell's Kitchen. No goals, accomplishments or ambitions are attached to this idea—the basic sentiment is: you are a hero for living in this city and doing nothing. There is no need to become politically engaged, and all citizens should congratulate themselves no matter their actions or inactions. Second, even while Karen's voice-over is reading her cloying and contrived article,⁹⁴ which claims that “all” of the citizens of New York are heroes, the camera focuses almost exclusively on Daredevil and The Punisher, alternating between the two.⁹⁵ Although everyone in Hell's Kitchen is declared a hero, basically only the two superhero characters are shown. Finally, the argument that *everyone* is a “hero” is absurd because, as established many times throughout the series (and discussed in the preceding section), Hell's Kitchen resembles a Hobbesian state of nature populated mostly by criminals. The series claims that the city is largely

⁹⁴ Here, one might ask, “cloying and contrived from whose perspective?” As Carol Clover argues, the viewing audience is set up as the real judges in the film. In the trial movie sub-genre in particular, the jury within the film serves as a stand-in for the viewing audience. Allowing for exceptions such as *12 Angry Men* (which can be seen more to re-enact the courtroom space within the jury room, rather than as a typical jury deliberation), juries are typically seldom seen, glimpsed only in “a pan across the courtroom” or in the “the occasional cutaway;” they thus serve as “necessary blank space in the text, one reserved for occupancy by us” (253). Trial movies merely demonstrate most vividly a broader pattern in contemporary film, which is that viewers are positioned “not as passive spectators, but as active ones, viewers with a job to do” (246). Thus, in this case, I suggest that although passive viewers might buy in to Karen's flattery, the critical viewers judging the show (such as myself) will determine that the scene is contrived and manipulates audiences' affective responses to peddle its ideology. (Carol J. Clover, “Judging Audiences: The Case of the Trial Movie,” in *Reinventing Film Studies*, ed. by Christine Gledhill and Linda Williams (New York: Oxford University Press, 2000), 244)

⁹⁵ The two exceptions, for politically correct purposes, are a father and son picking out a Christmas tree and a family huddled around a menorah in an apartment window.

made up of thieves, rapists, murderers, drug dealers, and their henchmen. So, who, exactly, is Karen Page talking about when she says we are “all” heroes?

Karen’s story is a feel good season closer designed in part to make viewers content with just being themselves.⁹⁶ The idea that we are “all” heroes flatters egos while placing zero demands on anyone. The scene in which Karen reads her story simultaneously suggests (to mainly Western audiences) that being alive is an accomplishment while literally focusing (the camera) on the superheroes we hope will save us from impending disasters. The message for everyday life is that people should continue their politically disengaged and consumer-driven lives and hope that an extraordinary individual (e.g. scientific genius) will save the world (e.g. from climate change).

3. *Frank Castle/The Punisher*—“Your Way is Bullshit.”

Another shared trait of Western and Superhero films is that the stories are dominated by the themes of “law” and “justice.” Buchanan and Johnson point out that the Western is one of the “most prolific and powerful genres for exploration of accounts of law’s origins,”⁹⁷ as well as an investigation of “justice and the civilisation of the frontier.”⁹⁸ Moreover, a worked over theme in the Western is that the law is incapable of delivering justice. As Buchanan and Johnson explain, Western films often “dictate that whatever measure of justice is to be seen will be in the hands of the characters.”⁹⁹ To this end, the hero is usually depicted as the means to achieving a just

⁹⁶ The idea that there is a socio-cultural mandate to “be happy” and that people are told “just be happy being yourself” is explored and critiqued by Sara Ahmed in her book *The Promise of Happiness*. (Sara Ahmed, *The Promise of Happiness* (Durham NC: Duke University Press, 2010))

⁹⁷ Buchanan and Johnson “The ‘Unforgiven’ Sources,” 134.

⁹⁸ Buchanan and Johnson “The ‘Unforgiven’ Sources,” 145.

⁹⁹ Rebecca Johnson and Ruth Buchanan, “Getting *The Insider*’s Story Out: What Popular Film Can Tell Us About Legal Method’s Dirty Secrets,” *Windsor Yearbook of Access to Justice* 20 (2001): 1.

resolution that is out of law's reach, and the audience comes to crave the concluding retributive justice.¹⁰⁰

Similarly, Costello and Worcester note that the superhero genre interrogates themes of "law, justice, and public order."¹⁰¹ They go on to explain that, because superheroes are portrayed as crime fighters, their stories commonly "depict and sometimes deconstruct the boundary between the law and lawlessness."¹⁰² For this reason, Costello and Worcester argue that:

Superheroes regularly interfere with the normal prerogatives of states, implying that legal processes are insufficient, and perhaps even that inner-directed morality is superior to other-directed legality. Not surprisingly, superhero stories often return to the question of the merits and limitations of vigilantism and unbridled or unregulated power, whether in the hands of individuals or public authorities.¹⁰³

Western heroes and superheroes are largely understood as operating within this boundary between law and lawlessness that highlights the perceived limits of law and its inability to satisfy a public need for (some version of) justice.

Netflix's *Daredevil* establishes that justice will not be done inside the courtroom (contra District Attorney Reyes), and thus the situation in Hell's Kitchen is presented as a problem that must be solved outside of legal avenues. Throughout the show, the responsibility to act "beyond the law" to resolve injustices seems to belong to the show's "superheroes" or "vigilantes." Much of the season centers on the relationship between Daredevil and The Punisher, how their views about law and justice differ, and how these divergent views inform their methods. This conflict pushes the debate about tolerated illegality or "vigilante justice" to the background by shifting the conversation to questions about violence. Whereas Season 1 focused on whether Daredevil's

¹⁰⁰ Buchanan and Johnson state: "The stories almost always culminate in an ecstatic scene of violent retribution, in which the audience is expected to identify with the hero." (Buchanan and Johnson, "The 'Unforgiven' Sources," 138)

¹⁰¹ Costello and Worcester, "The Politics of the Superhero," 86.

¹⁰² Costello and Worcester, "The Politics of the Superhero," 86.

¹⁰³ Costello and Worcester, "The Politics of the Superhero," 86.

actions (taking the law into his own hands) were acceptable, Season 2 assumes that audiences have mostly accepted this “vigilante” premise, and the new debate is about whether criminals should be captured or killed. The two characters confront their different perspectives in the following conversation:

- PUNISHER: These people, they took my children from me. They killed my kids! Don’t you get that?!
- DAREDEVIL: Then do right by them. Help me. Work with me to find the man who gave the order.
- PUNISHER: And then what Red? We gonna “bring him in for justice?!” Is that what we’re gonna do?! Your way is bullshit Red. It doesn’t work. I need him gone. It’s gotta be permanent. It’s gotta be finished.
- DAREDEVIL: I understand. You’re right—my way isn’t working. So maybe, just this once... [pauses, performs the Catholic cross] maybe...yeah...your way is what it’s gonna take.
- PUNISHER: [quietly] Not just this once. No, no, no, no, no Red. That’s not how it works. It’s just, you cross over to my side of the line, you don’t get to come back from that. Not ever.¹⁰⁴

Whereas Daredevil believes that it is his responsibility to apprehend criminals and turn them over to the police to be tried in a court of law, The Punisher maintains that the legal system does not work and one way or another (technicalities, appeals, bribery, corruption, etc.) criminals will end up back on the street. Throughout *Daredevil* Season 2 the characters do not really discuss whether the superhero’s interventions are acceptable because it is generally assumed that they are.

Season 2 of *Daredevil* justifies The Punisher’s violent methods, obscures the casualties of real-life violence, and makes The Punisher’s executions seem palatable, in the following three ways. First, The Punisher is constructed as a sympathetic character. The audience empathises with The Punisher because he is a war veteran and a family man, and his family was tragically killed right in front of him. The love that he feels for his family and the anguish over their loss

¹⁰⁴ Doug Petrie, Marco Ramirez, and Drew Goddard, “.380,” *Netflix’s Daredevil*: Season 2, episode 11, directed by Stephen Surjik, produced by Marvel Television and ABC Studios (Los Gatos, CA: Netflix, Inc., 2015).

resonates with viewers. As Karen (our moral compass/point of identification) puts it, we not only understand why Frank/The Punisher is seeking vengeance, but indeed we could understand “why *anyone*”¹⁰⁵ (emphasis added) would seek vengeance under such circumstances. Karen establishes that any “reasonable person,” any person with strong family values, would do the same thing in Frank’s position (if he/she had the means and the skills). The empathy that viewers feel for Frank/The Punisher makes it more difficult for viewers to be critical of his methods. Indeed, when Daredevil prevents The Punisher from killing gang members, viewers instinctively resent Matt for getting in the way of Frank’s revenge. This desire that audiences feel to see Frank avenge his family through executions makes it difficult to critique his violent methods, and their implications.

In his discussion of the TV show *24*, which Hassler-Forest considers akin to a “superhero” series, he argues that protagonist Jack Bauer is established as “a devoted father and a loyal patriot.”¹⁰⁶ Thus, when Jack Bauer breaks rules, illegally surveys people, or uses violent methods, the audience accepts his choices because he is a good guy who shares “our values.” Even when superheroes break the rules and commit “illegalities” their “moral responsibility is reassuringly confirmed,” so that viewers know that the hero did what he had to do to protect us all.¹⁰⁷ In other words, the superhero is “free to disregard the laws he is expected to uphold whenever he decides that the circumstances demand it.”¹⁰⁸ The fact that superheroes use their powers “for good” ultimately “contributes to their public acceptance.”¹⁰⁹ Following Michael Hardt and Antonio Negri, Hassler-Forest argues that part of what superhero films do is justify

¹⁰⁵ Doug Petrie, Marco Ramirez, and Drew Goddard, “Semper Fidelis,” *Netflix’s Daredevil*: Season 2, episode 7, directed by Ken Girotti, produced by Marvel Television and ABC Studios (Los Gatos, CA: Netflix, Inc., 2015).

¹⁰⁶ Hassler-Forest, *Capitalist Superheroes*, 169.

¹⁰⁷ Hassler-Forest, *Capitalist Superheroes*, 179.

¹⁰⁸ Hassler-Forest, *Capitalist Superheroes*, 180.

¹⁰⁹ Hassler-Forest, *Capitalist Superheroes*, 186.

exceptional tactics by “*appeal[ing] to essential values of justice*” (original emphasis).¹¹⁰ By making it seem like particular American values are universal,¹¹¹ mainstream audiences are more easily able to accept that the protagonists on screen are acting heroically without criticizing their actions. In short, “we do not mind that the superhero is fighting, as long as we implicitly share the values he is fighting for.”¹¹² Thus, whether the protagonist is Jack Bauer or Frank “The Punisher” Castle, the superhero’s “unquestioned heroic status” allows him to break the rules and make questionable decisions without reproach.^{113,114}

The second way in which *Daredevil*, Season 2, makes The Punisher’s methods seem less controversial is by presenting him as infallible. Audiences wholeheartedly trust that Frank/The Punisher will not kill innocent bystanders,¹¹⁵ criminals’ families, or the wrong person. Early in season 2, Frank is out to kill a character named Grotto, who is under the protection of *Nelson and Murdock*.¹¹⁶ Karen is with Grotto at the hospital when The Punisher comes for him.¹¹⁷ Karen and Grotto run for their lives as The Punisher pursues them while firing a gun in their direction (allegedly, we later learn, at Grotto only, but the shots fired are dangerously close to Karen and

¹¹⁰ Hassler-Forest, *Capitalist Superheroes*, 59 (citing Hardt and Negri).

¹¹¹ See discussion about Wendy Brown and Ben Berger’s (respective) works in thesis #2.b. in Chapter 4, “Nine Theses On Toleration, Illegality and Power.”

¹¹² Hassler-Forest, *Capitalist Superheroes*, 147.

¹¹³ Hassler-Forest, *Capitalist Superheroes*, 186.

¹¹⁴ As Scott Woodcock adds, another example of this trend is the protagonist Bryan Mills (played by Liam Neeson) in the film *Taken* (directed by Pierre Morel). Mills shoots another character’s wife, who is sweet and in no way complicit with her husband’s illicit activities, as a means to obtain information, and there are no repercussions whatsoever because Mills is a (white, American, male) father trying to save his daughter so he can do whatever he pleases.

¹¹⁵ For some reason, even though “collateral damage” (the abstract and dehumanizing military term for innocent people who are killed) is how Frank’s own family was murdered in the park in the first place, viewers automatically assume that Frank will not produce any “collateral damage” on his own revenge missions because he is “better than that.”

¹¹⁶ Grotto initially seems like a sympathetic character when he comes to Nelson and Murdock for help and protection (from The Punisher). Grotto acknowledges that he has done horrible things throughout his life, but now he has repented and reformed. However, viewers get a different perspective on Grotto when the Punisher forces him to confess his crimes, and he admits not only to performing “hits” for his employer, but also to killing any innocent people who happen to be witnesses.

¹¹⁷ This event happens in episode 2, and neither the show’s viewers nor the characters within the show have much information on who Frank is, whether he is “good” or “bad,” what his motives are, or what he is trying to do.

other people at the hospital). Later, when Karen gets to know Frank/The Punisher better, he tells her: “You were never in any danger [...] I only hurt people that deserve it—I wanted you to know that.”¹¹⁸ There is something entirely convincing when Frank/The Punisher says this to Karen because viewers *like him* and *want* to believe him, and accordingly audiences are not likely to question his statement (nor does our audience surrogate, Karen). From this point on, most viewers banish the thought that The Punisher could possibly err, and indeed the show never explores a situation in which Frank kills a civilian or the wrong person.¹¹⁹

In the film *Iron Man* (2008), there is a scene in which Iron Man intervenes when a village is about to be attacked. Iron Man is forced to confront terrorists who have taken hostages. Luckily for Iron Man, his superhero suit includes advanced technology that indicates to him which individuals are hostiles and which are civilians. As Hassler-Forest puts it, Iron Man’s suit makes him “able to target only those who supposedly deserve to be killed.”¹²⁰ Drawing on the work of Slavoj Žižek, Hassler-Forest remarks that this type of scenario from *Iron Man* allows audiences to fulfill their “fantasies of this kind of ‘clean war’.”^{121,122} Just like The Punisher who assures Karen that he only kills those who deserve it, “Iron Man’s use of high-tech weaponry is depicted as something that is possible without civilian casualties.”¹²³ Consequently, through Iron Man and The Punisher we see enactments of fantasies of clean wars, which distort viewer’s

¹¹⁸ Doug Petrie, Marco Ramirez, and Drew Goddard, “Regrets Only,” *Netflix’s Daredevil*: Season 2, episode 6, directed by Drew Goddard, produced by Marvel Television and ABC Studios (Los Gatos, CA: Netflix, Inc., 2015).

¹¹⁹ *Dexter* (Showtime) is a rare example of a television series that explores a protagonist (Dexter) with a code (to only kill other serial killers) who is fallible; for example, Dexter accidentally kills the wrong person, and willfully kills a character who learns his secret.

¹²⁰ Hassler-Forest, *Capitalist Superheroes*, 182.

¹²¹ Hassler-Forest, *Capitalist Superheroes*, 183.

¹²² This fantasy of a “clean war” relates to Jean Baudrillard’s oft-misunderstood declaration that “the Gulf War did not happen.” In making this statement Baudrillard was suggesting that the Gulf War was the first “virtual war.” Iraq lacked advanced technological countermeasures, so its citizens experienced a conventional war (“firsthand” deaths, explosions, etc.). However, American civilians “followed” the war on TV and soldiers dropped computer guided missiles that they tracked, disengaged, on their digital read-outs. Baudrillard was not, in fact, arguing that the war literally never happened (the war was all too real), but rather commenting on how, like Iron Man, soldiers can now approach wars with videogame-like detachment.

¹²³ Hassler-Forest, *Capitalist Superheroes*, 183.

perceptions of casualties incurred in nonfictional violent assaults (e.g. drone strikes).¹²⁴

The third and final way in which Frank/The Punisher's methods are not really contested is that the show only acknowledges one of The Punisher's "victims" in a brief and dismissive scene. During the trial of The People versus Frank Castle, a teenage boy stands up and yells out from the gallery:

You killed my dad! I don't give a shit what you've been through. You're guilty! I saw him in a coffin with holes in him. He was my dad. Now he's gone. [sobbing]¹²⁵

It is not that this "outburst" (as the judge calls it) has no effect on *Daredevil*'s viewers, but rather that this scene only complicates the plot in a minor way. No one, including the now fatherless boy, questions whether the man Frank/The Punisher murdered was a criminal—this premise remains intact. Furthermore, it is only logical to think that some criminals may have children who would miss their deceased parents, but the show does not entertain the possibility that this is reason enough to spare their lives. Furthermore, The Punisher did not attack the boy or put his life at risk, which maintains viewers' faith in Frank. Ultimately, the boy's outburst in court is not enough to disrupt the logic that sometimes criminals need to be killed, nor to entertain the idea that The Punisher was wrong to kill the boy's father. More importantly, viewers are already

¹²⁴ William MacNeil provides an interesting connection here, a bridge that links both to the fantasy of a "clean" war (only the "bad guys" are killed) and my argument in chapter two about "scientism" in law (law's desire for predictability). In "Precrime Never Pays! 'Law and Economics' in *Minority Report*," MacNeil discusses the film version of *Minority Report* (Spielberg, 2002), which is not a superhero film, but is "superhero-adjacent" because its male lead (John Anderson, played by Tom Cruise) takes on traits similar to the male protagonists in (most) superhero films. MacNeil reads this film as a form of what he calls "lex populi" or "popular law," (202) and argues that the narrative's desire for "pre-emptive" policing (preventing crimes before they even happen) reflects law's recurring need to seek "prediction." (202) Here we see a move beyond just the fantasy of a "clean war:" a fantasy of a *causality free* war—all crimes are stopped before they happen. Moreover, this site of analysis ("pre-crime") offers further insight into law's fixation on prediction. As MacNeil states: "For me, what makes *Minority Report* such an interesting example of *lex populi* lies not so much in its analepsis of the present-day politics of pre-emption but rather in its representation of a far more longstanding theme in the nomological tradition (the science of law): law's prediction" (202). (William P. MacNeil, "Precrime Never Pays! 'Law and Economics' in *Minority Report*," *Continuum: Journal of Media & Cultural Studies* 19, no. 2 (2005))

¹²⁵ Doug Petrie, Marco Ramirez, and Drew Goddard, "Guilty as Sin," *Netflix's Daredevil*: Season 2, episode 8, directed by Michael Uppendahl, produced by Marvel Television and ABC Studios (Los Gatos, CA: Netflix, Inc., 2015).

emotionally invested in Frank and his mission to avenge his family, and they have no feelings at all for this random and underdeveloped character (the boy) who appears in one courtroom scene. Ultimately, Frank's ethics are never really tested at all; the people he kills are portrayed as unambiguously "bad," their families are never present at the executions, there are never any witnesses, and so on.¹²⁶ Again, viewers believe in what Frank tells Karen: "I only hurt people that deserve it."¹²⁷

4. "...someone who prevents lives from needing to be saved at all..."

One of the reasons why Western and Superhero shows have enjoyed such popularity and longevity is because they are able to navigate the tension between familiarity (the old) and currency (the new), which allows them to satisfy audience expectations while also embodying today's public controversies. Buchanan and Johnson note that the Western genre demonstrates a "paradoxical" trend of combining "stability and flexibility,"¹²⁸ explaining that although Western films may tell "the same old stories," they have also "proven highly adaptable in response to changing social and political contexts."¹²⁹ Indeed, despite remaining a consistent genre via "endless repetition,"¹³⁰ the Western has also been able to shift and reflect "cultural anxiet[ies] and popular ideals" of the present day.¹³¹ Similarly, Dan Hassler-Forest notes that superhero films and TV shows navigate this repetitive-adaptive tension by providing, "familiar characters,

¹²⁶ In the only scene that may be a possible exception and Frank is arguably "tested" a bit, a scene where an ex-marine comes up to the roof to see what all of the racket is about, the viewer knows that Frank would never kill this man.

¹²⁷ This is not to suggest that some superhero shows are not more critical and aware than others (such as the 2017 film *Logan* directed by James Mangold), but rather that there is a trend across popular superhero series to fantasize about violent conflicts in which only the "people who deserve it" are killed and there are no civilian casualties.

¹²⁸ Buchanan and Johnson, "The 'Unforgiven' Sources," 137.

¹²⁹ Buchanan and Johnson, "The 'Unforgiven' Sources," 138.

¹³⁰ Buchanan and Johnson, "The 'Unforgiven' Sources," 158.

¹³¹ Buchanan and Johnson, "The 'Unforgiven' Sources," 138 (Quoting Lee Clark Mitchell).

but who must also be reinvented over and over again.”¹³² On the one hand, these comic book characters follow a formula that suggests “the replication and combination of previously successful narratives,”¹³³ such as the superhero’s “origin story.”¹³⁴ On the other hand, like the Western, superhero series are “flexible and adaptable,”¹³⁵ and demonstrate an ability to shift over time to reflect contemporary “cultural, political and social values.”¹³⁶ One of the ways that superhero films continue to adapt is by drawing on “the specific fears and anxieties of the age” to construct the particular “crisis” situation that must be averted.¹³⁷ This ability to satisfy audience expectations through repetition, while also adapting to reflect the current ideals and anxieties, allows superhero stories (like Westerns) to seem familiar and yet fresh too.

There is a telling scene between Karen and Matt (a.k.a. Daredevil) in episode 7 when Karen suggests that there is a difference between “someone who saves lives, and someone who prevents lives from needing to be saved at all.” This scene takes place at Matt’s apartment, and Matt and Karen are eating take-out food and going over Frank (The Punisher)’s case. Both characters are shown from an objective point of view (mixing some shots that show the characters head on, and others from behind). The camera never takes one of the specific characters’ points of view while looking at the other one.¹³⁸ The following is an abridged version of their conversation:

KAREN: You believe in what he does? You know, the Devil of Hell’s Kitchen?
MATT: I believe in the law. If that’s what you’re asking.

¹³² Hassler-Forest, *Capitalist Superheroes*, 22.

¹³³ Hassler-Forest, *Capitalist Superheroes*, 10 (citing Maltby).

¹³⁴ Hassler-Forest, *Capitalist Superheroes*, 22.

¹³⁵ Hassler-Forest, *Capitalist Superheroes*, 6.

¹³⁶ Hassler-Forest, *Capitalist Superheroes*, 16.

¹³⁷ Hassler-Forest, *Capitalist Superheroes*, 24.

¹³⁸ The only possible exception is a shot of Karen when she gets off the couch and heads to the kitchen for a glass of water. Here we see Karen straight on, which could be from Matt’s perspective (except for the fact that Matt is legally blind).

KAREN: But what about when the law fails? Like it did with me, like it did with Frank...what are we supposed to turn to, what do we believe will protect us then?
[...]

KAREN: I guess it's just that ever since we took on Frank's case, I keep asking myself if there's really a difference between someone who saves lives, and someone who prevents lives from needing to be saved at all...

MATT: Wait a second...Frank Castle should be behind bars. I mean, he deserves a fair trial, but he's murdering people—

KAREN: —But bad people. I mean, like the ones who killed his family or the ones who came after me.

MATT: It's not Frank's decision who lives or dies, that's up to God. Or sometimes a jury. What happened to Frank's family is a tragedy Karen, but it doesn't give him the right to kill...

KAREN: No, no, no, no god no, not the right to kill, that's not what I'm saying...I'm just saying that I can understand why Frank—why anyone—would seek vengeance for something after losing...

MATT: No, no, no that's not the same. Vengeance is not justice. What he's doing is completely wrong—

KAREN: —But right or wrong you can't deny that it works.

MATT: [long pause] You really believe that?

KAREN: [shocked by what she has said] I don't know. [pause] No. [pause] Maybe.¹³⁹

There are three aspects of this conversation that I find particularly important. The first pertains to my claim that Karen has been established as a moral reference and audience point of identification, so viewers are swayed toward her position. The second is the substance of Karen's position: that sometimes heroes kill people to prevent lives from needing to be saved at all. The third is her performative shock when she makes this claim.

First, because of the objective gaze of the camera throughout this scene, one could argue that audiences are not positioned to identify with one character over the other. However, this claim only takes into consideration the camera choices in this isolated scene, and not the narrative construction of the characters across (nearly) two seasons. I suggest that most viewers identify with Karen in this scene over Matt. From season 1, episode 1, up to this point in the

¹³⁹ Doug Petrie, Marco Ramirez, and Drew Goddard, "Semper Fidelis," *Netflix's Daredevil*: Season 2, episode 7, directed by Ken Girotti, produced by Marvel Television and ABC Studios (Los Gatos, CA: Netflix, Inc., 2015).

show, *Daredevil* has already invested significant time and energy setting Karen up as an identifiable character. She metamorphs from a damsel in distress (opening of Season 1) into a strong and gutsy character by the end of Season 1 and throughout Season 2. Moreover, Karen is not a superhero but rather an “ordinary” person, which makes her more relatable to the average viewer. Another argument is that Matt/Daredevil eventually comes around to the position that Karen articulates in this debate (as discussed in the above scene analysis), acceding to The Punisher’s methods. Thus, ultimately, there is no disagreement between Karen and Matt—it is just that Karen reaches the conclusion first.

Second, by entertaining the possibility that a hero sometimes “prevents lives from needing to be saved at all,” and that perhaps this idea should not only be tolerated but applauded, Karen perpetuates a narrative found across Westerns, superhero stories, and contemporary politics alike. This narrative tells us that sometimes “bad people” must be eliminated, regardless of whether it is “legal” or not, for our own safety and security. Furthermore, those in the global West who share a *particular* set of values (although these values are presented as *universal*) are depicted as being more capable of making these difficult moral decisions. Because Karen—who is not a “superhero” but rather a likable and relatable “ordinary” person—voices this argument (“kill to prevent people from needing to be saved”), it seems like the type of position a reasonable person would hold. Once again, by “closely aligning the viewer’s point of view with hers,” Karen Page voices the popular audience position. Not only has the narrative shaped this position across two seasons (encouraging viewers to side with Karen/The Punisher), but this position is also consistent with dominant ideology (in other words, the narrative merely reflects

popular assumptions back to its viewers, presenting them with an already established popular cultural position).¹⁴⁰

Third and finally, Karen's reaction to her own assertion that killing criminals can be justified on the grounds of public safety is also important. Because "good" people are not supposed to endorse killing, she needs to be shocked by her assertion for this idea to have credibility. Karen's reaction to her blurt lessens or removes the guilt that viewers may feel for sympathizing with (and rooting for) The Punisher and his methods. Just as Mark Fisher remarks that, "So long as we believe (in our hearts) that capitalism is bad, we are free to continue to participate in capitalist exchange,"¹⁴¹ it is okay to support "preventative killings" as long as we demonstrate some sort of regret or remorse.¹⁴²

When superhero shows use contrived characters (like Karen) to voice support for preventative strikes, stories on the nightly news and superhero narratives begin to blend together. Discussing the Western genre, Johnson and Buchanan remark on how there is a "distressing slippage between movies, CNN and the 'desert of the real'." ¹⁴³ As they put it:

...it seems hardly remarkable that the press room in the White House seems to recount the familiar Western plot line in which a lawless outlaw must be ruthlessly killed, and his bad deeds avenged, in order that a just, free and democratic legal order can take its rightful place on the frontier.^{144,145}

Indeed, Johnson and Buchanan discuss how the repetition of narratives, "whether played out in

¹⁴⁰ Kamir, *Framed*, 280.

¹⁴¹ Mark Fisher, *Capitalist Realism: Is There No Alternative?* (Winchester: Zero Books, 2009), 13.

¹⁴² Also, interestingly, the way Karen covers her mouth in shock during this conversation is reminiscent of the way in which she covered her mouth during our introduction to the character (season 1, episode 1), kneeling over a dead body and holding a bloody knife (see second scene analysis for more details).

¹⁴³ Buchanan and Johnson, "The 'Unforgiven' Sources," 158.

¹⁴⁴ Buchanan and Johnson, "The 'Unforgiven' Sources," 139.

¹⁴⁵ Dan Hassler-Forest opens *Capitalist Superheroes* with a true story about a German magazine that ran a cover photo of (then president) George W. Bush and key members of his administration photo-shopped to look like action stars and superheroes (George W. Bush, out in front, was altered to look like Rambo). This magazine cover was meant as a satirical critique, so the publication was shocked when they received word from a White House representative that the President was "flattered" and requested copies of the magazine. (Hassler-Forest, *Capitalist Superheroes*, 1-2)

the Cineplex or on CNN,”¹⁴⁶ facilitates audience acceptance. When news stories resemble film plots, and vice versa,¹⁴⁷ audiences in both cases are more receptive to these stories—and less likely to question them.¹⁴⁸

In this way, modern Superhero movies and TV shows use repetition (so that their stories “cohere and sustain themselves”¹⁴⁹) while simultaneously adapting to depict contemporary fears. Near the top of the list of current societal fears are “anxieties concerning disaster capitalism and global terrorism.”¹⁵⁰ Consequently, many superhero series today foreground themes of financial crisis and terrorism, and only the superheroes can thwart these plots. The idea that a hero is “someone who prevents lives from needing to be saved at all,” whether embodied by The Punisher as he avenges his family in *Daredevil* Season 2 or by the U.S. military in the form of drone strikes, plays on anxieties about public safety and security. As these plots are run and re-run on news programs and in superhero shows, ideas like pre-emptive strikes become ubiquitous and within the realm of acceptability in the dominant ideology of the global West.

FINAL DISCUSSION: SUPERHEROES AND TOLERATED ILLEGALITY

Hassler-Forest’s insight that superhero narratives perform “ideological manipulation through limitation” is central to unlocking what is actually going on in these stories.¹⁵¹ Superhero series never quite do what they seem to be doing: when they appear to be depicting social change, they are often performing an illusion of revolution; when they appear to be empowering

¹⁴⁶ Buchanan and Johnson, “The ‘Unforgiven’ Sources,” 158.

¹⁴⁷ With U.S. military operations (like the assassination of Bin Laden) the global West has entered a zone of indistinction, one signifying plane, corresponding to Jean Baudrillard’s fourth phase of the image. (Jean Baudrillard, “Simulacra and Simulations,” in *Jean Baudrillard: Selected Writings*, 2nd ed., edited by Mark Poster (Stanford, California: Stanford University Press, 2001))

¹⁴⁸ Buchanan and Johnson, “The ‘Unforgiven’ Sources,” 158.

¹⁴⁹ Buchanan and Johnson, “The ‘Unforgiven’ Sources,” 158.

¹⁵⁰ Hassler-Forest, *Capitalist Superheroes*, 47.

¹⁵¹ Hassler-Forest, *Capitalist Superheroes*, 144.

subjects, they are often reinforcing docile subjectivity; and when they appear to be promoting shared values, they are often justifying violence and a particular (imperial) agenda. The same is true of superhero series and the law; when superheroes seem to be challenging the limits of the law, they are often reinforcing dominant notions of law and order.

Insights about superheroes and tolerated illegality have already been interwoven throughout the four scene analyses from *Daredevil*. However, there is another angle—a psychoanalytical one—worth exploring here: it relates to the id and the superego. David Graeber claims that it is no coincidence that comic books gained popularity in the mid twentieth century at a time when many artistic and literary works were influenced by Sigmund Freud.¹⁵² Like Hassler-Forest, Graeber notes that the villains are the creative ones, consistently imagining different future possibilities, and “[a]lmost never do the superheroes make, create, or build anything.”¹⁵³ The villains are “full of plans and projects and ideas,” which is why there is often an initial audience identification with them.¹⁵⁴ However, viewers are encouraged to feel guilty about this initial identification, and later re-identify with the hero and take pleasure in the hero conquering the villain.¹⁵⁵ In this way, the villain represents the Id and the hero represents the Superego, and, ultimately, audiences are conditioned to “have even more fun watching the Superego pummel the errant Id back into submission.”¹⁵⁶ This idea that the deviant and thrill-seeking Id (the naughty villain) must be brought back in line by the reasonable and responsible Superego (the valiant protagonist) maps onto reoccurring cinematic messages about legality and illegality.

¹⁵² Graeber, *Utopia of Rules*, 210.

¹⁵³ Graeber, *Utopia of Rules*, 211.

¹⁵⁴ Graeber, *Utopia of Rules*, 211-212.

¹⁵⁵ Graeber, *Utopia of Rules*, 212.

¹⁵⁶ Graeber, *Utopia of Rules*, 212.

Although it often seems like the superhero is acting above the law, in the end he or she (mostly he) reinforces existing laws and maintains the status quo.¹⁵⁷ The villain provides the rule-breaking behaviour that audiences crave, but the moralizing message of the superhero film is that such behaviour is dangerous and must be contained. At the show's conclusion, the superhero brings retributive justice to the villain and restores order. Thus, the Id performs a cathartic demonstration of chaos and whimsy, but the superego warns about the danger of change and the need for stability and moral/legal conventions. Although the villain's disorder and lawlessness speak to audience's hidden desires, viewers are taught, time and time again, that any alternative to today's neoliberal system is worse than the present, and prevailing norms of law and order must be reinforced.

In current movies and televisions series, many heroes, even seemingly rebellious heroes like *Batman* and *V*, exhibit this trend. At the conclusion of *The Dark Knight* Batman makes a pact with the head of the Police (Commissioner James Gordon) to scapegoat Batman and preserve the pristine public image of District Attorney Harvey Dent in order to maintain citizens' faith in the legal system.¹⁵⁸ The end of *V for Vendetta* shows a partnership between Inspector Eric Finch and Evey as the Inspector consents to ending the corrupt fascist regime, and, presumably, looks toward a future of "democratic law and order" which resembles the nonfictional present. In the television series *Arrow* and *The Flash*, the heroes frequently partner with law enforcement (for *Arrow* it is police detective Quentin Lance, and for *The Flash* it is Police Detective Joe West). Often the hero and police duo (e.g. Batman and Gordon) work

¹⁵⁷ Sure, the heroes are seen to break the rules sometimes (e.g. discussion on pages 27-28), but these illegalities are commonly (1) micro, not macro (in relation to the scale of the plot); (2) towards the beginning of the narrative, not the end; and/or (3) enacted by supporting characters (e.g. The Punisher within the *Daredevil* series). Moreover, any illegalities perpetrated by the protagonists in mainstream superhero shows usually result in negative consequences for the hero and serve as early "lessons" about what *not to do*.

¹⁵⁸ Graeber, *Utopia of Rules*, 222-223.

through the corruption in the police department to purge the system of any bad seeds (those sympathetic to the villain's cause) and finally to install the virtuous and morally trustworthy officer at the helm of the police, garnering viewers' support for the determinedness of the good guys to ensure that a just legal system prevails.

As a lawyer in the firm *Nelson and Murdoch*, Matt/Daredevil initially seems to suggest that the law has limitations, and when Matt cannot achieve justice in a court of law during the day, he resorts to apprehending criminals on the streets as Daredevil at night. However, upon closer examination, this the crude division proves unstable. Even as Daredevil, Matt is continually supporting and affirming the importance and validity of law. As mentioned, Matt forms a tenuous partnership with Sergeant Brett Mahoney. When Matt captures The Punisher, he calls the police and tells them to take the credit for apprehending The Punisher, bolstering the public image of the legal system. In his exchange with Karen, in the fourth scene analysed above, Karen asks Matt "You believe in what he does? You know, the Devil of Hell's Kitchen?" and he replies, "I believe in the law. If that's what you're asking." In these examples, and countless others, Matt/Daredevil fights to enforce the law. Although the fact that a lawyer feels the need to become a caped crusader automatically suggests that being a lawyer is not "getting the job done," as Daredevil, Matt repeatedly reinforces the idea that there are actually limits to vigilantism—not law.

So, what we learn from this chapter is that my premise was wrong: superhero shows are not, in fact, forums for studying tolerated illegality, but rather forums for observing *intolerable* illegality and reaffirmed legality. Counter-intuitively, these shows that seem to display heroes operating above the law perform a slight-of-hand manoeuvre and ultimately show the heroes supporting dominant legal norms. Consequently, viewers' rebellious Ids are first satisfied

(vicariously through the villains) then reprimanded by moralizing Superegos. The secret to mainstream superhero shows' success is that they provide temporary escapism followed by comforting disciplinary displays in which order is restored, a comfort that most viewers do not even know they (have been conditioned to) desire. ★

FINAL REFLECTIONS: IF THE LINE DON'T FIT, FLIT

Reading law books is like eating sawdust. Few of us have ever escaped the dry taste in the mouth occasioned by the study of jurisprudence.¹

A more congenial version to me would involve the art of *loosing*: and not as one art but a cluster of related ones. Ideally life, loves, and ideas might then sit freely, for a while, on the palm of the open hand.²

At the outset of *Touching Feeling*, Eve Kosofsky Sedgwick discusses the structure of her influential book. She writes that “with increasing stubbornness” her project “refused to become linear in structure.”³ She attributes this outcome to her aspiration to explore “nondualistic thought.”⁴ As she states: “No doubt the ambition of thinking other than dualistically itself shaped the project’s resistance to taking the form of a book-length, linear argument on a single topic.”⁵ She also notes that although multiple voices suggest nondualistic thought, “[f]ewer are able to transmit how to go about it.”⁶ Ultimately, her collection of essays on touch, performativity, and affect, aspires to create a “sense of possibility,” and enable “a mind receptive to thoughts, able to nurture and connect them.”⁷ Her inability to tame her unruly research—and indeed her corresponding decision to embrace the possibilities emanating from its “errant” ways—provides me with a welcome sense of comfort and reassurance.⁸ I will now revisit my chapters,

¹ Costas Douzinas and Adam Gearey, *Critical Jurisprudence: The Political Philosophy of Justice* (Oxford: Hart Publishing, 2005), 3.

² Eve Kosofsky Sedgwick, *Touching Feeling: Affect, Pedagogy, Performativity* (Durham: Duke University Press, 2003), 3.

³ Sedgwick, *Touching Feeling*, 1.

⁴ Sedgwick, *Touching Feeling*, 1.

⁵ Sedgwick, *Touching Feeling*, 1.

⁶ Sedgwick, *Touching Feeling*, 1.

⁷ Sedgwick, *Touching Feeling*, 1.

⁸ Relatedly, in *Violence: Six Sideways Reflections*, Žižek describes why his project necessitated a “sideways” approach. His topic of inquiry—violence—is obscured when one stands right in front of it and looks directly at it. The head-on approach causes people to conjure up images of obvious violence committed by identifiable sources

incorporating a personal narrative style into the description, in order to highlight not only the content of the thesis, but also significant steps in the process of researching and writing it (insights that were only gained by reflecting retrospectively on the dissertation process).

My project attempts to approach scholarship similarly to Sedgwick: offering not one single argument, but rather a cluster of constellating considerations all grouped around this idea of “tolerated illegality.”⁹ This approach to scholarship is helpful when the object of inquiry in one’s analysis is too uncontainable to be clearly defined or pinned down. Funnily enough (or perhaps not), it was my (long time coming) rejection of a dualistic structure for the project that birthed the beginning of the thesis as it exists today. My original plan was to make Lon Fuller’s work the scaffolding for the entire project. The first half of the thesis was going to use Fuller’s “morality of law” thesis to articulate the socio-legal confusions and harms unleashed by pervasive tolerated illegality. The second half was then going to draw on Fuller’s “human interaction and the law” thesis to illuminate the benefits and usefulness of tolerated illegality as an expression of collective agency in contradistinction to legal commands. When I broke through this binary structure, I was left with great uncertainty (a recurring theme throughout the thesis) regarding the form and the substance of the project, and I found myself rudderless in a sea of boundless scholarship.

(e.g. a person setting off a bomb). However, there are multiple forms of violence, and Žižek is more interested in the types that we cannot easily see, committed by perpetrators we cannot easily identify. To think about violence beyond the obvious, the only option is to take multiple sideways glances. (Slavoj Žižek, *Violence: Six Sideways Reflections* (New York: Picador, 2008))

⁹ In addition to Sedgwick’s work on “affect,” other scholars who have used this constellating approach to investigate abstract notions include Jacques Rancière (“politics”), Slavoj Žižek (“violence”), and Glen Coulthard (“resurgence”). Although each of these scholars is significantly different, what they teach us is that it is okay that not all projects fit into the structure of linear arguments. (Jacques Rancière, “10 Theses on Politics,” in *Dissensus: On Politics and Aesthetics*, trans. Steven Corcoran (London: Continuum International Publishing Group, 2010); Slavoj Žižek, *Violence: Six Sideways Reflections*; Glen Coulthard, “Five Theses on Indigenous Resurgence and Decolonization,” in *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014))

Eventually, it became apparent that a critical lens was needed to re-examine the legal philosophy literature in which I was previously immersed. I wondered: what was the attraction of this scholarship, and what, if anything, might this body of literature reveal in terms of its shared assumptions—and omissions? Stepping back, stepping outside of this literature, or perhaps stepping to the side of it (to borrow Sedgwick’s language) revealed new insights. I came to realize that this literature offers a sort of “disagreement without (much) difference;” that is, despite the myriad legal philosophers reviewed and their “competing” allegiances (i.e. positivism versus natural law), many differences I found were more rhetorical than substantive. The following sequence of ideas repeated itself across their writings: the law acts a guide to behaviour, the rule of law helps strengthen this guide by making it more certain and predictable, and this design strives to enhance the agency of legal subjects. What was largely absent was a more nuanced discussion of this undifferentiated mass of “legal subjects,” and the specifics of their encounters with the law (e.g. animated by socio-economic inequality, racial and gendered discrimination, power relations, and political circumstances, etc.).

Thinking about the “logic” underlying arguments from legal scholars advocating for the merits of certainty and predictability led to my critique of “scientism in law” (building on the work of Roger Berkowitz). One explanation for law’s fixation on certainty and predictability can be traced to a type of “science envy” and a desire to retain prestige in today’s highly technocratic society. Privileging these two qualities in the legal domain, and suggesting that a stable system of rules enhances agency, overlooks the implicit violence inherent to law (violence that emanates from the fact that people are forced to submit to laws and also from the looming threat of punishment for disobedience). That being said, in my effort to “stay with the trouble,”¹⁰ I did not

¹⁰ Here I borrow Donna Harraway’s useful phrase and call to action (and by action I mean thinking).

want to shy away from counter-arguments that could complicate my own. It is undeniable that in today's neoliberal age, flexible and informal rules often cause precarious situations (particularly for employees in the workplace), leaving citizens longing for some sense of stability and dependability. What can we discern from this tension between the dangers of both certainty and flexibility? Although Desmond Manderson productively complicates the arguments of his colleagues in analyzing this impasse, he ultimately reinscribes both of the problematic positions ("poles"), essentially ensuring that we bounce around in this binary *ad infinitum*. How are these two positions constructed, why does it seem like there are only two choices, and what other options for self-organization and government (beyond the rule of law's influence) might exist? Wrapping up Chapter 2, Sophocles' *Antigone* provides a literary context to help draw out the legal tensions identified throughout the chapter—and introduces some new conundrums as well. One new problem is that there may be sources of law that conflict with or supersede state-made law, and state representatives themselves could be the ones perpetrating illegalities contra these incommensurable rules.

The third chapter of the project not only helped introduce some of the nuances that I felt were lacking in discussions of legality up to this point, but it also made the idea of tolerated illegality feel more important—like more was at stake than before. To be honest, it was hard to become too worked up over examples like jaywalking or speeding, but the injustices involved in the dispossession of Indigenous peoples of their lands (not only the loss of land, but also of home, culture, and ways of life), as well as other atrocities (physical and cultural genocide), added a greater sense of purpose and significance to the notion of tolerated illegality. This chapter also opened up a whole new series of questions about the law, such as: Whose law? Who gets to decide what is deemed "legal" and "illegal?" Who has the luxury of tolerating, and who is

forced to tolerate? While considering these questions, I tried to keep in mind a couple important notes: first, that placing all of the blame on a faceless entity like “the State” distracts from the roles that settler-Canadians play in ongoing crimes against Indigenous peoples; and second, that framing Indigenous land dispossession as a “tolerated illegality” runs the risk of keeping law at the centre of the conflict when perhaps other languages might offer alternative productive frameworks (e.g. justice, morality, solidarity, resurgence, ecology, etc.). And yet, for all of the avenues of inquiry opened up in this chapter, I still had a sense that intriguing aspects of this rich notion of tolerated illegality remained unexplored and some pressing questions had not yet been asked. This feeling gave rise to the most structurally liberated chapter of the dissertation: nine theses on toleration, illegality, and power.

At first, I was perturbed that I only had nine theses, not ten. Later, I decided that my desire for ten theses was a part of the very conditioned subjectivity (all of those “top 10” lists...) that I was trying to dislodge (or perhaps this was just my retroactive justification). I particularly enjoyed where this chapter began, and where it ended. It starts with Wendy Brown’s enticing analysis of the notion of “toleration” in today’s (neo)liberal society. Thus far, the project had focused on the themes of legality and illegality, but never addressed *toleration*. Brown’s analysis offers insight into the latent fears embedded in the ideology of “tolerance,” and its secret disdain for the “Other.” Some people/things we accept, others we consider equal, and then there are those we *tolerate* (those perceived as harmful or threatening). The chapter ends with a provocative insight from Judith Butler that directs attention towards the psychic and temporal dimensions of tolerated illegality. Butler reminds us that when it comes to the psyches of subjects, there is no actual division between the “internal” and the “external;” that is, the thoughts, beliefs, preferences, etc. contained within our psyches have been imported “inside”

from the world around us (advertising campaigns, conventional morality, popular narratives, etc.). Thus, analysing the immediate interaction (perhaps between an accused transgressor and a law enforcement official) in which the alleged tolerated illegality occurred might not go back far enough if the official was already predisposed to enforce the rules a certain way. Between these two bookends (Brown and Butler) I constructed seven more theses to explore additional social, political, and power-related considerations that were pertinent to a better understanding of tolerated illegality.

Finally, to my mind, the missing piece of my exploration of tolerated illegality was the dimension of popular culture. More specifically, I reasoned that because film and television make up such a significant portion of people's daily lives and conversations in the twenty-first century, ignoring them seemed like a noticeable oversight. When one imagines the themes of legality and illegality in film, the genre of the Western likely comes to mind. Today, a lot of the themes in Westerns reappear in superhero shows, along with some new ones. Upon first glance, it might seem as if superheroes offer an ideal site to analyze tolerated illegality (I certainly thought so). Recurrently, superheroes appear to operate "above" or "beyond" the law to achieve some sort of extra-legal "justice." Sure, there is commonly a point in these shows (often two-thirds of the way through) in which the crowd turns against the hero and his or her (usually his) "vigilante" ways, but the hero almost always wins the crowd (and the viewing audience) over in the end. The interesting catch is that, most of the time, superheroes only *seem* to break the rules and defy law enforcement. In the end, these heroes almost always *reinforce* the rules, the reigning norms, and the status quo. Initial rebellious activities are quashed in favour of subtly (or occasionally not-so-subtly) doubling down on "law and order." Accordingly, one argument for why audiences return to these films repeatedly is because they experience the best of both

worlds: their ids relish the film's initial chaos and destruction, and their superegos are reasserted by the ultimate enforcement of the dominant order. And so, rather than offering a site for exploring tolerated illegality, superheroes generally provide examples of *intolerable* illegality and strengthen notions of legality.

My aims throughout this thesis have been to question, consider, investigate, analyze, explore, constellate, criss-cross, connect, collide, construct, deconstruct, reconstruct, and create. This approach sits in tension with, for example, Kristen Rundle's purpose in *Forms Liberate*. From start to finish, Rundle's argument in that book is clear: Fuller's peers have misunderstood his work all along; the unique connection between law and morality that Fuller prescribes pertains not to the moral *substance* of laws, but to law's concern with the *moral concept* of *human agency*. Rundle reiterates this message by providing evidence to support her thesis in every chapter of the book. I do not share Rundle's methodology. In any event, our topics are too different. As far as I can tell, there is no single productive argument one could make about tolerated illegality that exists across different times, places, circumstances, and actors. Tolerated illegality is a moving target; it is not always "good" or "bad," meaningful or insignificant, empowering or harmful—it is all of those things, but also more (and sometimes less). Ideally, part of the appeal of this project is that it explores the ideas contained within the notion of tolerated illegality itself (i.e. "toleration," "legality" and "illegality"), it thinks through multiple permutations of tolerated illegality in varying contexts, and it makes connections with diverse literatures, ranging from legal philosophy to law and film studies.¹¹ Accordingly, my hope is that this work can be taken up, adopted, challenged, borrowed, pulled apart, critiqued, and/or used as

¹¹ When, toward the end of the project, I found myself absorbed in Carol Clover's brilliant text *Men, Women, and Chainsaws: Gender in the Modern Horror Film* it really hit me that my intellectual terrain had shifted significantly across this wild intellectual journey.

building material for future research by scholars across many disciplines with diverse research interests.

Sedgwick explains that over the course of her project in *Touching Feeling*, she gradually let go of some of the ideas she previously believed to be clear and obvious. As she recounts, while writing the book “I’ve also had to ungrasp my hold on some truths that used to be self-evident...”¹² This sentiment was not only a genuine relief to read (undertaking a multi-year research project seems to create a sort of paradox in which one simultaneously knows more and less¹³), but also guided me toward my closing reflection. At the end of a project, the inevitable question one must face is: “what is *the point* of your work?”

“Point” emerges in the English language in the 13th century and means “minute amount, single item in a whole,” or the “sharp end.” Its etymology can be traced to the Latin word *pungere*, which means “to prick or pierce.” Later on, “point” comes to mean a “sharp tip,” or a “small mark [or] dot.”¹⁴ Meanwhile, the phrase “beside the point” comes to be understood colloquially to mean “irrelevant,” “unconnected,” “peripheral,” and “off-topic.”¹⁵ Here, I think

¹² Sedgwick, *Touching Feeling*, 3.

¹³ Similarly, my favourite film critic, Walter Chaw, writes that there is a type of arrogance in the idea that one has all of the answers. In fact, he suggests that the older one gets, the less one knows: “I had all the answers twenty years ago. Now? Now I don’t know shit.” In a certain sense, I feel that writing this dissertation over the past seven years has allowed me to share this sentiment. At the outset, I had a plan, and I thought that Lon Fuller’s dual theories of law (law’s internal morality, and human interaction and the law—see chapter 1) would form the foundation of the entire project. Moving beyond the legal philosophy literature to include socio-legal theory and critique, Indigenous thought, political writings, and cultural studies and film scholarship not only helped texture the ideas of legality and tolerated illegality, but also helped me embrace a liberating type of trans-disciplinary scholarship. In the end, I relate to Chaw’s sentiment; I have been exposed to more ideas than ever before and have far fewer answers. If I ever do have an answer now, it tends to be: “it’s complicated.” (Chaw, Walter. “Star Wars: The Last Jedi (Film Review).” *Film Freak Central*. December 13, 2017. <http://www.filmfreakcentral.net/ffc/2017/12/star-wars-the-last-jedi.html>)

¹⁴ Online Etymology Dictionary, “[Etymology of] Point,” *Online Etymology Dictionary*, accessed March 4, 2018, <https://www.etymonline.com/word/point>.

¹⁵ Oxford English Dictionary, “Thesaurus: Beside the Point,” *English Oxford Living Dictionaries*, accessed March 4, 2018, https://en.oxforddictionaries.com/thesaurus/beside_the_point.

about Donna Haraway's critique of the "prick tale"¹⁶—narratives that focus on a single masculine hero—and Ursula LeGuin's corrective suggestion in the "carrier bag theory of fiction."¹⁷ I also recall Sedgwick's support for the orientation of "beside" because it escapes certain traps like "seeking origins," "searching beneath the surface," "re-inscribing unproductive dualisms," and "asserting cause and effect." As she says, many elements may lie alongside one another with different relationships, such as: "desiring, identifying, representing, repelling, paralleling, dedifferentiating, rivalling, leaning, twisting, mimicking, withdrawing, attracting," and more.^{18,19} I also cannot help but smile thinking about a witty line offered by my partner and fellow academic, Mark. Accused of making a comment that was "beside the point" he playfully replied: "I live beside the point." And I think that this little joke captures a crucial aspect of my project. While reviewing the formal legality literature I realized that what the legal philosophers in this tradition are missing is that which lies *beside the point*; they tend to focus on the "minute" amount, the single item in the whole, the "prick," the small dot—to the detriment of many of the considerations that fall outside or beyond it.²⁰

One of the arguments that influenced this project the most comes from the work of Lon Fuller and his colleagues. They argue that formal lawmaking principles can increase law's certainty and predictability, which in turn demonstrates respect for human agency. If legal expectations are clear, then people have the information they need to make choices in their daily lives. This argument is not necessarily completely "wrong;" moreover, absolutely "agreeing" or

¹⁶ Donna Haraway, "Staying with the Trouble: Anthropocene, Capitalocene, Chthulucene." In *Anthropocene or Capitalocene? Nature, History, and the Crisis of Capitalism*, ed. by Jason W. Moore (Oakland, CA: PM Press, 2016), 47.

¹⁷ Ursula K. Le Guin, "The Carrier Bag Theory of Fiction," in *The Ecocriticism Reader: Landmarks in Literary Ecology*, ed. by Cheryll Glotfelty and Harold Fromm (Athens, Georgia: University of Georgia Press, 1996).

¹⁸ Sedgwick, *Touching Feeling*, 8.

¹⁹ See discussion in Chapter 2 for more.

²⁰ Online Etymology Dictionary, "[Etymology of] Point," *Online Etymology Dictionary*, accessed March 4, 2018, <https://www.etymonline.com/word/point>.

“disagreeing” with it is overly simplistic.²¹ But my realization in this project is that there is so much more *beside the point*. Who are these “legal subjects”? Are they all the same? Don’t their circumstances and situations matter? What about unequal distributions of wealth and power? Isn’t law sometimes implicated in the problems it aims to fix? How so? Who gets to decide what is legal and illegal? Are there other sources of law beyond the sources that are generally recognized? Can we see these legal discussions represented in the realm of popular culture? If so, what might these popular cultural sites help make visible?

As academics, venturing outside our initial coordinates and expanding beyond our comfortably established boundaries of inquiry is risky. It requires a foray into the unknown and “ungrasp[ing] [...] some truths that used to be self-evident.”²² It might also require changing one’s opinion or admitting previous oversights.²³ In short, these exploratory endeavours are often quite *uncertain*. A major part of the challenge lies in becoming at ease with uncertainty (like a comfortable silence between friends), rather than allowing uncertainties to continue unavowed, causing fear and anxiety. Thus, my suggestion here is this: “the point” is overrated. Exploring tolerated illegality has allowed me to venture beyond the particular arguments in the legal philosophy literature and appreciate more of the textures and nuances involved in complex socio-legal interactions. So, instead of asking: “what is the point?” perhaps we should be asking: “what is *beside the point*?” ★

²¹ This stance is reminiscent of what Wendy Brown writes about tolerance: “without foolishly positioning ourselves ‘against tolerance’ or advocating ‘intolerance,’ we can contest the depoliticizing, regulatory, and imperial aims of contemporary deployments of tolerance with alternative political speech and practices.” (Wendy Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton: Princeton University Press, 2006), 205) See Chapter 2’s discussion of Brown’s work for more.

²² Sedgwick, *Touching Feeling*, 3.

²³ This statement recalls Chapter 3’s comment about the principles of formal legality preventing Creon from recanting his law, and the corresponding footnote about the ways in which the Common Law system reframes potential misjudgements as new interpretations or applications of rules (see discussion in Chapter 2).

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