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# NATURALISING THE MYTH: HART, BIOPOLITICS AND THE BODY CORPORATE

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## Abstract

This article extends the critique of H.L.A. Hart developed by Peter Fitzpatrick in the conclusion to *The Mythology of Modern Law*. Fitzpatrick finds myth at the very heart of positivist legal theory, functioning to reproduce an imperialist worldview. Through a focus on Hart's account of incorporation, this article will argue that Hart naturalises this mythic law by insinuating it into social relations. Incorporation, alongside other 'facilitative' or 'power-conferring' elements of law such as wills and marriages, are so important that we could not imagine life without them. At the same time, Hart maintains the importance of choice and autonomy in relation to such rules, but in so doing obscures their constitutive function. In his reliance on myth, Hart avoids contending with the history that forms the unacknowledged context for his account of incorporation. By reintroducing this history, this article demonstrates that Hart participates in the normalisation of law that Michel Foucault locates in the union between life and law that is characteristic of biopolitics.

## 1.0 Introduction

Peter Fitzpatrick concludes *The Mythology of Modern Law* with a devastating critique of H.L.A. Hart, finding myth at the heart of positivist legal theory.<sup>1</sup> By 1992, Hart's more than thirty-year-old text had achieved a place at the pinnacle of the positivist canon.<sup>2</sup> Despite many critiques, *The Concept of Law* has largely retained this position; a testament to the enduring obstinacy of a self-evident, self-assured legal positivism.<sup>3</sup> Fitzpatrick's critique is an invaluable tool in the ongoing task of challenging this positivism. This article aims to recover and extend Fitzpatrick's critique of Hart. His approach involves reading Hart against himself, identifying slippages in the text that transform it from a promising engagement with linguistic philosophy to a dangerously reductive reproduction of an imperialistic worldview through the invocation of a mythic past. Initially, *The Concept of Law* offers the possibility of a radically social law through a necessary 'internal aspect'.<sup>4</sup> Law, famously for Hart, is not a matter of simple obedience to a sovereign, but is rather constituted normatively, through rules. Despite these innovations and

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<sup>1</sup> Peter Fitzpatrick, *The Mythology of Modern Law* (Routledge 1992) 183-210.

<sup>2</sup> H L A Hart, *The Concept of Law* (Oxford University Press 2012).

<sup>3</sup> A W Brian Simpson notes that *The Concept of Law* has sold over 150,000 copies and is 'the most successful work of analytical jurisprudence ever to appear in the common law world'; it is 'the point of entry into the subject' occupying the place once held by the works of John Austin. A. W. Brian Simpson, *Reflections on the Concept of Law* (Oxford University Press 2011) 1.

<sup>4</sup> Hart above note 2 at 56.

generative insights, Hart produces a retracted, autonomous and ahistorical law that is the privilege of those societies that are modern enough to possess it.

Through a focus on Hart's account of the body corporate, I will argue that Hart not only constructs his positivist legal theory through myth, he also naturalises that myth by insinuating it into social relations. Hart contends that he transcends the old debate between real and fictitious personality by explaining the meaning of incorporation as a right, and only by reference to the legal system in which it emerges. Hart also affords a considerable social role to corporate personality, suggesting that it both facilitates and constitutes social relations. Incorporation, alongside other 'facilitative' or 'power-conferring' elements of law such as wills and marriages, is so important that we could not imagine life without it. At the same time, Hart maintains the importance of choice in relation to such rules. The confluence of these two observations exposes a tension in Hart's analysis that goes to the heart of *The Concept of Law*. His 'internal aspect' of law does not elucidate the normativity of law, but rather entrenches it further, reproducing and ultimately normalising the command theory of law he sets out to critique. In Hart's reliance on myth, he avoids contending with the history that forms the unacknowledged context for his account of incorporation, that of the development of the system of incorporation by registration in the mid-nineteenth century. Through a comparison with Michel Foucault's conception of biopolitics and the normalisation of law, I argue that far from 'cutting off the king's head', as Leslie Green suggests,<sup>5</sup> Hart participates in the normalisation of law that Foucault associates with the emergence of biopolitics in the nineteenth century.<sup>6</sup> I begin by recounting Fitzpatrick's critique of Hart as a purveyor of myth. This followed by an account of how Hart naturalises this myth, demonstrated through the specific example of his approach to incorporation. The final section reads Hart with Foucault as a way of elaborating the implications of Hart's naturalisation of this mythic law.

## 2.0 The Myth

In *The Mythology of Modern Law*, Fitzpatrick 'seeks to subvert Western rationalities from within by heightening the contradictions and suppressions involved in their construction.'<sup>7</sup> He argues that, in spite of pretenses to the contrary, modernity has been constructed on the basis of myth. The final chapter of the book, entitled 'Law as Myth' brings this critical observation of the mediating role of myth to bear on positivist legal theory, through a critique of Hart.<sup>8</sup> There

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<sup>5</sup> Leslie Green, Introduction to *The Concept of Law* (Oxford University Press 2012) xx.

<sup>6</sup> Michel Foucault, *The History of Sexuality, Volume 1: An Introduction* (trans Robert Hurley) (Vintage Books 1990).

<sup>7</sup> Fitzpatrick above note 1 at 13.

<sup>8</sup> The coherence of this step has been questioned by some. Valerie Kerruish, for instance, describes this chapter as 'anti-climactic' because of its narrow focus on jurisprudence, following an otherwise expansive critique. Valerie Kerruish, 'Review: *The Mythology of Modern Law*' (1994) 10 *Australian Journal of Law and Society* 263 at 268. Alain Pottage suggests that 'so insistent is Fitzpatrick's concern to hold a mirror to the face of Jurisprudence that he seems to affirm precisely the authority he denies.' Alain Pottage, 'Review: *The Mythology of Modern Law*' (1993) 56 (4) *Modern Law Review* 616. There is some credence to the idea that critique can serve to reaffirm the centrality and dominance of precisely that which it seeks to undermine. If this was a risk when Fitzpatrick wrote his critique, then it is even more so now. However, Hart's continuing influence suggests that he is much more than his text or his contribution to analytic jurisprudence. He is an iteration of the self-evidence of positivism which manifests across disciplines. As a leading figure, and an incredibly sympathetic figure at that, within jurisprudence, he is also very

are two elements to Fitzpatrick's critique. The first concerns Hart's restriction of the 'internal aspect' of law to officials, and the second, Hart's invocation of a 'primitive society' as part of the historical genesis of his definition of law. These will be taken in turn. In a critique of earlier forms of legal positivism which 'reduce' law to commands of the sovereign, particularly those of Jeremy Bentham and John Austin, Hart attempts to rescue positivism by demonstrating a necessary social dimension of law, by removing the need for a sovereign at all. As Hart suggests, there has been a tendency, which he attributes to Austin, to define law in relation to an obligation brought about by the threat of force, or orders from an unlimited sovereign.<sup>9</sup> According to Hart, this conception of law fails for a number of reasons; in particular it is unable to account for the generality of laws (i.e. that they are not specifically or immediately directed at any one person) and their enduring character, between sovereigns.<sup>10</sup> Moreover, certain types of law, which he will come to call 'secondary rules' cannot be explained within the basic coercive model because they function to confer powers, private and public, rather than imposing obligations as such.<sup>11</sup>

Hart departs completely from the premise of law as habitual obedience to orders issued by an unlimited sovereign. He posits a 'fresh start' for law as the union of primary and secondary rules.<sup>12</sup> 'Primary rules' are those under which 'human beings are required to do or abstain for certain types of actions, whether they wish to or not'.<sup>13</sup> 'Secondary rules', in turn, provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations.<sup>14</sup>

Social rules, for Hart, convey the normative dimension of law by capturing not only the instance of habitual obedience, but also the fact that lapses garner criticism and 'pressure for conformity,' and that the standards upheld by such rules will be regarded as 'legitimate or justified'.<sup>15</sup> Finally, rules also have an 'internal aspect', which moves beyond a model of habitual obedience to a more complex normative framework in which law takes on meaning for the person who finds themselves obliged to follow it, or to exercise it, as the case may be. The 'internal aspect' of social rules suggests that 'some at least must look upon the behaviour in question as a general standard to be followed by the group as a whole.'<sup>16</sup> This is more than mere habit. The internal aspect means that 'they have a reflective critical attitude to this pattern of behaviour: they regard it as a standard for all who play the game'.<sup>17</sup> The critical attitude is not reducible to

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close to home for those of us teaching in law schools today. See, for instance, Nicola Lacey, *A Life of H.L.A. Hart: The Nightmare and the Noble Dream* (Oxford University Press 2006). This is not to suggest that critique should end with Hart, but rather that the contradictions and tensions in Hart's text remain largely suppressed, as most engagements with Hart focus on the technicalities of his argument rather than his reproduction of a Western, imperialist worldview.

<sup>9</sup> Hart above note 2 at 7.

<sup>10</sup> As above at 22-23.

<sup>11</sup> As above at 24 and 28.

<sup>12</sup> As above at 79.

<sup>13</sup> As above at 81.

<sup>14</sup> As above.

<sup>15</sup> As above at 56-57.

<sup>16</sup> As above at 56.

<sup>17</sup> As above at 57.

feelings or beliefs, but is rather the 'distinctive style of human thought, speech, and action which is involved in the existence of rules and which constitutes the normative structure of society'.<sup>18</sup>

However, as soon as Hart posits this necessary 'internal aspect', he proceeds to restrict its necessity to officials within the legal system. This is the first aspect of Fitzpatrick's critique. Hart observes that

In a modern state it would be absurd to think of the mass of the population, however law-abiding, as having any clear realization of the rules...we would only require such an understanding of the officials or experts of the system; the courts, which are charged with the responsibility of determining what the law is, and the lawyers whom the ordinary citizen consults when he wants to know what it is.<sup>19</sup>

By contrast:

The ordinary citizen manifests his acceptance largely by acquiescence in the results of these official operations. He keeps the law which is made and identified in this way, and also makes claims and exercises powers conferred by it. But he may know little of its origin or its makers: some may know nothing more about the laws than that they are "the law."<sup>20</sup>

While describing a lack of public knowledge of law that may well be a constitutive condition of modern legal systems, Hart obscures the effects of normativity, which are by no means dependent on specific knowledge of laws. As Fitzpatrick writes, having based both his criticism of previous ideas of law and the lineaments of his alternative on the necessity for rules to have an internal aspect, Hart proceeds to deny that necessity for ordinary citizens.<sup>21</sup> Instead of participating in the normative dimension of law, private citizens are reduced to simple obedience; they 'can now follow a rule but opt out of the internal aspect simply by adopting an appropriate mental state'.<sup>22</sup> This is at odds with his earlier account of the internal aspect of law, as Fitzpatrick notes:

Having said that the internal aspect cannot be envisaged in terms of individual mental states, he now proceeds to treat of its presence and absence in terms of individual mental states.<sup>23</sup>

These individuals, for Hart's purposes, apparently have no necessary connection to one another. This is as Fitzpatrick writes, 'a strange society. It is a society without social relations, a society which Hart bolsters with a desperate metaphor rather than sociolinguistic or sociological observation.'<sup>24</sup>

This law, retracted and restricted in its normative dimensions to officials, is then universalised and given a sense of historical necessity through the invocation of myth. At various stages in the analysis, Hart turns to the notion of a so-called 'primitive society', characterised by having only primary rules.<sup>25</sup>

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<sup>18</sup> As above at 88.

<sup>19</sup> As above at 60.

<sup>20</sup> As above at 61.

<sup>21</sup> Fitzpatrick above note 1 at 198.

<sup>22</sup> As above at 199.

<sup>23</sup> As above at 198.

<sup>24</sup> As above.

<sup>25</sup> Hart above note 2 at 53.

It is, of course, possible to imagine a society without a legislature, courts, or officials of any kind. Indeed, there are many studies of primitive communities which not only claim that this possibility is realized but depict in detail the life of a society where the only means of social control is that general attitude of the group towards its own standard modes of behaviour in terms of which we have characterized rules of obligation.<sup>26</sup>

Ordinarily such a society might be thought of in terms of custom, but Hart suggests that to avoid some of the pernicious implications of such a term, 'we shall refer to such a social structure as one of primary rules of obligation.'<sup>27</sup> In other words, the society is defined by the absence of secondary rules, and therefore the absence of a legal system.<sup>28</sup> He then articulates several 'obvious truisms about human nature and the world we live in' that should be satisfied within such a society, including 'restrictions on the free use of violence, theft and deception.'<sup>29</sup> 'Such rules' he contends 'are in fact always found in the primitive societies of which we have knowledge'.<sup>30</sup> Further, he suggests that 'it is plain that only a small community closely knit by ties of kinship, common sentiment, and belief, and placed in a stable environment, could live successfully by such a regime of unofficial rules.'<sup>31</sup> Moreover, these rules, with nothing common between them, will not form a system, nor will there be any 'authoritative text' by which disputes as to the rules can be adjudicated.<sup>32</sup> This is a defective system, only remedied if this society is surpassed by a superior one that adopts secondary rules. Indeed, as Hart makes plain, 'the introduction of the remedy for each defect might, in itself, be considered a step from the pre-legal into the legal world'; this progression is 'a matter of history'.<sup>33</sup>

While presented as a matter of historical self-evidence, Fitzpatrick argues that these are just tired, if slightly repurposed, imperialist tropes. Hart relies on 'stock delusions attending colonial rule' in order to support his account, including, but not limited to the perception that 'native society is simply, small and self-contained', and that 'it is characterized by uncertainty, stasis, inefficiency, and by a lawless or only incipiently legal condition'.<sup>34</sup> This is myth not history. The seemingly innocuous categories Hart uses to describe modern legality, such as 'municipal law' are 'freighted with the mythic power of the nation in its identifying of a people and their

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<sup>26</sup> As above at 91.

<sup>27</sup> As above.

<sup>28</sup> It is unclear whether or not Hart actually believes such a society existed. In the original text, he refers to the anthropologist Bronislaw Malinowski and others for 'studies of the nearest approximation of this state'. As above at 291. However, in the postscript, written thirty-two years later, he refers to this same society as 'imagined'. As above at 249. Simpson (above note 4 at 175) describes Hart's view of customary law as 'simplistic in the extreme', and concedes Fitzpatrick's claim that this 'Hart's account is derivative' from John Locke. Fitzpatrick develops this critique further in *Modernism and the Grounds of Law* (Cambridge University Press 2001) 97-99. However, it ultimately does not matter much if Hart thought such a society to have existed or not; what matters is the role that this primitive society - which along with the state of nature more generally, never existed - plays in the overall analysis, serving as the constitutive outside to his society, with its developed legal system. It is a myth, whether he believed it to be mere postulate or truth.

<sup>29</sup> Hart above note 2 at 91.

<sup>30</sup> As above.

<sup>31</sup> As above at 92.

<sup>32</sup> As above.

<sup>33</sup> As above at 94.

<sup>34</sup> Fitzpatrick above note 1 at 203.

law'.<sup>35</sup> The 'primal scene' for Fitzpatrick, is 'the point of origin from the negation of which creation issues forth. It exists in a time of beginnings, of absolute truths whose empirical authenticities cannot be tested.'<sup>36</sup>

The restriction of the internal aspect of law to officials, combined with invocation of myth, result in an account of law that it is not as far removed from the command theory of Austin and Bentham as Hart would have us believe. Through the divide between officials and laypeople, 'Hart continues to insinuate Rex into his account'.<sup>37</sup> As Fitzpatrick writes:

The official emerges whole and impregnable to determine, to posit that which all others must obey. Introduced with the insidious supposition of Rex and his successors, then rendered inevitable by that natural history of the primal scene, the official now becomes the apotheosis of the legal, the only necessarily sentient element in law and hence the only source of the legally positive. Hart thus effects the separation of the rule from its use and enables it to be treated definitively as so separated.<sup>38</sup>

In place of the traditional sovereign, Hart gives us the rule of law, self-referential in its constitution, and maintained by loyal officials. His orientation in linguistic philosophy gives way to a 'deracinated' account of law in which the 'realm of the official is an assumption of pure and complete authority that transcends and determines the use and context.'<sup>39</sup> Despite starting his account with the promise of a law that will be radically social, constituted as part of the normative fabric of society through an 'internal aspect', Hart creates a law that, at its core, is inaccessible to and unaffected by the vast majority of people. Popular perceptions of law, the choice of whether to obey or not, are only the 'end product' of the legal system, and not a constitutive dimension of it.<sup>40</sup> Ultimately, as Fitzpatrick suggests, 'if the orthodoxy of legal positivism and law's autonomy are to be sustained, the populace has to be relegated, in the last instance as it were, to its inert state'.<sup>41</sup>

### 3.0 Naturalising the Myth

*The Mythology of Modern Law* exposes the myth that grounds and enables *The Concept of Law*. This law, as I will argue, is then insinuated by Hart into social relations in a way that naturalises it. While his reliance on myth already effects a form of naturalisation by grounding it in a timeless past and inevitable historical progression, this section explores how the erasure of history allows Hart to presuppose an unproblematic identity between law and life. This section turns to the debate over the nature of the corporate person, and considers how Hart's attempt to rectify the older theories of incorporation betrays inadequacies in his own theory. Hart provides a theory of incorporation as a *right* derived from linguistic philosophy, and reliant on normativity rather than sovereignty for its operation. Yet in this very movement from sovereignty to normativity, he obscures the coercive dimension of incorporation and rights more

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<sup>35</sup> As above.

<sup>36</sup> As above at 202.

<sup>37</sup> As above at 191.

<sup>38</sup> As above at 201.

<sup>39</sup> As above at 201.

<sup>40</sup> Hart above note 2 at 112.

<sup>41</sup> Fitzpatrick above note 1 at 201.

generally that arises from their integral, constitutive relationship with social life. By turning to the history of incorporation, this section shows that incorporation always retained its connection to sovereignty and coercion, even as it came to be regarded as a right in the nineteenth century.

### 3.1 Raising the Dead: Hart on Incorporation

The debate over the nature of corporate legal personality long precedes Hart's intervention. It can be traced back at least to the nineteenth century German Historical School, and to the competing perspectives of Friedrich Carl von Savigny and Otto von Gierke. The debate between them concerned whether corporate legal personality was a fiction of law or a reflection of the 'real' personality of groups. For Savigny, legal personality is a 'pure fiction' and the juridical person so created is 'a Person who is assumed to be so for purely juristical purposes', having no personality other than that generated by the fiction.<sup>42</sup> This argument served the political ends of centralisation in Germany. Combined with the 'concession theory', in which this personality could only be secured by an explicit concession from the sovereign, the fiction theory produces a form of absolutism. By contrast, Gierke maintained that while groups may be aided in their association by law, their personality is neither fiction nor product of law, but rather arises organically from the association itself.<sup>43</sup> As he writes:

we recognize in the social body the unity of life as a whole arising out of separate parts, – such a unity as we do not find elsewhere except in natural living creatures.<sup>44</sup>

As individuals associate, they do so by transferring part of their own living self to the group; it is from this transference of life that groups attain their own life.<sup>45</sup> This produces a real living unity in the association. It is a 'spiritual unification'.<sup>46</sup> Legal recognition, in turn, entails not the granting of legal status but the recognition of the prior unity and personality of the group. As Gierke asks, is it possible:

that law, when it treats organized associations as persons, is not disregarding reality, but giving reality more adequate expression? Is it not possible that human associations are real unities which receive through legal recognition of their personality only what corresponds to their real nature?<sup>47</sup>

The real personality of groups supported a broader political case for a pluralist, federal state that would have the ancient German conception of fellowship at its heart. This debate was never fully resolved, but it was largely put to rest by Morris Cohen and John Dewey. They were anxious to avoid, or at least bypass, the metaphysical implications of the debate: in particular, they and other realists thought the idea that the corporation could be a 'real' person was enabling legal

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<sup>42</sup> Friedrich Carl von Savigny, *Jural Relations; or the Roman Law of Persons as Subjects of Jural Relations: Being a Translation of the Second Book of Savigny's System of Modern Roman Law* (trans W.H. Rattigan) (Wildy & Sons 1884) 2.

<sup>43</sup> Otto von Gierke, 'The Nature of Human Associations' in John D. Lewis (ed) *The Genossenschaft-Theory of Otto von Gierke* (University of Wisconsin Press 1935) 139 at 140.

<sup>44</sup> As above at 145.

<sup>45</sup> George Heiman (ed) Introduction to *Otto Gierke: Associations and Law: The Classical and Early Christian Stages* (University of Toronto Press 1977) 1 at 9.

<sup>46</sup> Gierke above note 43 at 146.

<sup>47</sup> As above at 143.

reasoning that would attempt to give effect to rights arising from such a claim.<sup>48</sup> In contrast to Gierke and Savigny, they argued that the corporate form was simply a shorthand for a more complex reality, and preferred to limit their concerns to ‘practical’ questions, such as how to create collective responsibility.

In ‘Definition and Theory in Jurisprudence’, his Inaugural Lecture at Oxford, Hart turns his attention to the debate some thirty years after its provisional conclusion, claiming that ‘the juristic controversy over the nature of corporate personality is dead,’ and as such, ‘we have a corpse, and the opportunity to learn from its anatomy’.<sup>49</sup> Hart’s main innovation in relation to the old debates is to treat incorporation as a right, and as an element of legal discourse, with no immediate correspondence to some entity in the world. The basis of Hart’s intervention into the debate is ordinary language philosophy, and in this lecture, he develops many of the ideas that will form the basis of *The Concept of Law*. The ‘three great theories of corporate personality’ were so problematic, and ultimately defective, because they assumed that like ordinary words legal terms such as corporate person have a direct correspondence with the world.<sup>50</sup> This confusion ‘distort[s] the distinctive characteristics of legal language’.<sup>51</sup> As Roger Cotterrell summarises:

The endless debate on the nature of corporate personality...sought to fix the meaning of the concept without adequate reference to the immense variability of the circumstance in which it could be invoked, and of the legal consequences which could follow from it.<sup>52</sup>

For Hart, these irreconcilable theories demonstrate the difficulty in defining such words adequately, while ultimately failing to ‘throw light on the precise work they do’.<sup>53</sup>

Hart elucidates the meaning of the corporation by restricting its potential meaning to that which it is given by its articulation within legal discourse, and within particular statements. Unlike ordinary language, the use of corporate names

silently assumes a special and very complicated setting, namely the existence of a legal system with all that this implies by way of general obedience, the operation of the sanctions of the system, and the general likelihood that this will continue.<sup>54</sup>

The statement will necessarily have some connection to a rule of the legal system itself, in which it takes on a particular meaning.<sup>55</sup> A statement regarding a corporate person ‘is therefore the tail-end of a simple legal calculation: it records a result and may be well called a conclusion of

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<sup>48</sup> Morris Cohen, for instance, writes that ‘to speak, as many do nowadays, as the union or group as having a single mind is a convenient but dangerous metaphor’. Morris Cohen, ‘Communal Ghosts and Other Perils in Social Philosophy’ (1919) 16(2) *The Journal of Philosophy, Psychology and Scientific Methods* 673 at 678. See also John Dewey, ‘The Historical Background of Corporate Legal Personality’ (1926) 35(6) *Yale Law Journal* 655–73; and Morton J. Horowitz, ‘Santa Clara Revisited: The Development of Corporate Theory’ (1985) 88 *West Virginia Law Review* 173–224.

<sup>49</sup> H.L.A. Hart, ‘Definition and Theory in Jurisprudence’ in *Essays in Jurisprudence and Philosophy* (Oxford University Press 1983) 21 at 36. This was originally published in 1954.

<sup>50</sup> As above at 24.

<sup>51</sup> As above at 26.

<sup>52</sup> Roger Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (University of Pennsylvania Press 1989) 88.

<sup>53</sup> Hart above note 49 at 25.

<sup>54</sup> As above at 28.

<sup>55</sup> As above.

law'.<sup>56</sup> The meaning of the corporation, as an element of legal discourse, can thus be confined to its legal implications—any other effects, however important they may be, are outside the scope of law. As Hart summarises:

Here can be seen the essential elements of the language of legal corporations. For in law, the lives of ten men that overlap but do not coincide may fall under separate rules under which they have separate rights and duties, and then they are a collection of individuals for the law; but their actions may fall under rules of a different kind which make what is to be done by any one or more of them depend in complex ways on what was done or occurred earlier. And then we may speak in appropriately unified ways of the sequence so unified, using a terminology like that of corporation law which will show that it is this sort of rule we are applying to the facts.<sup>57</sup>

While we may be misled into thinking that the corporation reflects the presence of a 'corporate spirit' (as it did for Gierke), which may be 'real enough', no such spirit is necessary for the operation of the legal rule, which is the true essence of the corporation.<sup>58</sup> The corporation so-called is an outcome of a particular sequence wholly determined by the operation of a legal rule. As Hart writes, 'the fundamental point is that the primary function of these words is not to stand for or describe anything but a distinct function', or operation of law.<sup>59</sup> It is thus possible, Hart suggests, to speak of the corporation 'without mentioning fiction, collective names, abbreviations, or brackets'.<sup>60</sup>

Hart's account of incorporation brings some clarity to the old debates. By removing the assumption of any *essential* feature of the corporation, Hart, at first, avoids the problematic equation, given by the idea of the 'real' personality of groups, between the personality produced by law and groups' self-perception. There are, simply,

many varieties of widely different conditions (psychological and others) under which we talk in this unifying personal way. Some of these conditions will be shown to be significant for legal or political purposes; others will not.<sup>61</sup>

Simultaneously, Hart's theory maintains the idea that incorporation is a product of law, like the fiction theory, but without this in itself becoming a form of absolutism. Instead, Hart's reliance on linguistic philosophy produces a view of law as constitutive, in which the legal concept, by virtue of its status as law, creates a particular social reality. As Cotterrell writes,

Hart's form of linguistic philosophy does not necessarily claim to be concerned with words or statements as *representations* of a social reality. The statements *are*, in themselves, the social reality. They constitute it.<sup>62</sup>

This coincides more generally with Hart's contention in *The Concept of Law* that the presence or absence of law is a question of social fact.<sup>63</sup> However, as I will demonstrate below, despite these

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<sup>56</sup> As above.

<sup>57</sup> As above at 30.

<sup>58</sup> As above.

<sup>59</sup> As above at 31.

<sup>60</sup> As above at 36.

<sup>61</sup> As above at 43.

<sup>62</sup> Cotterrell above note 52 at 91.

<sup>63</sup> For an elaboration of the idea of social facts, see Benjamin C. Zipursky, 'The Model of Social Facts' in Jules L. Coleman (ed) *Hart's Postscript: Essays on the Postscript to 'The Concept of Law'* (Oxford University Press 2001) 219.

initial insights, Hart collapses the distinction between law and life, thereby naturalising law, through his consideration of incorporation as a form of *right*. In so doing, he not only reproduces the terms of the old debates, but raises them from the dead and gives them new life.

Following this account of incorporation, Hart further elaborates on the circumstances that are presupposed by statements regarding incorporation, and rights more generally. Any statement regarding the existence of a corporation, or indeed any legal right, presupposes, as noted above, that a legal system exists and that there is a relevant rule corresponding to the events that create an obligation. Finally, it presupposes that this right is invoked by choice.<sup>64</sup> As with power-conferring rules more broadly, an essential element of the existence of a right is that the obligation to perform the corresponding duty is made by law to depend on the choice of the individual who is said to have the right or the choice of some person authorized to act on his behalf.<sup>65</sup>

This element of choice is a key part of the radical difference between power-conferring rules and commands from the sovereign in *The Concept of Law*. It is this difference, in turn, that leads Hart to introduce the internal aspect of law, by which laws function normatively rather than through coercion, conceived as orders back by threats from the sovereign. Unlike commands, power-conferring rules

do not impose duties or obligations. Instead they provide an individual with *facilities* for realizing their wishes, by conferring legal powers upon them to create, by certain specified procedures and subject to certain conditions, structures of rights and duties within the coercive framework of the law.<sup>66</sup>

Such laws are essential to social life, because ‘if such rules of this distinctive kind did not exist we should lack some of the most familiar concepts of social life, since these logically presuppose the existence of such rules’.<sup>67</sup> This form of power ‘is one of the great contributions of law to social life; and it is a feature of law obscured by representing all law as a matter of orders backed by threats’.<sup>68</sup>

At this point, a revealing tension emerges between the constitutive effects of Hart’s linguistic philosophy and the element of choice that is constitutive of his conception of rights. Although such rules require an element of choice – an element that forms the basis of the assertion that they are fundamentally non-coercive – they also have an identity with social life. If we would not be able to recognise social life without these legal instruments, as Hart describes, this begs the question of what it would mean to live without them and, in turn, whether or not foregoing the use of such instruments constitutes a meaningful ‘choice’ in such a society. It is precisely here that Hart implicitly naturalises the law by insinuating it into social relations, while also continuing to suppose that the one who exercises this power can simply adopt or abandon it, as they please. However, Hart does not address this as a potential problem, firstly, because he maintains that rules are non-coercive, by virtue of not being derived from sovereign command; and secondly, because the consequences of not being able to take advantage of the facilities they offer is only ‘invalidity’ rather than ‘illegality’. These will be examined in turn.

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<sup>64</sup> Hart above note 49 at 35.

<sup>65</sup> As above.

<sup>66</sup> Hart above note 2 at 27-28 (emphasis in original).

<sup>67</sup> As above at 32.

<sup>68</sup> As above at 28.

While Hart specifically acknowledges that power-conferring rules function, like all law, as a mechanism of social control, that they are fundamentally non-coercive is a central presumption of his entire system in *The Concept of Law*. Their power is normative rather than derived from sovereignty. This movement from sovereignty to normativity is conveyed most clearly by Hart in his critique of Bentham on legal rights and powers (such powers are conceived as rights when possessed by a private citizen).<sup>69</sup> Hart agrees with Bentham that ‘a permission is simply the absence of legal prohibition and hence the absence of a legal duty not to do a certain act’. However, he differs fundamentally on how this power is to be understood.<sup>70</sup> In Bentham’s account, legal powers still derive from the imperative of the sovereign. ‘The sovereign,’ as Hart explains, “‘allows” the mandate to be issued’.<sup>71</sup> Absent this permission from the sovereign, ‘it is an illegal mandate and to issue it is an offence’.<sup>72</sup> This is problematic for Hart, precisely because he wants to do away with the necessary role of the sovereign. Bentham’s approach in this regard is a ‘mistake’.<sup>73</sup> Turning to ordinary language philosophy to circumvent this reliance on the sovereign, Hart claims that acts that create powers will have certain ‘operative words’ which, by virtue of their status as law, obtain a particular legal force to effect legal relationships. However, Hart claims that these are ‘legal *normative* effects or consequences, not *natural* effects.’<sup>74</sup> These, in turn, can be compared to non-legal cases where such powers are invoked, but with ‘no background of imperative laws’.<sup>75</sup> The comparison allows Hart to conclude that ‘powers to change normative situations need not rest on a Sovereign’s commands at all’.<sup>76</sup> As he explains ‘they are more like *instructions* how to bring about certain results than mandatory impositions of duty’.<sup>77</sup> Hart thus replaces the sovereign with the normative concept of a rule. While the ‘effect is to bring individuals within the scope of existing commands or prohibitions or exceptions to them’, these rules confer the power to ‘enter into legally effective transactions... [and] cannot be construed as commands or prohibitions.’<sup>78</sup> Importantly, the power that is conferred by such rules is one that allows the holder of the right to alter the freedom of another, but that does not appear to affect the freedom of the holder in any meaningful sense.<sup>79</sup>

With these two forms of rule distinguished, Hart emphasises both in his engagement with Bentham and in *The Concept of Law* that the consequence of not following them is merely invalidity, rather than illegality. While the failure to follow the prescribed form in order to exercise legal powers, or a use of legal powers that one does not actually possess, may

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<sup>69</sup> See H.L.A. Hart, ‘Legal Rights’ in *Essays on Bentham* (Oxford University Press 1982) 163 and H.L.A. Hart, ‘Legal Powers’ in *Essays on Bentham* (Oxford University Press 1982) 194. (I want to cite both of these pieces as general references, not sure how best to do that and what the next note should look like).

<sup>70</sup> H.L.A. Hart, ‘Legal Powers’ in *Essays on Bentham* (Oxford University Press 1982) 194 at 197.

<sup>71</sup> As above at 211.

<sup>72</sup> As above.

<sup>73</sup> As above at 212.

<sup>74</sup> As above at 217.

<sup>75</sup> As above.

<sup>76</sup> As above at 218.

<sup>77</sup> As above at 219 (emphasis in original).

<sup>78</sup> As above at 213.

<sup>79</sup> This is further supported by Hart’s contention that the only naturally occurring right is an equal right to freedom. It is this ordinary freedom that the bearers of Hart’s legal powers appear to retain when they exercise those powers. H.L.A. Hart, ‘Are There Any Natural Rights?’ (1955) 62(2) *The Philosophical Review* 175.

sometimes be illegal, they are not always and there is a clear substantive difference for Hart between the two.<sup>80</sup> The consequences of failing to comply with the stipulations of power-conferring rules, if not made criminal by some other provision, can only be a 'nullity', 'without legal "force" or "effect"'.<sup>81</sup>

In the case of a rule of criminal law we can identify and distinguish two things: a certain type of conduct which the rule prohibits, and a sanction intended to discourage it. But how could we consider in this light such desirable social activities as men making each other promises which do not satisfy legal requirements as to form. This is not like the conduct discouraged by the criminal law, something which the legal rules stipulating legal forms for contracts are designed to suppress. The rules merely withhold legal recognition from them.<sup>82</sup>

The denial of legal recognition is thus relatively inconsequential for Hart. Indeed, it would only matter 'if we think of power-conferring rules as designed to make people behave in certain ways and as adding 'nullity' as a motive for obedience, can we assimilate such rules to orders backed by threats'.<sup>83</sup>

However, this ostensibly exceptional circumstance in which such rules would be designed to influence and control behaviour forms a particular historical reality that emerges in the nineteenth century. This history, moreover, is presupposed by Hart's basic assertion that incorporation is a right. At the same time, through his reliance on myth, he takes this history for granted and suppresses it, both in his account of incorporation as a right, as well as his account of law more generally. This history, as I will demonstrate in the next section, reveals that when incorporation comes to be perceived as a right, its connection to sovereignty is obscured rather than lost.

### 3.2 Historicizing Hart

Incorporation was not always understood as a right, neither in a popular sense, nor in a strictly legal one. While the history of the legal form of the body corporate can be traced back at least to the medieval church, the first clear articulation of the corporation in English law comes in the early 17<sup>th</sup> century. In *Sutton's Hospital* [1612], Sir Edward Coke wrote that 'a corporation aggregate of many is invisible, immortal, and *rests only in intendment and consideration of the law*'.<sup>84</sup> William Blackstone in his *Commentaries on the Laws of England*, develops these basic tenets of the corporation in English law, writing that:

It has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to constitute the artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality.<sup>85</sup>

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<sup>80</sup> Hart above note 70 at 212.

<sup>81</sup> Hart above note 2 at 28.

<sup>82</sup> As above at 31.

<sup>83</sup> As above at 34.

<sup>84</sup> Edward Coke, *The Reports of Sir Edward Coke Vol. 5* (John Farquhar ed) (John Butterworth and Son 1826) 303 (emphasis added).

<sup>85</sup> William Blackstone, *Commentaries on the Laws of England: Book the First* (Clarendon Press 1765) 467.

Corporations, as Blackstone indicates, were artificial or fictional persons formed for the public benefit, and had to be authorised by the Crown. There is no doubt that ‘the King’s consent is absolutely necessary’.<sup>86</sup> Far from being a right, early modern corporations were created by a ‘sovereign gift’ and performed quasi-public functions that were intended to extend the reach of the state, through projects that included imperial expansion and the development of infrastructure.<sup>87</sup> As Joshua Barkan suggests:

... in seventeenth-century England, the corporate charter became a technique by which the Crown both recognized the autonomy of these groups and attempted to redirect their power toward the fiscal and physical health of the state.<sup>88</sup>

While incorporation is conceived of as a gift of sovereignty, which functions as an exemption from certain laws that would ordinarily apply or prohibit such association, it is only through the charter that the exemption occurs: the sovereignty of the corporation is always a subordinate sovereignty, at least in the early modern period.

This dynamic between state and corporation, in which the corporation was clearly the product of and subordinate to state sovereignty, shifted considerably in the nineteenth century. Through the introduction of a system of incorporation by registration, incorporation came to be seen increasingly as a *right*, an available to anyone who wished to exercise that power, rather than as a narrow privilege. The late eighteenth and early nineteenth centuries saw a proliferation of private joint stock companies that frequently operated illegally – in contravention of *The Bubble Act 1720*.<sup>89</sup> These companies were inherently risky, frequently failed in catastrophic ways, and often served as a vehicle for unrestrained fraud. The response to this problem, paradoxically, was a movement to liberalise the means by which companies could incorporate. A series of partial efforts culminated in the passage of *The Joint Stock Companies Act 1844*, which made incorporation possible through a relatively simple process of registration. Importantly, however, the intention of the Act was not to create a freely available right as such, but rather

... to bring these companies within the law where they would cease to be such a disruptive influence on the economy, and to enable shareholders to perform their regulatory duties more effectively.<sup>90</sup>

Registration would make companies more transparent and accountable. Free incorporation was adopted as a ‘blanket solution’, as it was believed that the government could not decide which corporations were legitimate and which would be fraudulent.<sup>91</sup> The Act effectively removed the state from the role of deciding which associations and endeavors warranted legal protection,

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<sup>86</sup> As above at 472.

<sup>87</sup> See, for instance, Philip J. Stern, *The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India* (Oxford 2011).

<sup>88</sup> Joshua Barkan, *Corporate Sovereignty: Law and Government under Capitalism* (University of Minnesota Press 2013) 20.

<sup>89</sup> For a detailed account of this legal history see Ron Harris, *Industrializing English Law: Entrepreneurship and Business Organization 1720-1844* (Cambridge University Press 2000). This act is formally called *The Royal Exchange and London Assurance Corporation Act 1719* (6 Geo I, c 18).

<sup>90</sup> James Taylor, *Creating Capitalism: Joint-Stock Enterprise in British Politics and Culture 1800-1870* (The Boydell Press 2006) 135.

<sup>91</sup> As above at 139.

replacing this 'with a mechanical self-regulating system which would exclude government to oversee the operation of this system, the Joint-Stock Companies Registrar'.<sup>92</sup>

In comparison to the older system of narrow corporate privileges bestowed by Royal Charter or Act of Parliament, general incorporation by registration entailed a demonstrable increase in regulation of the affairs of joint stock companies, and a greater role for law in the market. However, it was conceived of as both as a right and a freeing of the market. As James Taylor explains:

[T]he reform was also facilitated by, and helped to perpetuate, a reconceptualisation of corporate privileges as private rights, and of joint-stock companies as private bodies. With such a realignment, the state's role of delegating corporate powers to selected companies in order to further specific public aims became an unjustifiable 'interference' in private enterprise which had to be removed. In this way, what amounted to a significant reshaping of the commercial laws of the nation could be presented as free trade reform.<sup>93</sup>

Those who petitioned for legal protection for joint stock companies put forward a variety of arguments which were not terribly influential at the time, but nonetheless anticipated a logic that would eventually become dominant. Company promoters 'couched their arguments in the language of *laissez-faire* and freedom from judicial and legislative interference', citing Adam Smith even though he disapproved of the joint stock model outside of specific, capital intensive endeavors.<sup>94</sup> There was also an attempt to situate the joint stock company within a longer history of commercial association, implicitly suggesting that corporate status was itself something natural. One promoter, in an anonymous pamphlet, derided attempts

... to mislead the Country, to suppose that an Association of Gentlemen for commercial purposes is illegal. Such Associations have existed for centuries past; and are we now, in this age of civil liberty, to be deprived of commercial freedom.<sup>95</sup>

Incorporation, in this brief account, is conceived of as a freedom in spite of the fact that it is a freedom that only exists by virtue of a grant from the state, facilitated by a process of registration. Although the changes were not immediate, Barkan suggests that eventually as the law developed into the twentieth century, 'lawmakers ceased treating corporations as creatures of positive law, viewing them instead as natural entities that emerged from contracts'.<sup>96</sup> With free incorporation, the state withdrew from explicit sovereign decision and exercised power differently: moving from determining which associations deserved corporate privileges, to facilitating a system in which incorporation was readily available, and the test of survival would be public opinion and competition in a 'free' market. Yet for all that, incorporation was no less a product of sovereignty.

The history of incorporation in English law demonstrates that in the transition between the early modern form of incorporation by charter, to the nineteenth century form of incorporation by registration, there is a disappearance of sovereignty. As the reach of law is extended to 'private' joint stock companies, its connection to sovereignty is obscured and

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<sup>92</sup> As above at 135.

<sup>93</sup> As above at 136.

<sup>94</sup> As above at 97-99.

<sup>95</sup> As above at 99.

<sup>96</sup> Barkan above note 88 at 68-69.

replaced with a conception of right. It is this conception of incorporation as a right, fundamentally non-coercive with no necessary connection to sovereignty, that Hart adopts as the basis of his analysis of incorporation, completely divorced from its history. By treating incorporation as a right, Hart naturalises the law—not by directly claiming that the corporate form itself is natural, but regarding the form of freedom that is exercised through it as a genuine freedom, rather than one that is thoroughly shaped by a prior subordination to sovereignty. To return to Fitzpatrick’s critique, it is Hart’s reliance on myth that allows him to entirely avoid this history and deracinate the terms of his analysis, such that they appear to be the product of reason, rather than historical circumstance. The myth of origin in a primitive society, as discussed above, universalises a particular account of law, as the union of primary and secondary rules, that Hart seeks to establish. By turning to a myth of origin, Hart transcends history, effacing the particular conditions in which such a law might be said to exist.

#### 4.0 Biopolitics and the Normalisation of Law

In his foreword to the most recent edition of *The Concept of Law*, Leslie Green claims that Hart anticipated, if not pre-empted, Foucault’s call to ‘cut off the King’s head’ in political philosophy. ‘News of the regicide’, he writes, ‘must not have crossed the Channel, for Hart had long finished the job’.<sup>97</sup> However, far from cutting off the King’s head, Hart participates in the normalisation of law that Foucault locates in the emergence of biopower, precisely by effacing the relationship between sovereignty and law. This final section will explore the implications of Hart’s erasure of history described above, within a Foucauldian conception of biopolitics. In particular, a comparison with Foucault demonstrates that Hart’s normative conception of rules, the ‘internal aspect’ of law that allows it to be conceptually detached from sovereignty, functions to normalise law and obscure its relationship to power. Hart not only ‘continues to insinuate Rex into his account’, as Fitzpatrick argues, but deploys the ‘internal aspect’ of law in such a way as to advocate a totalizing form of law in modern society.<sup>98</sup>

The historical shift in incorporation from a gift of the sovereign to a right can be described, in Foucauldian terms, as a shift from a sovereign modality of power, associated with police, to one of biopolitics and disciplinary power. Through the seventeenth and into the eighteenth century, governmental power was exercised as a mode of police, which mandated intervention into diverse spheres of activity and the active management of populations. However, the eighteenth century saw a critique of police and a turn to a liberal modality of governance, and the emergence of biopolitics. This shift is described as one from a power characterised by the negative exercise of sovereign power through prohibition and proscription, to one concerned with the promotion of the welfare of the population as a whole. As Foucault writes, ‘one might say that the ancient right to take life or let live was replaced by a power to foster life or disallow it to the point of death’.<sup>99</sup> In the forms of liberal governmentality associated with biopolitics, and

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<sup>97</sup> Green above note 5 at xx. *The Concept of Law* predates Michel Foucault’s *Society Must be Defended* by about ten years.

<sup>98</sup> Fitzpatrick above note 1 at 191.

<sup>99</sup> Foucault above note 6 at 138 (emphasis in original).

particularly the discourse of political economy, the market became a 'site of truth',<sup>100</sup> and the law had to function to allow that truth to express itself. Government interventions could not be regarded as ends in themselves or, as was the case with the old power of police, as a means of expanding the state.<sup>101</sup>

In spite of this fundamental shift, political theory often continues to operate as though sovereignty were the dominant modality of power, and law the main mechanism through which it is exercised. It is in this context that Foucault claims that 'we need to cut off the King's head'.<sup>102</sup> However, unlike Hart's approach, this call to cut off the King's head does not mean disregarding or abandoning an analysis of sovereignty, but recognizing that sovereignty and law function differently in conjunction with biopolitics. As Foucault writes, 'sovereignty and disciplinary mechanisms are two absolutely integral constituents of the general mechanism of power in our society'.<sup>103</sup> The challenge for political and legal theory is not to think of law without sovereignty, but to understand how sovereignty and law function as mechanisms of biopolitical and disciplinary power. It is this persistence of sovereignty and law within biopolitics that is taken for granted by those, such as Hart, who would merely remove sovereignty from the analysis by associating it with an exclusively repressive or, in Hart's terms, coercive, modality of power.

The shift, as Foucault describes it, is twofold. On the one hand, the shift to biopolitics does not mean that government no longer intervenes or even that the level of intervention decreases. The limitation of government prescribed by political economy is not a 'negative boundary'.<sup>104</sup> Instead:

an entire domain of possible and necessary interventions appears within the field thus delimited, but these interventions will not necessarily, or not as a general rule, and very often not at all take the form of rules and regulations. It will be necessary to arouse, to facilitate, and to *laisser faire*.<sup>105</sup>

The provision of 'free' incorporation by registration for joint stock companies highlights this tension at the heart of liberal governmentality. Free incorporation was understood as a privatisation of the corporation, yet 'their formation relied on a State statute and was subject to State regulation'.<sup>106</sup> The private sphere, as it comes to be constituted in the mid-nineteenth century is not a sphere beyond the control of the state, but rather 'the effect of a multitude of state and other governmental interventions'.<sup>107</sup>

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<sup>100</sup> Michel Foucault, *The Birth of Biopolitics: Lectures at the College de France 1978-1979* (Michael Sellenart ed.) (trans Graham Burchell) (Palgrave Macmillan 2008) 38.

<sup>101</sup> As above at 203.

<sup>102</sup> Michel Foucault, 'Truth and Power' in *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977* (Colin Gordon ed) (Pantheon Books 1980) 109 at 121.

<sup>103</sup> Michel Foucault, 'Two Lectures' in *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977* (Colin Gordon ed) (Pantheon Books 1980) 78 at 108.

<sup>104</sup> Michel Foucault, *Security, Territory, Population: Lectures at the College de France 1977-1978* (Michael Sellenart ed) (trans Graham Burchell) (Palgrave Macmillan 2008) 352.

<sup>105</sup> As above at 352-353.

<sup>106</sup> Harris above note 89 at 284.

<sup>107</sup> Mitchell Dean, *The Constitution of Poverty: Toward a Genealogy of Liberal Governance* (Random House 1991) [ebook].

Moreover, in this context, sovereignty does not function in a simply repressive manner. It always 'oversteps' these boundaries.<sup>108</sup> Instead of disappearing, the negative or deductive mechanisms of sovereign power come to operate as:

merely one element among others, working to incite, reinforce, control, monitor, optimize, and organize their forces under it: a power bent on generating forces, making them grow, and ordering them.<sup>109</sup>

The mechanisms of sovereignty come to function in a productive or constitutive manner, creating objects of regulation. Law, in this relation, functions increasingly in a normalizing capacity, while nonetheless retaining its connection to sovereignty. After elaborating the shift from a sovereign modality of power to one of biopolitics and discipline, Foucault suggests first that

law cannot help but be armed, and its arm par excellence, is death; to those who transgress it, it replies, at least as a last resort, with that absolute menace. The law always refers to the sword.<sup>110</sup>

This is followed by a qualification in which Foucault explains that

I do not mean to say that law fades into the background or that institutions of justice tend to disappear, but rather that the law operates more and more as a norm, and the judicial institution is increasingly incorporated into a continuum of apparatuses (medical, administrative, and so on) whose functions are for the most part regulatory.<sup>111</sup>

Much rides on how Foucault's statement that 'law operates more and more as a norm' is understood.<sup>112</sup> While these statements have been interpreted in a variety of conflicting ways, at a minimum, the enduring connection between law and death suggests that law still retains its link to sovereignty even as it comes to function as a norm. This connection is obscured by the discourse of rights, which presents rights as real forms of freedom in relation to a sovereign modality of power.

Hart takes for granted this penetration of sovereignty and law by the power of normalisation, in the promotion of particular modes of life, in his account of incorporation as a right, and more broadly in his articulation of law as the union of primary and secondary rules. By denying the coercive aspect of power-conferring rules, and ultimately severing their operation from any necessary connection to sovereignty, Hart participates in this normalisation of law. What Hart disregards as the outside possibility of rules 'designed to make people behave in certain ways' is a defining aspect of biopolitics.<sup>113</sup> As Foucault writes, reflecting on the coincidence of capitalism and biopower, 'it had to have methods of power capable of optimizing forces, aptitudes, and life in general without at the same time making them more difficult to govern'.<sup>114</sup> These interventions, as Mitchell Dean specifies, 'loosely cohere around the objective of the promotion of a specific *form of life*.'<sup>115</sup> This entailed a union between law and life, or 'the

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<sup>108</sup> Foucault above note 102 at 121.

<sup>109</sup> Foucault above note 6 at 136.

<sup>110</sup> As above at 144.

<sup>111</sup> As above.

<sup>112</sup> As above.

<sup>113</sup> Hart above note 2 at 34.

<sup>114</sup> Foucault above note 6 at 141.

<sup>115</sup> Dean above note 106 (emphasis in original).

inscription of natural life into the juridico-political order of the nation-state'<sup>116</sup> - so much so that the distinction between law and life would become at times indiscernible, a situation that Hart describes yet oddly fails to adequately consider. This inscription of life into the law, while it does not efface sovereignty, but rather biopolitics comes to 'penetrate it, permeate it'.<sup>117</sup>

In contrast, 'right' should be viewed, as Foucault suggests 'not terms of a legitimacy to be established, but in terms of the methods of subjugation that it instigates'.<sup>118</sup> To this end, the discourse of right that emerges from the French Revolution onward is the product of 'a normalizing society' and 'the historical outcome of a technology of power centered on life'.<sup>119</sup> These forms of right, as Foucault suggests, 'made an essentially normalizing power acceptable'.<sup>120</sup> In this context, 'right...transmits and puts in motion relations that are not relations of sovereignty, but of domination'.<sup>121</sup> This is much different from Hart's movement from sovereignty to normativity. All law, for Hart, is ostensibly a means of social control. Even non-coercive laws, as Green elaborates, function to 'channel social power'.<sup>122</sup> However, this element of social control, despite its centrality to Hart's theory, is not borne out. While Hart removes the sovereign through a shift to normativity and the 'internal aspect of law', his conception of power betrays his continuing reliance on the model of sovereignty. The previous section described in some detail how, for Hart, rights and power-conferring rules necessarily entailed an element of choice: the ability to voluntarily adopt such rules for particular ends, or not. This emphasis on the freedom of the rights-holder, in contrast to the limited freedom of the one whose situation can now be altered by the rights-holder, sounds much more like a liberal or juridical conception of rights than one focused on social control. In the juridical or liberal theory, as Foucault describes it, power is:

... taken to be a right, which one is able to possess like a commodity, and which one can in consequence transfer or alienate, either wholly or partially, through a legal act or through some act that establishes a right, such as takes place through cession or contract.<sup>123</sup>

Yet, as Foucault asks, if power only functioned in this way, why would we obey it? As he suggests:

what makes power hold good, what makes it accepted, is simply the fact it doesn't only weigh on us a force that says no, but it traverses and produces things, it induces pleasure, forms of knowledge, produces discourse.<sup>124</sup>

As Ben Golder reminds us about the liberal or juridical conception of power, 'thinking [of it] in this way tends to elide its constitutive dimension, resulting in an impoverished understanding of

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<sup>116</sup> Giorgio Agamben, 'Biopolitics and the Rights of Man' in in Timothy Campbell and Adam Sitze (eds) *Biopolitics: A Reader* (Duke University Press 2013) 152 at 153.

<sup>117</sup> Michel Foucault, *'Society Must Be Defended': Lectures at the College de France 1975-76* (Mauro Bertani and Alessandro Fontana eds) (Picador 2003) 241.

<sup>118</sup> Foucault above note 103 at 96.

<sup>119</sup> Foucault above note 6 at 144.

<sup>120</sup> As above.

<sup>121</sup> Foucault above note 103 at 96.

<sup>122</sup> Green above note 5 at xxxiii.

<sup>123</sup> Foucault above note 103 at 88.

<sup>124</sup> Foucault above note 102 at 119.

the way power operates in modern societies'.<sup>125</sup> Power is not 'superstructural', operating from 'a position of exteriority' but rather completely immanent to these relations, as 'the internal conditions of these differentiations'.<sup>126</sup>

While it would seem that Hart addresses precisely this through his emphasis on the internal aspect of law, the theory brings him to a place quite different from that of Foucault. In particular, his understanding that the participation of citizens in the internal aspect of law would demonstrate the *health* of the legal system betrays the incongruence between his theory and that of Foucault. It may be recalled that after postulating the necessity of the internal aspect of law, Hart quickly restricts that necessity to officials. It is enough for the private citizen to 'obey each "for his part only" and from any motive whatever'.<sup>127</sup> He then qualifies this statement by suggesting that

[I]n a healthy society they will in fact often accept these rules as common standards of behaviour and acknowledge an obligation to obey them, or even trace this obligation to a more general obligation to obey the constitution.<sup>128</sup>

Far from being a 'reflective critical attitude' as Hart originally described, it seems that the 'health' of the legal system is to be equated with a *loss* of discernment involved in the decision of whether to obey or not.<sup>129</sup> This betrays the unity between life and law that is a consequence of law's integration within the normative structure of society. Hart's ideal society is thus a normalising society, which, as Foucault writes, 'is the historical outcome of a technology of power centered on life.'<sup>130</sup>

## Conclusion

Hart's problematic engagement with normativity did not escape Fitzpatrick's critique in *The Mythology of Modern Law*. As Fitzpatrick observes, ordinary citizens, not properly external to the system yet having no necessary participation in its internal aspect, seemed to participate in 'no aspect at all',<sup>131</sup> becoming, in Hart's terms, 'deplorably sheeplike'.<sup>132</sup> Yet what Hart fails to appreciate is that on the terms he has provided, participation in the internal aspect of law would make them even more like sheep than those who do not accept these rules as standards for behavior, but who at the very least seem to know it when they are being coerced. Hart ultimately misconstrues the operation of normativity, as in the very contemplation of whether or not to obey law, it must already have an internal dimension. Hart's project, as Fitzpatrick succinctly argues, 'culminates in a simple, very simple, claim to authority'.<sup>133</sup> It is a claim to authority that, for all of Hart's attempts to throw off the sovereign, winds up being surprisingly totalitarian. The only way to avoid it, it seems, would be to throw off positivism.

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<sup>125</sup> Ben Golder, *Foucault and the Politics of Rights* (Stanford University Press 2015) 48.

<sup>126</sup> Foucault above note 6 at 94.

<sup>127</sup> Hart above note 3 at 117.

<sup>128</sup> As above.

<sup>129</sup> As above at 157.

<sup>130</sup> Foucault above note 6 at 144.

<sup>131</sup> Fitzpatrick above note 2 at 200.

<sup>132</sup> Hart above note 3 at 114.

<sup>133</sup> Fitzpatrick above note 2 at 201.

While Hart's attempt in *The Concept of Law* to replace sovereignty with a normative concept of law was ultimately misguided, this does not mean that law is in fact reducible to sovereignty. The reality of sovereignty is something that can, and indeed should, be called into question. However, this can only be done once its symbolic effects are taken into account. While sovereignty, as Georges Bataille suggests, is 'impossible', the normative effects of its absent presence structure our relationship to law, even if the pursuit of sovereignty would result in finding precisely nothing.<sup>134</sup> In his later work, Fitzpatrick describes sovereignty as a 'deific substitute', occupying the place of a transcendent reference that once belonged to God.<sup>135</sup> As such, its normative and ultimately metaphysical effects are hardly elucidated by simply removing it. Indeed, removing it, as argued above, only reinforces those effects by making the structures of power which rely on sovereignty appear natural. As Timothy Mitchell suggests, 'we should examine it not as an actual structure but as the powerful, apparently metaphysical effect of practices that make such structures appear to exist.'<sup>136</sup>

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<sup>134</sup> Georges Bataille, *The Accursed Share, Volumes II and III* (Zone Books 1991) 243.

<sup>135</sup> Peter Fitzpatrick, "'What are the Gods to Us Now?': Secular Theology and the Modernity of Law' (2007) 8(1) *Theoretical Inquiries* 161 at 162.

<sup>136</sup> Timothy Mitchell, 'Society, Economy, and State Effect' in Aradhana Sharma and Akhil Gupta (eds) *The Anthropology of the State: A Reader* (Blackwell Publishing Ltd., 2006) 169 at 180.