

Law Up Loud: Jurisprudence and Rock Music

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For my parents.

Abstract

In order to better perceive and understand philosophies of the law, this thesis connects jurisprudence expounded by mainstream 20th century legal thinkers with the lives and music of rock stars of the 1960s and beyond. With their propensity for unconventional, anti-establishment, and sometimes lawless behaviour, rock stars may initially appear incompatible with legal thinking and its concerns, such as justice, rules and rulers, and considered decision making. However, opening a ‘channel’ between law and music, it is argued, performs dual functions. First, comparing the activities of theorists and rockers vividly displays the workings of jurisprudence. Second, the pairing of academic understandings of the law with popular culture reveals how ‘everyday people’ understand and discuss jurisprudential concepts and issues. Jurisprudential reading using popular culture creates the possibility of insights into theory that the theory may be unable to recognise in itself. Not only do rock stars perform jurisprudence, they problematise jurisprudence, exposing the issues, dilemmas, and paradoxes within jurisprudence’s central themes.

This study heeds Nietzsche’s call to aesthetic responsibility by drawing upon the thematic of individual responsibility for authentic living through creativity found in *Thus Spoke Zarathustra*. It is argued that this thematic characterises the mentality shared by the legal philosophers and rock stars analysed in this study. Nietzsche’s presence in this thesis brings jurisprudes and rock stars into ‘tune’ with each other and provides a lens through which to identify the legal philosophical implications of this pairing.

The individual analyses in this thesis discuss critical elements of jurisprudence. The order in which these examinations of theorists and rock stars are presented constitutes a narrative whereby each pair responds to or proceeds from the work and

times of the previous duo. Taken together, these analyses trace both a trajectory of jurisprudential thought and locate contested sites within that thought. The narrative begins with John Rawls' formulation of one of jurisprudence's oldest concepts: justice. Examined via the work of Jimi Hendrix is John Rawls' attempt to entice people towards a society founded upon distributive principles. The following chapter calls upon the writings of Thomas Hobbes, Carl Schmitt, and Giorgio Agamben to discuss sovereignty. It is in John Lennon that this dark art of jurisprudence finds its popular musical expression. John Finnis' bid at restoring nature to jurisprudential prominence is then assessed through David Bowie's brazenly artificial personae. Subsequently, Madonna's performative acts of self-definition are read as assertions of individual rights in keeping with the jurisprudence of Ronald Dworkin. The final analysis examines H.L.A Hart's positivist system of law in relation to the powerful singing style of Liam Gallagher, frontman of English rock band Oasis.

Consistent with the possible repercussions of the creative endeavours analysed, legal philosophies have become fragmented: no longer purporting to explain the entirety of the law and people's experiences under it. Law pervades the different layers of reality in which people's lives are acted out. Uncovering the subjectivity beneath the universal claims of these jurisprudences has shown that law can, and should be, energised by keeping an ear to the quickening of human perceptions. Law is something that must be made, and so can tap into the vigour that is circulated through acts of creativity. 'Law up loud' suggests a vision for legality that taps into the provocative effects of volume, awakening the senses and allowing a multiplicity of voices to be heard. In the stadium, the audience is as loud as the band. The lesson of the rock star for jurisprudence is that, just as the people make the gig, people make the law.

Declaration of Originality

This work has not previously been submitted for a degree or diploma in any university. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

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The Opening Act

‘I wanna live in a dream in my record machine’.

– Noel Gallagher.¹

¹ Noel Gallagher’s High Flying Birds (2011) (I Wanna Live in a Dream in My) Record Machine, *Noel Gallagher’s High Flying Birds*.

Chapter One

Lex, Drugs, and Rock 'n' Roll: Introduction

It is 1975, and David Bowie² sits on the floor of a house he has rented in Los Angeles.³ He stares into the flame atop a black candle and focuses on the complex network of occult symbols in his mind. Bowie is surrounded by Egyptian artefacts. The gold sofas and sarcophagi came with the place, made it a good choice of residence.⁴ These ornate objects might glitter under the sun's rays, but the curtains have remained drawn since Bowie moved in.⁵ He requires darkness to prevent being distracted by the physical world. That plane of reality is not where his work is carried out. Bowie is cleaning up after a magical ritual.⁶ The candle wards off any harmful spirits that have been sent to invade his mind. Bowie has enemies. He has not met these foes but is obvious that he will have been noticed on his repeated journeys through ignorance to the place of light that elucidates the true laws of existence. Others who are able to perceive that light will wish to keep its power for themselves, or take his power into their own. Bowie looks over to the clock. It nears five in the evening, the time for his second of two daily meals.⁷ The first – he wouldn't call it 'breakfast', as mundane terms like that do not apply to the kind of life he leads – was

² This passage is a fictional recreation of events in Bowie's life as reported in music news media and recounted in biographies. Like Zachary Lazar's imaginary version of the Rolling Stones, this prose is informed by the phenomenon whereby some rock stars' '...public lives were detached from the realm of fact and became a kind of contemporary folklore.' See Lazar (2009) 'Author's Note'. It is not meant as a transcript of David Bowie's actual thoughts and deeds, but is intended to illustrate some of the themes of this thesis!

³ Buckley (2005), p 232.

⁴ Buckley (2005), p 232.

⁵ Buckley (2005), p 231.

⁶ MacDonald (2003a), p 144; Buckley (2005), p 231.

⁷ Buckley (2005), p 231.

eaten at the usual time of four in the morning.⁸ He sits in front of the fridge, the electric light that spilled forth when its door is open guiding his use of a knife on the meal.⁹ There were two things in the fridge: peppers and milk.¹⁰ One food and one liquid were all that he would allow into his body, except for all the powder, of course. The last time he awoke he noticed that the mirror from which he took the cocaine had been moved. Coco, his female companion had placed the mirror under his nose, making sure his breath fogged up the glass.¹¹ She meant well, the sweet girl, but he she did not understand that someone of his will would not perish. He was only becoming more powerful. He was deepening his connection with the forces that animated the world. It was not surprising that Coco was scared. ‘The Thin White Duke’, the character he inhabited at present – or did The Duke inhabit him? either way¹² – the character he inhabited was emotionless,¹³ and this must seem threatening to those still cowed by the old ways of living. He had cast off the weak and useless ways of the herd, just as he had read in Nietzsche and the stories of the other supermen throughout history. He was following the signs left by systems of magick and numerology and in all the other places where the path had been encoded.¹⁴ He could really see things now. He was glimpsing at the laws of the universe, discovering the things that people really ought to be striving for. The masses could not see it because they had yet to wake up.¹⁵ He was finally exploring the ideas that were gravely important to his intelligent mind. How to make it all mean something? Fascism was necessary, at least to the extent that the common people had to realise

⁸ Buckley (2005), p 231.

⁹ Buckley (2005), p 231.

¹⁰ Buckley (2005), p 231.

¹¹ Buckley (2005), p 231.

¹² Buckley (2005), p 226.

¹³ Buckley (2005), p 225.

¹⁴ MacDonald (2003a), pp 143 – 144.

¹⁵ MacDonald (2003a), p 143.

that the people who could glimpse at how things should be had to be acknowledged as superior, and yes, logically, they should be the ones to run things.¹⁶ It was for the best. Only the ignorant people would be afraid of the great work he was doing. But was it necessary? Doubt slipped into his thoughts. For years, this life lived through roles and rock and drugs had seemed like a kind of flourishing. He thought he was transcending his flaws, but now, he wondered if his flaws were taking over. Was this transcendence, or was it merely escape? Escape from the pressure and from the sycophants, an escape from his loneliness and depression. It is now that Bowie begins to question where these secret laws of existence had really brought him to.

I – ‘Two of Us’:¹⁷ The Pairing of Law and Music

In order to better perceive and understand philosophies of the law, this thesis connects jurisprudence¹⁸ expounded by mainstream 20th century legal thinkers with the lives and music of rock stars of the 1960s and beyond. With their propensity for unconventional, anti-establishment, and sometimes lawless behaviour, rock stars may initially appear incompatible with legal thinking and its concerns, such as justice, rules and rulers, and considered decision making. The above fictional portrait of David Bowie’s ‘dark doings’,¹⁹ for example, depicts a man occupied with worlds of his own imagining, someone who appears to be concerned least of all with the social fabric regulated by law. But it is the argument of this thesis that, while rock

¹⁶ MacDonald (2003a), pp143 – 144.

¹⁷ The Beatles (1970) ‘Two Of Us’ *Let It Be*.

¹⁸ In this thesis, ‘jurisprudence’ (also referred to as ‘legal philosophy’) is conceptualised as a body of thought ‘concerned with explaining law within its own boundaries’, in contrast to ‘legal theory’, which ‘considers law within its own framework and critical responses to the operation of law’: Leiboff and Thomas (2009), p 8. The word ‘theory’ alone, however, is used in describing the jurisprudential writings of the legal philosophers under examination.

¹⁹ MacDonald (2003a), p 140.

stars such as Bowie seem to have ‘fought the law’,²⁰ unknown to themselves and the rest of the world, jurisprudence and rock music might actually be secret allies. The most pressing question that a proposed reading of law and music must confront is: why ‘listen’ to musicians? Why should those seeking to understand law examine musicians’ work as legal texts? A connection between law and music can be made because both the legal philosophers and the rock stars of the 20th century have devoted themselves to similar quests. Both exemplify the struggle to ensure freedom and create meaning in a flawed world where imagination is always at risk of being stifled. Both have fashioned ambitious and often contradictory constructs in response to this threat. Particularly, jurists and rock stars have struggled with the nihilistic environment of the West in the wake of Friedrich Nietzsche and other such thinkers. For the jurists, the issue was how law should relate to its subjects in a terrifying age where seemingly the only justification required for law’s exertion of power over people was its own command. These legal thinkers took it upon themselves to lead the people to a life of meaning and value under the law, their totalising stories attempts to save law from the void. The rock stars responded to the challenge of artistic responsibility, a call for every person to create for themselves the values by which they relate to others, values which can be founded only on a courageous act of will. These musicians literally and metaphorically stood apart from (and in front of) the crowds and presented their imaginative worlds as inspiration to and confrontation of their audiences in regards to these audiences’ duties to the world.

Opening a ‘channel’ between law and music, it is argued, performs dual functions. First, comparing the activities of theorists and rockers vividly displays the

²⁰ The Clash (1979) ‘I Fought the Law’ *The Cost of Living*.

workings of jurisprudence. Second, and as Žižek argues, animating ‘high theory’ through popular culture provides more than just a way for making theory more understandable to academics.²¹ This thesis contributes to the argument, made by scholars such as MacNeil, that popular culture is worthy of legal academic consideration.²² There is an ‘ambient’ legality to popular culture. The pairing of academic understandings of the law with popular culture reveals how ‘everyday people’ (as Sly Stone described the public²³) understand and discuss jurisprudential concepts and issues. As is implicit in the record machine²⁴ imaginary of Noel Gallagher which prefaced this chapter, community dialogue is conducted not in the language of the legal academy, but through sights and sounds and other ways of writing. Readings that use popular culture also create the possibility of insights into theory that the theory may be unable to recognise in itself. In other words, not only do rock stars perform jurisprudence, they problematise jurisprudence, exposing the issues, dilemmas, and paradoxes that exist within jurisprudence’s central themes. David Bowie, for example, searched for the goods towards which people should orient their lives and desired to help other people towards these goods, thereby improving society. However, during the mid-1970s, Bowie ended up advocating dominance over the population, wishing people could be ordered to act in accordance with his conception of the good life. Bowie’s initial project of reform can be analogised to modern natural law theories, which are often held out as vehicles for critique that will lead to the improvement of law and the lives of those under it. The comparison with Bowie exposes that, just as Bowie’s ambitions became dictatorial, natural law critique of legal institutions can result in a reinscription of positive law.

²¹ Žižek (1998), p 3.

²² MacNeil (2007), p 1.

²³ Sly and the Family Stone (1968) ‘Everyday People’ *Stand!*

²⁴ Noel Gallagher’s High Flying Birds (2011) ‘(I Wanna Live in a Dream in My) Record Machine’ *Noel Gallagher’s High Flying Birds*.

Critique can become control when natural law jurisprudes decide that only a powerful few are sufficiently enlightened to ascertain how life should be organised. Making connections between David Bowie and the natural law jurisprudence of John Finnis further develops that particular argument. The exercise of aligning Finnis with Bowie (a task which occupies chapter 5 of this thesis) has been used here to demonstrate that rock stars have the potential to elucidate jurisprudence. The following paragraph will describe where in the activities of rock stars this study will find jurisprudential content.

There are two broad concepts that will direct this enquiry into rock music and jurisprudence. The first is the idea that musicians and those theorising the law create worlds or environments that represent their vision of human interaction. Sociologist Simon Frith argues that music is constitutive of identity.²⁵ Different types of music offer the listener ‘alternative modes of social interaction’, possibilities that the listener partners with to form an understanding of themselves.²⁶ The listening experience generates a unique kind of environment that Frith calls a ‘space without boundaries’,²⁷ and inhabiting this environment lets the listener occupy ‘imaginative cultural narratives’ to explore societal issues.²⁸ The rock stars that are examined in this thesis create their own worlds: Jimi Hendrix sings of a place called ‘Electric Ladyland’,²⁹ while John Lennon invites listeners to ‘imagine’³⁰ a global fellowship in which the traditional causes of human discord are absent.³¹ David Bowie acts out characters, telling stories of the troubled civilisations they inhabit; Madonna seeks liberation on the dance floor in the night club’s world-within-a-world; while Liam

²⁵ Frith (1999), pp 269-270.

²⁶ Frith (1999), p 275.

²⁷ Frith (1999), p 276.

²⁸ Frith (1999), p 275.

²⁹ Hendrix (1968) ‘Have You Ever Been (To Electric Ladyland)’ *Electric Ladyland*.

³⁰ Lennon (1971) ‘Imagine’ *Imagine*.

³¹ Furthermore, for analysis of John Lennon, culture, and physical space, see Kruse (2005).

Gallagher invokes the tradition of England and its music. Law, too, is a spatial³² or interpersonal activity. Law takes place on the levels of the individual and the societal, concerning itself with people's relationships to each other as well as the purpose of the collective.³³ Akin to the musicians sampled for this study, the legal philosophers analysed in the upcoming chapters convey their ideas as environments. John Rawls conceives of justice as being attained through the institutions that make up society. Carl Schmitt is concerned with the security of the state. John Finnis argues for a society oriented towards the good life, Ronald Dworkin depicts the law as a community of interpreters united by a 'seamless web',³⁴ and HLA Hart's work is steeped in the traditions of his country; England.

Second, this thesis considers the purposes that these imaginative worlds are meant to serve. The attitude of the rock star, occupied as it is with being heard, addressing societal issues, and challenging conventions, reveals some of the motivation of legal philosophers towards their projects. As will be shown in the following chapter, jurists craft their theories in pursuit of a benefit, be it justice, security, the good life, or some other objective. Legal philosopher and rock star alike attempt to create, save themselves and others, try to make a better world, and find peace in their own minds. In the course of this thesis' chapters of analysis, the abstract constructs that arise from this twinning of legal philosophers and rock musicians will be interrogated for their jurisprudential significance. Having established where in rock music to look for insight into the law, the following section will identify how a reading together of jurists and rock stars is to begin.

³² For analysis of law and space, see Butler (2009).

³³ Douzinas and Gearey (2005), p 3.

³⁴ Dworkin (1977), p 115.

II – Legal Hearts Club Band

Like the cover of the Beatles' *Sgt. Pepper's Lonely Hearts Club Band*,³⁵ with its assembly of disparate figures that influenced the fab four, the present section locates this thesis in relation to existing research on law and music. While jurisprudence and rock stars constitute a novel pairing, this thesis begins at a 'crossroads'³⁶ of four pre-existing schools of thought: popular music studies, law and music, law and aesthetics, and law and literature.

The first road includes the musicological, sociological, and cultural study of popular music. Musicology scrutinises music, or sound, itself; the very medium that enables the transmission of the cultural meanings this thesis seeks to discuss in relation to legal philosophy. Therefore, musicology is placed at the beginning of this review. Thereafter, musicology is cited at several points during the thesis and also influenced the study's attentiveness to sound as a bearer of meaning. For example, the implications of Jimi Hendrix's distorted guitar tones are discussed in chapter 3.³⁷ Sociology transfers attention to the involvement of music in people's actions and relations. While not used in formulating a method for jurisprudence and rock music, or as data for its analysis, sociology orients popular music in a physical reality and creates a passage for this thesis' incorporation of cultural studies, a school of thought that emerged from the former discipline. Cultural studies is oriented towards the realm of cultural products, but expressly views these creations and performances from perspectives that relate to the subjective experiences of its scholars. The cultural study of popular music examines how musicians and their works are understood by particular audiences, and their implications for those audiences in

³⁵ The Beatles (1967) *Sgt. Pepper's Lonely Hearts Club Band*.

³⁶ Cream (1968) 'Crossroads' *Wheels of Fire*.

³⁷ Waksman (2006), p 65.

relation to identity and power. Cultural studies material is admitted to this study to enhance its analysis of its sample musicians' workings. The remaining three 'roads' that form the intersection at the beginning of this thesis bring culture to the law; they are interdisciplinary analyses engaging with the legal in relation to music, aesthetics, and literature, respectively.

Law and music scholarship uses explanations of predominately traditional musical composition and performance to improve the understanding of how law is practiced. This literature differs from the present study in its choice of music as well as the purpose for which music is enlisted by law. The present study focuses on popular music instead of traditional forms and applies this music to legal philosophy instead of legal processes. In spite of these differences, law and music literature is reviewed to orient the present study within the legal academy and to begin regarding music as instructive to the law. Moving then to another school of legal enquiry, law and aesthetics argues for consideration of the aesthetic component of law's influence. This study takes the aesthetic as one of the ways in which law and music are to be connected and explained. The last area of scholarship examined is law and literature, which has yielded varying ways of combining the study of law with the written word, including the inventorying of fictional depictions of lawyering to identify public understandings of law work, analogising the process of legal interpretation to literary appreciation, and the use of narrative and textual tropes as a vessel for jurisprudential discussion. All of the aforementioned literatures are expanded upon below.

The initial concern of this literature review is music. The domain of musicology is the notes, timbres, and words produced by musicians as well as certain cultural connotations of these sounds. In *The Space Between the Notes: Rock and the*

Counter-Culture, for example, Whiteley argues that counter-cultural understandings informed the creation and consumption of rock music.³⁸ Whiteley identified counter-cultural meanings embodied in both the lyrics and the music of the work under consideration,³⁹ meanings informed by practices and understandings alluded to but not always specifically described in the music itself.⁴⁰ Musicology demonstrates that sound is imbued with meaning in its reception, but that meaning also prompts sound's creation.

The nexus between sound and meaning points towards the next relevant body of literature, which takes people as its focus. Sociological study observes and interprets real life individual and group behaviour, aiming to discover how music influences and is used by people in their lives. Within the social register at which this discipline is conducted, a plane that includes social processes such as that found in groups, are studies such as Bennett's 'Subcultures or Neotribes? Rethinking the Relationship between Youth, Style and Musical Taste', which critiques the subcultural account of youth culture and music.⁴¹ According to the subcultural approach, deviant activity was enacted through working class means, such as followers of the Mod style working through the week to purchase conspicuous attire that could be worn on the weekend.⁴² This contention does not explain why many subcultural practices originated outside of the working class.⁴³ Furthermore, the subcultural approach assumes that people are steadfastly devoted to particular styles of music and that rigid boundaries distinguish musical taste.⁴⁴ Instead, it is possible

³⁸ Whiteley (1992), p 1.

³⁹ Whiteley (1992), p 2.

⁴⁰ Whiteley (1992), p 6.

⁴¹ Bennett (2006), p 107.

⁴² Bennett (2006), p 107.

⁴³ Bennett (2006), p 107. The idea of the consumption of popular music being class-based is also critiqued by Hesmondhalgh and Negus (2002), p 87.

⁴⁴ Bennett (2006), p 108.

that listeners' interest in particular types of music is not so permanent or so deliberately chosen.⁴⁵ Bennett presents Maffesoli's neotribes as an alternative to the subculture. Neotribes are less stable groups that congregate for particular events or purposes and are not comprised of a fixed selection of people.⁴⁶ Bennett conducted an ethnographic study of the urban dance music scene in a city in the north-east of England.⁴⁷ This study demonstrated features of the scene that could not be described by a subcultural approach, such as multiple styles of music being played simultaneously in the same venue, and different artists and styles being sampled into a single piece.⁴⁸ Other scholars have also evaluated the subcultural approach in reference to the electronic dance music of the 1990s. In 'Raving, Not Drowning: Authenticity, Pleasure and Politics in the Electronic Dance Music Scene',⁴⁹ Huq contends that dance music does not fit with subcultural understandings. Dance music contains a multiplicity of styles⁵⁰ and is not always associated with practices of resistance.⁵¹ Unlike the eye-catching scenes examined by the subcultural approach, dance music often lacks distinctive or unifying visual features as it attracts people who congregate on an ad-hoc basis instead of being permanently aligned with a particular subculture.⁵² In 'Understanding Hipness: "Subcultural Capital" as Feminist Tool', Thornton uses Bourdieu's concept of cultural capital to explain audience involvement in various styles of music, including dance music.⁵³ Cultural capital is gained when a person cultivates knowledge and skills to gain standing

⁴⁵ Bennett (2006), p 108.

⁴⁶ Bennett (2006), p 106.

⁴⁷ Bennett (2006), p 109.

⁴⁸ Bennett (2006), p 110.

⁴⁹ Huq (2002).

⁵⁰ Huq (2002), p 90.

⁵¹ Huq (2002), p 96.

⁵² Huq (2002), p 97.

⁵³ Thornton (2006), p 100.

amongst a particular group of people.⁵⁴ While attempting to progress beyond traditional subcultural explanations, Thornton's depiction of music followers relies on a clear separation between those with subcultural capital and those without, an arrangement similar to that between subcultures and mainstream society. These critiques of the subcultural approach are relevant not only to dance, but to all styles of music and have led to new scholarly understandings of interactions between music and the consumer.

In the introduction to the section of their volume on 'Audiences, Consumption and Everyday Life', Hesmondhalgh and Negus, the editors of *Popular Music Studies* emphasise that, rather than using the subcultural approach as a framework for analysis, many recent studies have examined the role of popular music in everyday life.⁵⁵ This form of analysis seeks to ascertain the meanings attributed to music by its listeners. Reinforcing the need to ascertain the ways in which audiences understand music, Bennett identifies a crucial connection between performer and audience in rock 'n' roll. Bennett refers to televised performances of Elvis and the Beatles that included footage of specific audience members reacting to the performance⁵⁶ as examples of how listeners constitute essential context for music's creation.⁵⁷ DeNora conducted interviews asking subjects to describe how they utilised music in their everyday lives. Interviewees responded that music made them remember people and situations or imbued them with a feeling of agency they once possessed.⁵⁸ From these results, DeNora contends that music has a biographical function, operating as both a stimulus for the listener's memory and as a soundtrack to their activities in the present. Through its temporal qualities, music helps shapes

⁵⁴ Thornton (2006), p 107.

⁵⁵ Hesmondhalgh and Negus (2002), p 87.

⁵⁶ Bennett (2000), p 39.

⁵⁷ Bennett (2000), p 40.

⁵⁸ DeNora (2006), p 142.

the past into a narrative that gives insight or understanding as to how one should act in the future.⁵⁹ Hesmondhalgh also argues that more attention should be given to use of music in everyday life. To Hesmondhalgh, focusing only on exceptional uses of music such as rebellious youth subcultures is to ignore many other ways in which people relate to music.⁶⁰ Nonetheless, Hesmondhalgh criticises DeNora's work for failing to consider how listeners make judgements of 'value, meaning and taste in music'.⁶¹ Although scholars may have overemphasised such issues due to their focus on youth culture, questions of value are essential if music is to have meaning past being a prompt for memory.⁶²

Questions of value can be seen in sociological work on popular music and identity. In the introduction to the 'Musical Diasporas' section of *The Popular Music Studies Reader*, Shank observes that rap music is of cultural importance to many of African descent as it engages with issues of place and identity.⁶³ In 'Voices from the Margins: Rap Music and Contemporary Cultural Production', Rose argues that rap music does not represent an essential identity, but allows performers and listeners to create through depictions of the specific.⁶⁴ Rap music helps to create identities and communities that run parallel to conventional social institutions that no longer sustain their members.⁶⁵ Hip-hop communities are created when individuals assume aliases and assemble posses.⁶⁶ The interrelationship between members of a posse was seen as particularly important by Rose, who concluded that creative achievement and the development of a recognisable artistic identity was motivated by desire to attain

⁵⁹ DeNora (2006), p 143.

⁶⁰ Hesmondhalgh (2002), p 117.

⁶¹ Hesmondhalgh (2002), pp 124-125.

⁶² Hesmondhalgh (2002), p 125.

⁶³ Shank (2006a), p 176.

⁶⁴ Rose (2006), p 216.

⁶⁵ Rose (2006), p 217.

⁶⁶ Rose (2006), p 217.

local status.⁶⁷ When music is seen as representative of identity, arguments often arise as to how authentic these representations are. Bennett asserts that music is not only a site for consumption, but can be used to contest power.⁶⁸ Attempts by young people to resist being defined by dominant forces will likely result in disputes between youths as to what music accurately represents them.⁶⁹ In *Popular Music and Youth Culture*, for example, Bennett presents interviews from musicians who put forward competing and contrasting notions of what constitutes authentic expression and legitimate use of hip-hop (of African American origin) by people from other countries.⁷⁰ Popular music's origins as a commodity complicate notions of authenticity. Bennett refers to Frith's observation that listeners imbue meaning into music within a rules set down in part by record companies.⁷¹ Frith affirms this view in *Music for Pleasure*, stating that while subcultural approaches had portrayed so-called amateur musicians working within popular music as representative of the people, these musicians had to act in keeping with the format of popular music, a format that record companies helped to define.⁷² According to Frith, the stardom of some popular musicians is not counter to the principles of popular music but is a part of it.⁷³ Conversely, in 'Punk Rock at Raul's: the Performance of Contradiction',⁷⁴ Shank draws attention to the oppositional tendencies that often arise in the creation of identity through music. Shank recounts the music of Austin punk rock band the Huns, a band whose lead singer kissed a policeman during a performance and was

⁶⁷ Rose (2006), p 218.

⁶⁸ Bennett (2000), p 40.

⁶⁹ Bennett (2000), p 2.

⁷⁰ Bennett (2000), p 133.

⁷¹ Bennett (2000), p 46.

⁷² Frith (1988), p 4.

⁷³ Frith (1988), p 4.

⁷⁴ Shank (2006b), p 114.

found guilty of assault.⁷⁵ Engaging in risky behaviour and ‘negating their identity’ as a performer was necessary for a musician to gain acceptance in the Austin punk rock scene.⁷⁶ Previously held notions of authenticity were being critiqued by performers who strived to make themselves more vulnerable. This approach carried over to the Huns’ music, where the band critiqued myths put forward by those in authority on both sides of political spectrum.⁷⁷ Frith’s discussion of record companies and capital and Shank’s talk of police and legal sanction implies the need to consider hitherto unmentioned sources of authority and power that impact upon music.

Frith’s assertion that economics influences music is further developed in *Music and Copyright*, which presented philosophy and economic forces as giving rise to the legal concept of copyright.⁷⁸ This work demonstrates the effects of copyright law on the creation and consumption of music.⁷⁹ Law’s intervention in the world is not incidental. Rather, the controlling power of the law is summoned by philosophically and/or financially influential entities. As demonstrated by Shank, opposing such controlling forces provides the opportunity to define identity. Opposition to the legal regulation of social circumstances, of which music is an important part, is described in McKay’s *Senseless Acts of Beauty: Cultures of Resistance Since the Sixties*.⁸⁰ McKay outlines practices of resistance that arose in response to regulation of U.K. dance culture through the 1994 Criminal Justice and Public Order Act.⁸¹ While briefly examining the legal dimensions of this legislation, (such as other statutory and human rights the act supposedly contravened),⁸² McKay

⁷⁵ Shank (2006b), p 116.

⁷⁶ Shank (2006b), p 117.

⁷⁷ Shank (2006b), p 118.

⁷⁸ Frith and Marshall (2004), p 15.

⁷⁹ Frith and Marshall (2004), pp 15-16.

⁸⁰ McKay (1996), p 159.

⁸¹ McKay (1996), p 159.

⁸² McKay (1996), p 171.

was primarily interested in detailing the social practices of resistance perpetrated by the musical subculture the legislation attempted to regulate. The interplay between forces of control and resistance suggests differing views about the ordering of the world. This kind of vantage-based interpretation also receives significant attention in cultural studies. Power, marginal peoples, resistant practices, identity, and authenticity: these are some of the major concerns of that discipline, and will now be outlined.

During observes that a large portion of cultural studies scholarship on rock music discusses authenticity, a theme already familiar to this literature review.⁸³ However, rock music's self-proclaimed authenticity is of particular interest to cultural studies, a school of thought that sourced some of its own oppositional aspirations in rock's attempts to surmount conventionality.⁸⁴ Rock's authenticity is complicated by the music's condition as a commodified medium, and authenticity remains a discourse that cultural studies has struggled to resolve.⁸⁵

The issue of authenticity, which has already emerged in sociological literature, reappears in cultural studies with a focus on audiences' relationship to music. In 'Little Girl Blue', Echols identifies cultural understandings as informing a widely held view that Joplin's music was inauthentic, a view that hindered her success.⁸⁶ Waksman's 'Black Sound, Black Body: Jimi Hendrix, the Electric Guitar, and the Meanings of Blackness' draws attention to the values that informed not only the expectations of Hendrix's audience, but type of audience he attracted.⁸⁷ According to Waksman, the audience's judgements of Hendrix's music influenced his subsequent musical creations as Hendrix attempted to defy preconceptions as to

⁸³ During (2005), p 127.

⁸⁴ During (2005), p 128.

⁸⁵ During (2005), pp 127-128.

⁸⁶ Echols (2006), p 53.

⁸⁷ Waksman (2006), p 64.

what type of music he should play.⁸⁸ In ‘Liveness: Performance and the Anxiety of Simulation’, Auslander makes use of Baudrillard’s theories of simulation to challenge conventional understandings that position recorded music as inferior to live performance.⁸⁹ Recording technologies brought with them the anxiety that artists may be inauthentic, as recorded music implies the involvement of record companies.⁹⁰ This anxiety is assuaged by reinforcing the realness of recorded music through its faithful recreation in a live setting.⁹¹ Paradoxically, allocating such a function to live performance further threatens the legitimacy of the distinction between live and recorded performance.⁹² Auslander refers to Milli Vanilli, who had their Grammy award revoked upon being discovered to have lip synched to recorded vocal tracks during their concerts. In the words of Baudrillard, Milli Vanilli were used as ‘scandal effect’ to reinforce the opposition between live and recorded performance,⁹³ while to reward a type of performance seen as more authentic, Eric Clapton’s *Unplugged* album⁹⁴ was subsequently awarded multiple Grammys.⁹⁵ These examples show that cultural understandings, such as the meaning of authenticity, are defined by interactions between musician and audience.

Now, it will be demonstrated that this practice of examining cultural products from subjective viewpoints is fundamental to cultural studies’ critical intentions. Cultural studies does not merely seek to identify and explain social behaviour. It does not claim to be objective.⁹⁶ Rather, the discipline is concerned with

⁸⁸ Waksman (2006), p 65.

⁸⁹ Auslander (2006), p 85.

⁹⁰ Auslander (2006), p 89.

⁹¹ Auslander (2006), p 87.

⁹² Auslander (2006), p 87.

⁹³ Auslander (2006), p 88.

⁹⁴ Clapton (1992) *Unplugged*.

⁹⁵ Auslander (2006), p 90.

⁹⁶ During (2005), p 1.

interpretation. Its analyses are usually aligned with the marginalised of society.⁹⁷

One of the ways cultural studies often examines popular music is by reading particular songs or musicians as cultural texts. The mediated experience of the rock star (communicated through, among other things, music, videos, photographs, and interviews) is connects people with a dialogue on cultural meanings. Peñaloza explains:

‘Part fantasy, part reality, celebrity encounters are part of a larger set of social processes through which we work out key social issues of the day. Through contacts with and narratives about celebrities, people develop understandings of themselves, each other and our culture.’⁹⁸

Not only are culturally meaningful transmissions made by rock stars, but these communiques are utilised by audiences in far from homogenous ways. Cultural studies’ engagement with Madonna (who features in chapter 5 of this thesis’ study) will now be reviewed to demonstrate the reading of a rock star as cultural text and show some of the discipline’s recurring critical interests. Madonna is a vivid example of cultural studies work; she has received significant academic attention and is often analysed in relation to her subjective reception by marginal cultures.

The chapters that appear in two major scholarly engagements with Madonna; *The Madonna Connection: Representational Politics, Subcultural Identities, and Cultural Theory* and *Madonna’s Drowned Worlds: New Approaches to her Cultural Transformations 1983-2003* are similarly categorised. These categories are helpful in identifying recurring critical interests of cultural studies. Both books read Madonna’s music and performance in relation to racial, sexual, and gender identities, and the

⁹⁷ During (2005), p 1.

⁹⁸ Peñaloza (2004), p 176.

popular musician as commodity.⁹⁹ The following will recount one paper from each section of these two books, making for two chapters from each of these categories, pairs chosen to ally or contrast with each other and show the complexity of the cultural issues under analysis and the often differing conclusions that can be drawn from reading culture.

In 'Images of Race and Religion in Madonna's Video *Like a Prayer*: Prayer and Praise', Scott locates Madonna's video for *Like a Prayer*¹⁰⁰ within African-American constellations of understanding.¹⁰¹ The video is not explained using interviews with African-American viewers of the video,¹⁰² but is read as a culturally meaningful text.¹⁰³ Scott evaluates differing interpretations of the video, including readings arguing that African-American men were portrayed in a stereotypical fashion.¹⁰⁴ Through a close reading of video's imagery and narrative, Scott weighs up the possible interpretations of the video's features, and determines that the *Like a Prayer* contains a preponderance of positivity towards racial matters, and that its message is more likely one of equality, compassion, and courage in the face of racial oppression.¹⁰⁵ Discussing Madonna from an ethnic perspective is Fouz-Hernandez's 'Crossing the Border(line): Madonna's Encounter with the Hispanic'.¹⁰⁶ Fouz-Hernandez argues that the succession of overhauls in Madonna's presentation, facilitated by her appropriation of ethnicities, highlights the performative quality of

⁹⁹ Schwichtenberg (1993a) considers 'race', 'gay culture', 'the feminist question', and 'commodity'; Foz-Hernandez and Jarman-Ivens (2004) examines 'ethnic identities', 'sexual identities', 'gender identities', and 'consuming celebrity'.

¹⁰⁰ Lambert (1989) *Madonna, Like a Prayer*.

¹⁰¹ Scott (1993), p 57.

¹⁰² An observation that Schwichtenberg (1993b), p 5 makes in her introduction to the *Madonna Connection* when summarising Scott's paper.

¹⁰³ Scott (1993), p 57.

¹⁰⁴ Scott (1993), pp 65-66.

¹⁰⁵ Scott (1993), p 57.

¹⁰⁶ Fouz-Hernandez (2004), p 138.

ethnic identity.¹⁰⁷ Fouz-Hernandez addresses Madonna's interactions with the Hispanic in the musician's portrayal of and interactions with Hispanic, Latino, and Spanish people in her videos, her use of these ethnic images in her own appearance, her filmic portrayal of Eva Peron, and her inhabiting of Hispanic iconography such as emulating Che Guevara on one of her album covers.¹⁰⁸ The complexity of Madonna's relationship to the Hispanic is exposed, with Madonna interpreted as having a sustained interest and association with the ethnicity while also viewing the ethnicity at a remove and often objectifying its people.¹⁰⁹ Fouz-Hernandez claims that Madonna's inclusion of elements of Hispanic culture in her work has heightened the media profile of its people.¹¹⁰ Finally, Madonna's unrestricted use of ethnic identities, itself akin to the development of Latin American cultural attitudes, is suggested as a possible method for the positive revision of ethnicity in the United States.¹¹¹

'Justify Our Love: Madonna & the Politics of Queer Sex'¹¹² sees Henderson examining Madonna's relationship to gay culture. Akin to Scott's paper, Henderson centres her analysis around the meaning of a Madonna video, in this instance *Justify My Love*,¹¹³ to one of the audiences, here, gay people, referenced in the video's imagery.¹¹⁴ Additionally, Henderson illustrates the wider cultural context of controversy over gay culture into which the video was released.¹¹⁵ Like Fouz-Hernandez, Henderson deems Madonna's reinventions, and their complex implications, as 'playful' but also 'painful' and writes that Madonna's performativity

¹⁰⁷ Fouz-Hernandez (2004), p 139.

¹⁰⁸ Fouz-Hernandez (2004), p 139; p 153; p 154.

¹⁰⁹ Fouz-Hernandez (2004), p 153.

¹¹⁰ Fouz-Hernandez(2004), p 154.

¹¹¹ Fouz-Hernandez (2004), p 154.

¹¹² Henderson (1993), p 107.

¹¹³ Mondino (1990) *Madonna, Justify My Love* Video.

¹¹⁴ Henderson (1993), p 107.

¹¹⁵ Henderson (1993), pp 107-108.

and its difficulties are reminiscent of the experience of gay identity.¹¹⁶ Madonna's relationship to her gay audience is complicated by her addressing gay culture from a place outside of it.¹¹⁷ As with her engagement with Hispanic culture, the attention Madonna receives allows her to expose a wide audience to elements of gay culture.¹¹⁸ However, the same-sex connotations of this imagery go unstated by Madonna and may not be perceptible to a large number of those inhabiting the mainstream, doing little to reform negativity towards gays and lesbians.¹¹⁹ Nonetheless, Henderson suggests that Madonna's work can be taken up by gay people and used to improve their circumstances.¹²⁰ In her paper 'What it Feels Like for Two Girls: Madonna's Play with Lesbian (Sub-)Cultures', Jarman-Ivens negatively evaluates Madonna's incorporation of gay culture in the musician's work. In Jarman-Ivens' view, Madonna is 'inauthentic' in a negative sense, because her use of gay culture is motivated by her need for material to fuel her metamorphoses and her wish to appropriate gay culture's exotic allure to the mainstream.¹²¹ Jarman-Ivens also argues that Madonna has a distinct relationship with lesbian culture.¹²² Lesbian culture is multifaceted, and certain of Madonna's imagery, lyrical content, and extra-curricular behaviour deliberately speak to or unintentionally coincide with various lesbian discourses.¹²³

Cultural studies scholars have also reached differing conclusions on whether Madonna and her work are commendable from a feminist perspective. In 'Feminist Politics and Postmodern Seductions: Madonna and the Struggle for Political

¹¹⁶ Henderson (1993), p 109.

¹¹⁷ Henderson (1993), pp 108-109.

¹¹⁸ Henderson (1993), p 108.

¹¹⁹ Henderson (1993), p 123.

¹²⁰ Henderson (1993), p 124.

¹²¹ Jarman-Ivens (2004), p 69.

¹²² Jarman-Ivens (2004), p 70.

¹²³ Jarman-Ivens (2004), p 73; p 75.

Articulation', Manduziuk's view is that Madonna's success and influence alone do not qualify her as helpful to feminism.¹²⁴ Like Jarman-Ivens, Manduziuk disapproves of Madonna's inauthenticity. Here, inauthenticity keeps Madonna from having to commit to a political stance.¹²⁵ From a postmodernist perspective, Madonna may seem to be an admirable figure, trifling with political issues while performing her sexuality.¹²⁶ From a feminist perspective, however, Madonna commodifies herself, and is rewarded for doing so, reinforcing the traditional role for women as publically sexualised, preening, and apolitical.¹²⁷ According to Pisters in 'Madonna's Girls in the Mix: Performance of Femininity Beyond the Beautiful', there is a consistency to the issues that Madonna confronts and problematizes throughout her transformations.¹²⁸ Dealing in particular with issues of authenticity and performativity through a 'seduction' as described by Baudrillard,¹²⁹ Madonna's approach suggests possibilities for a post-feminist approach that confounds both politics and commodification.¹³⁰

The final cultural studies theme to be illustrated here is the commodification and consumption of the celebrity performer. 'Mextatextual Girl: → Patriarchy → Postmodernism → Power → Money → Madonna' contains Tetzlaff's explanation of audience's attraction to Madonna.¹³¹ Tetzlaff holds that Madonna's music and videos are not popular because of their content, but due to the metatextual narrative of Madonna's control over her career and the success she has experienced.¹³² 'Consuming Madonna then and now: An examination of the dynamics and

¹²⁴ Mandziuk (1993), p 167.

¹²⁵ Mandziuk (1993), p 183.

¹²⁶ Mandziuk (1993), p 183.

¹²⁷ Mandziuk (1993), pp 183-184.

¹²⁸ Pisters (2004), p 22.

¹²⁹ Pisters (2004), p 22.

¹³⁰ Pisters (2004), p 35.

¹³¹ Tetzlaff (1993), p 244.

¹³² Tetzlaff (1993), p 248.

structuring of celebrity consumption' reports Peñaloza's survey of how Madonna is understood and utilised by her audience.¹³³ Some of those surveyed conveyed a sense of closeness to Madonna, which Peñaloza attributes to the 'intimate and frequent contact' consumers have with Madonna through popular media.¹³⁴ The complexity of Madonna's work made it resource that her audience could use to contend with social issues in their own lives.¹³⁵ The open-ended possibilities for how Madonna may be used demonstrate the agency of the consumer,¹³⁶ consistent with cultural studies revelation that there is a realm of meaning in the music, performance, and behaviour of the rock star that can be interacted with and used in varying ways.

Cultural studies often considers the vantage points of the rock star's audience. Law and music and law and aesthetics scholarship also have an interest in subjectivity. Multiple law and music studies use musical analogies to deepen understanding of legal interpretation, while one law and aesthetics piece argues for the uniqueness of the subject's senses as creating particular interpretive and legislative responsibilities. First, to law and music. The subject matter of the majority of law and music scholarship is music outside of the popular, such as classical and folk. Examples include country music in Caudill, 'Fabricating Authenticity: Law Students as Country Music Stars',¹³⁷ classical music in Manderson, '*Et Lex Perpetua*: Dying Declarations & Mozart's Requiem',¹³⁸ and folk in Weisbrod, 'Fusion Folk: A Comment on Law and Music'.¹³⁹ Gearey's 'Outlaw Blues: Law in

¹³³ Peñaloza, (2004), p 180; p 184.

¹³⁴ Peñaloza, (2004), p 190.

¹³⁵ Peñaloza, (2004), p 184; p 190.

¹³⁶ Peñaloza, (2004), p 190.

¹³⁷ Caudill (1999), pp 1573-1587.

¹³⁸ Manderson (1999), pp 1621-1647.

¹³⁹ Weisbrod (1999), pp 1439-1458.

the Songs of Bob Dylan',¹⁴⁰ constitutes an exception to this non-pop subject, as does Ramshaw's 'Deconstructin(g) Jazz Improvisation: Derrida and the Law of the Singular Event',¹⁴¹ Richmond's 'Law and Popular Music: An Etude in Two Movements',¹⁴² and Jaff's 'Law and Lawyer in Pop Music: A Reason for Self-Reflection'.¹⁴³ According to Manderson, societal change threatens the legitimacy and relevance of more traditional forms of law and music.¹⁴⁴ Consequently, there is an opportunity for the current study to draw conclusions about more contemporary and popular understandings of the law. Gearey calls for a rethinking of the lawyer from servant¹⁴⁵ to 'culture hero'.¹⁴⁶ As popular musicians can be seen as attaining 'hero' status among their followers,¹⁴⁷ Gearey's statement suggests the need to take the work of popular bands and musicians as the subject matter for analysis.

Most of the scholars who have brought music to the law have done so to enrich understandings of lawyering processes. In 'Fusion Folk: A Comment on Law and Music', for example, Weisbrod emphasised the metaphoric potential of law and music, listing the possibility for discussions on the distinction between theory and practice,¹⁴⁸ use of written notation,¹⁴⁹ and the political content of music.¹⁵⁰ Themes that run through law and music articles include the tension between societal order and the individual, the function of rationality in structuring law and music, issues of interpretation, and issues of authenticity. These themes are the sites at which law and music scholarship grapples with the challenges that arise in the lawyer's work.

¹⁴⁰ Gearey (1999), pp 1401-1422. Also, the symposium 'Bob Dylan and the Law' has examined Dylan in relation to, inter alia, the law's failings, social activism, and the profession of law: Levine (2010).

¹⁴¹ Ramshaw (2006).

¹⁴² Richmond (1998).

¹⁴³ Jaff (1986).

¹⁴⁴ Manderson (1999), p 1644.

¹⁴⁵ Gearey (1999), p 122.

¹⁴⁶ Gearey (1999), p 123.

¹⁴⁷ Weinstein (1995), p 189.

¹⁴⁸ Weisbrod (1999), p 1441.

¹⁴⁹ Weisbrod (1999), pp 1441-1442.

¹⁵⁰ Weisbrod (1999), p 1442.

The issue of rationality is dealt with in ‘Music Theory as Mode of Law: The Case of Heinrich Schenker, Esq’, where Alpern wrote of Schenker, an influential music theorist with legal training. Alpern contends that legal thinking informed Schenker’s work in music theory.¹⁵¹ Alpern examined the musical theoretical writings of Schenker and identified Schenker’s frequent use of legal metaphors.¹⁵² Legal themes run throughout Schenker’s understanding of music, including Schenker’s conception of good composition as requiring a balance between order and freedom (viewed musically in terms of the conflict between single notes and groups of notes), a view informed by the jurisprudential theories of societal arrangement.¹⁵³ Schenker viewed good composition as being ordered by rational principles, viewing other forms of music as irrational.¹⁵⁴ Order, freedoms, and rationality are recurrent considerations in acts of legal creation, and Alpern seems to discuss musical composition as similar to legislating. Several other law and music articles attend to the related task of interpreting.

Issues of interpretation are evident in ‘Interpreting Law and Music: Performance Notes on “The Banjo Serenader” and “The Lying Crowd of Jews”’. In this article, Balkin and Levinson analogised the performative aspect of law to the performance of classical music. Balkin and Levinson presented music as a suitable comparison for the law, as legal practice takes place in front of an audience, whereas textual literature is mostly consumed in private.¹⁵⁵ Despite their attention to performance, Balkin and Levinson’s interest lay with the dilemmas of interpretation that arise when translating musical notation into performance. Decisions made by performers as to the extent they will adhere to an original score were analogised to

¹⁵¹ Alpern (1999), p 1462.

¹⁵² Alpern (1999), pp 1462-1463.

¹⁵³ Alpern (1999), p 1482.

¹⁵⁴ Alpern (1999), p 1506.

¹⁵⁵ Balkin and Levinson (1999), p 1530.

the choices made in judicial interpretation of statute. Balkin and Levinson analogised the dilemma performers have to confront when faced with performing music containing offensive lyrics to the decision as to whether or not to apply an unjust law.¹⁵⁶ Balkin and Levinson acknowledge the context in which interpretation occurs. Those responsible for interpretation are faced with demands from their audience (be this a legal institution or a musician's fans), who harbour particular notions of authenticity.¹⁵⁷ Ultimately, Balkin and Levinson suggested differences between the interpretative options available to lawyers and musicians, as musicians have access to subtler forms of performance such as irony that cannot exist in statutory interpretation.¹⁵⁸ Balkin and Levinson's model assumes a particular configuration, a trinity made up of the composer, performer (or performers), and audience.¹⁵⁹ The problematic nature of applying this model to popular music is identified by Caudill, who observed that such a configuration is less likely to arise in popular music, where the composer and performer are often the same.¹⁶⁰ Hall made one such attempt in 'The Score as Contract: Private Law and the Historically Informed Performance Movement'. In this article, Hall proposed the use of a contract law analogy as an alternative to statutory interpretation. Examining musical notation, Hall portrayed the creation of music as a two-sided process where the performer is expected to exert particular influences over the realisation of the music.¹⁶¹ Hall argued that contract better explains the relationship between composer and performer because theory of interpretation require consideration of the force that compels people to obey statute, an ill-fitting metaphor considering that musicians are not forced to perform particular

¹⁵⁶ Balkin and Levinson (1999), p 1520.

¹⁵⁷ Balkin and Levinson (1999), p 1520.

¹⁵⁸ Balkin and Levinson (1999), pp 1555-1556.

¹⁵⁹ Balkin and Levinson (1999), p 1520.

¹⁶⁰ Caudill (1999), p 1575.

¹⁶¹ Hall (1999), p 1593.

pieces of music.¹⁶² In ‘Outlaw Blues: Law in the Songs of Bob Dylan’ Gearey also elucidates the theme of interpretation through an analysis of the lyrical depiction of the law in the music of Bob Dylan. Gearey identified legal philosophical content in Dylan’s search for a higher law than the posited legal system.¹⁶³ Gearey also utilised the often-used metaphor of legal interpretation, presenting Dylan as troubled by the lack of clear guidance offered by the law.¹⁶⁴ Examples presented by Gearey of Dylan’s concern with interpretation include the singer-songwriter’s portrayal of the unknowable feminine¹⁶⁵ and the unclear signs offered by God¹⁶⁶, both of which, according to Gearey’s reading of Dylan, must be deciphered. Interpretation turns on determinations of authenticity, as highlighted by Ramshaw in “‘He’s My Man!’: Lyrics of Innocence and Betrayal in *The People v. Billie Holiday*’.¹⁶⁷ During her trial, jazz musician Billie Holiday’s music and personal image cohered with her courtroom testimony so as to convince the jury of the authenticity of her claims, positively influencing their interpretation of the evidence in Holiday’s case.¹⁶⁸ Also, Ramshaw examined law’s anxieties over interpretation and authenticity in ‘The Creative Life of Law: Improvisation, Between Tradition and Suspicion.’¹⁶⁹ The law’s hostility towards improvisation is seen in its regulation of jazz musicians in New York City.¹⁷⁰ The law, preoccupied with its authenticity and striving to preserve its legal essence, denies improvisation, a stance that paradoxically diminishes the law’s integrity.¹⁷¹ The relationship between jazz and tradition is the inverse to that of law.

¹⁶² Hall (1999), p 1609.

¹⁶³ Gearey (1999), p 1401.

¹⁶⁴ Gearey (1999), p 1405.

¹⁶⁵ Gearey (1999), p 1406.

¹⁶⁶ Gearey (1999), p 1409.

¹⁶⁷ Ramshaw (2004).

¹⁶⁸ Ramshaw (2004), p 105.

¹⁶⁹ Ramshaw (2010), p 13. For further exploration on the inverse relationship between tradition and improvisation in jazz and law, see also Ramshaw (2006).

¹⁷⁰ Ramshaw (2010), p 13.

¹⁷¹ Ramshaw (2010), p 13.

In jazz, concession to tradition is thought to degrade the potential for originality that the music contains.¹⁷² However, tradition is inherent in improvisation, as departures from previous interpretations implicitly reference that from which is deviated.¹⁷³

Thus, it can be seen that:

‘As no two legal actions can be exactly the same, judges must improvise on tradition and past precedent every time they are asked to decide a case. Law can thus neither dispense with nor be completely determined by tradition. The legal decision instead lies on the border between what it “is” and what it otherwise could be, and every judicial act is, in some sense, a species of improvisation.’¹⁷⁴

Tradition and interpretation occur in the space that is of particular interest to this thesis; that of creativity and transformation, as will be explored in later chapters.

As has been conveyed, law and music scholarship acknowledges that law work involves discretion. Choice is present from the creative opportunities of the legislative moment, possibly guided by considerations of order and rationality, as suggested above, to the interpretation and application of the law, with its anxieties over authenticity, as well as possibilities for improvisation.

Law and aesthetics scholarship evinces a concern with the values that influence decisions made within legal discretion. Aesthetics is concerned with the processes by which people perceive and value that which is communicated to them by their senses.¹⁷⁵ Law and aesthetics scholarship asserts the importance of the aesthetic in understanding the values embodied and disseminated by law. In *Law and Aesthetics*, Geary used the philosophy of Nietzsche to argue that maintaining

¹⁷² Ramshaw (2010), p 13.

¹⁷³ Ramshaw (2010), p 13.

¹⁷⁴ Ramshaw (2010), p 13.

¹⁷⁵ Manderson (2000), p ix.

faithfulness to one's perceptions creates a responsibility to interpret the anew the values of the law.¹⁷⁶ Gearey's argument will be explored in greater detail in the following chapter. The other works of law and aesthetics scholarship that are relevant to this thesis associate law and music by focusing on the aesthetic qualities of both. In *Songs without Music*,¹⁷⁷ Manderson set out to demonstrate how the law's influence is derived from its aesthetic dimension. Starting from an aesthetic perspective rather than a legal one, Manderson identified the sensations induced by particular pieces of music and used these sensations to detect similar aesthetic structures within the law. Manderson based an aesthetic connection between law and music on their shared origin as cultural outputs.¹⁷⁸ Manderson's approach stands in contrast to a 'law as literature' method, which views methods of engagement with artistic outputs such as literature as providing new ways of relating to law. The 'Motet' chapter of *Songs without Music*, for example, tracked the parallel development of English statute and the motet form of composition starting from the 1200s in order to discover the worldview of those responsible for the legal and musical creations of the time and to argue that the law's aesthetic force compelled citizens to follow these laws.¹⁷⁹ Manderson also argued that normative beliefs (or values) often arise out of conflicting aesthetic imagery rather than being based on reasoned argument. For example, in the 'Requiem' chapter Manderson asserted that there is a lack of reason in discussions about the death penalty in the United States of America.¹⁸⁰ Manderson contrasted the sentiment embodied in Mozart's 'Requiem' to the 'corrupt' aesthetic imagery¹⁸¹ that resides in law (and can be found in places such

¹⁷⁶ Gearey (2001), p 64.

¹⁷⁷ Manderson also engages with the aesthetics of law and music in Manderson (2010).

¹⁷⁸ Manderson (2000), p 31.

¹⁷⁹ Manderson (2000), p 52.

¹⁸⁰ Manderson (2000), p 94.

¹⁸¹ Manderson (2000), p 96.

as the reasons for judicial decisions) that has brought about and sustained the death penalty.¹⁸² In using music to discoverer the presence of aesthetics within the law, Manderson identifies numerous sites within the legal world through which the aesthetic asserts its influence.

Also taking notice of the aesthetics that surround the practice of law and the performance of music, is Caudill in 'Fabricating Authenticity: Law Students as Country Music Stars'.¹⁸³ Caudill conducted an analysis that combines elements of law and aesthetics and law as literature. Pursuing a law as literature approach, Caudill drew parallels between attitudes towards the behaviour of country music singers and attitudes towards the behaviour of the legal profession. Caudill observed that both activities are compared to images of a bygone time where people within that profession served particular values instead of being self-serving and supposedly inauthentic.¹⁸⁴ In dealing with issues of authenticity, Caudill drew attention not only to the various aesthetic qualities of music itself, such as styles of singing and lyrical content, but also to the aesthetics of the practices through which music is delivered and consumed, including styles of speech, artists' origins, stage presentation, artists' personal lives, dress, and hairstyles.¹⁸⁵ Lawyers too deal in the aesthetics of these things when operating the law.¹⁸⁶ Moving to a work similar to Manderson's in its musically-inspired structure, Richmond's 'Law and Popular Music: An Etude in Two Movements' is divided into two parts.¹⁸⁷ In the first of these two 'movements' Richmond took a law and aesthetics approach, arguing that divorce lawyers could improve their ability to empathise with clients by listening to music that allowed

¹⁸² Manderson (2000), p 95.

¹⁸³ Caudill (1999).

¹⁸⁴ Caudill (1999), p 1573.

¹⁸⁵ Caudill (1999), p 1579.

¹⁸⁶ Caudill (1999), p 1575.

¹⁸⁷ Richmond (1998), p 79.

them to feel the emotions that their clients' were experiencing.¹⁸⁸ Richmond suggested that the music of Paul Simon was suitable for such a purpose.¹⁸⁹ Simon wrote songs about his divorces,¹⁹⁰ conveying his feelings on the subject through lyrics and the aesthetics of sound.¹⁹¹ In the second 'movement' of the paper, Richmond applied a 'law in literature' approach, demonstrating that the depiction of lawyering in the stage musical *Rent*¹⁹² may be used as an engaging scenario in illustrating to students the operation of certain types of law.¹⁹³ Similarly, in 'Law and Lawyer in Pop Music: A Reason for Self-Reflection', Jaff argues that popular musicians whose work conveys 'socially conscious' thoughts and feelings about lawyers can be used by lawyers to think upon and evaluate their role in society.¹⁹⁴

The style of research known as law and literature began by looking to illustrations of lawyering. In general, law and literature studies proceed from the idea that literature has something to teach the law. How law learns from literature varies according to the approach taken. Early studies pursued an approach that Weisberg has labelled 'law in literature'.¹⁹⁵ This method examined depictions of lawyering in literary works but did not treat these portrayals as necessarily connected to real-world legal work or cultural concerns. A second approach Weisberg calls 'law as literature', where law's primary materials are analysed as if they are works of literature.¹⁹⁶ Working in this approach, White used literature to develop methods of lawyering such as writing and interpretation.¹⁹⁷ For example, Geary describes

¹⁸⁸ Richmond (1998), pp 79-80.

¹⁸⁹ Richmond (1998), p 79.

¹⁹⁰ Richmond (1998), p 81.

¹⁹¹ Richmond (1998), pp 81-82.

¹⁹² Larson, Jonathan (1996) *Rent*.

¹⁹³ Richmond (1998), pp 96.

¹⁹⁴ Jaff (1986), pp 668-669.

¹⁹⁵ Weisberg (1989), p 1. Also, White (1990), p 17.

¹⁹⁶ Weisberg (1989), p 1.

¹⁹⁷ White (1990), pp 17-18.

White's approach to interpretation as one that uses literary criticism to show ways in which the law can act as a force that harmonises difference without homogenising it.¹⁹⁸ A third style, which may be called 'law and literature', is propounded by MacNeil.¹⁹⁹ MacNeil's project did not primarily concern depictions of lawyering (as in 'law in literature') or legal processes ('law as literature') but instead found analogies for jurisprudential tropes in ostensibly un-legal popular cultural texts, using these texts to explore the workings of legal philosophy.²⁰⁰ MacNeil aims to restore to jurisprudence an attentiveness to legal issues of fundamental importance and concern to those outside of the academy.²⁰¹ MacNeil argued that recent mainstream jurisprudential scholarship has ignored its core matters of discussion, neglecting concepts such as justice, rights, and morality, topics which are of concern to the public.²⁰² The use of popular culture in jurisprudential study, MacNeil suggests, will remind jurisprudence of the importance of these issues.²⁰³ Furthermore, popular culture is capable of providing insights into jurisprudence that conventional legal academic work has not discovered.²⁰⁴ This commentary does not arise merely from coupling points of similarity between the popular and the academic. Instead, popular cultural outputs offer an opinion on matters dealt with by high theory before academia arrives to join the two.²⁰⁵ MacNeil's use of popular cultural texts to provide insight into jurisprudence establishes the methodological foundation for this study, which will be detailed in the next section.

¹⁹⁸ Gearey (2001), p 9.

¹⁹⁹ MacNeil (2007).

²⁰⁰ MacNeil (2007), p 1.

²⁰¹ MacNeil (2007), p 1.

²⁰² MacNeil (2007), pp 1-2.

²⁰³ MacNeil (2007), pp 1-2.

²⁰⁴ MacNeil (2007), p 1.

²⁰⁵ MacNeil (2007), pp 8-9.

This literature review has described the academy's exploration of various interactions between music, people, and the law. Musicology, sociology and cultural studies have explored the uses and meanings of music. Law and music has examined traditional musical genres in relation to concrete instances of lawyering, but has not substantially engaged with popular musical forms and jurisprudence. Law and aesthetics, too, has not seen a more extensive investigation into popular music. Jurisprudence has been linked to popular culture in law and literature studies, but popular music has been omitted from these jurisprudential readings. Together, these literatures provide the resources with which jurisprudence can enter into dialogue with rock music.

III – From Law ‘n’ Lit to Rock ‘n’ Roll

This thesis aims to produce what might be called, in acknowledgement of its combination of popular music and jurisprudence, and in homage to Frith²⁰⁶ and MacNeil,²⁰⁷ a theory of ‘*sound* judgements’. Whilst the content of the reviewed musicological and cultural studies literatures are relevant as supportive data for the present study’s analysis, these disciplines do not contribute to its methodology. Furthermore, sociology, with its focus on the concrete implications of music, is totally omitted, as it does not accord with the theoretical register of this thesis. Also, the methodology of this thesis does not draw from law and music scholarship in a substantial way. As most of the law and music literature deals with traditional forms of music, its methodology is unsuitable for the analysis of popular music. Supporting this assertion, for example, is Caudill’s observation that Balkin and Levinson’s explanation of musical performance as an act of judicial interpretation relies upon a

²⁰⁶ Frith (1981) *Sound Effects*.

²⁰⁷ MacNeil (2012) *Novel Judgements: Legal Theory as Fiction*.

distinction between composer and performer that often does not exist in popular music.²⁰⁸ Similarly, Whiteley observes that popular music is not disseminated through musical notation.²⁰⁹ The textual dimension of classical music through which it can be analogised to legal practices is absent in rock music. Furthermore, specific legal practices are not the subject of inquiry here. As will be explained below, this study proposes a jurisprudential reading of music.

Law and aesthetics, however, is incorporated. This study heeds Gearey's reminder of Nietzsche's call to aesthetic responsibility, using a thematic present in Nietzsche's philosophical works to structure a narrative that connects the legal philosophers and musicians selected for analysis. It is argued that this thematic, which is concerned with acts of will creating value in the face of nihilism, characterises the mentality that unites the legal philosophers and rock stars analysed in this study. Exploring jurisprudence and music through a common theme allows the two fields to be united in a way that draws attention to similarities and preserves differences, allowing for the discovery of jurisprudential understandings.

Mainly, this study follows MacNeil's methodology of 'reading jurisprudentially', examining popular cultural texts from a jurisprudential perspective in order to yield insights regarding the latter.²¹⁰ Reading jurisprudentially first requires pairing a work of jurisprudence with a cultural text. In *Lex Populi*,²¹¹ MacNeil conducts readings of popular books and films. For example, in the chapter 'Kidlit as Law 'n Lit: Harry Potter and the Scales of Justice', MacNeil reads J. K. Rowling's novel *Harry Potter and the Goblet of Fire*.²¹² In this thesis, jurisprudence is applied not to the written word and to film, but to another seemingly a-

²⁰⁸ Caudill (1999), p 1575.

²⁰⁹ Whiteley (1992), p 5.

²¹⁰ MacNeil (2007), p 156.

²¹¹ MacNeil (2007).

²¹² Rowling (2000).

jurisprudential cultural text: the music and performativity of rock stars. According to MacNeil's method, the cultural texts under consideration do not need to contain overt expressions of legality or jurisprudence. In fact, most of MacNeil's chosen texts have little or no obvious legality circulating about them, and none are explicitly or intentionally concerned with jurisprudence. For example, after proposing a jurisprudential reading of *Harry Potter and the Goblet of Fire*,²¹³ MacNeil concedes:

‘Not that the legal profession directly figures in the text’s characterological system in the way, say, journalism is satirized in Rita Skeeter, the odious queen of tabloid tittle-tattle.’²¹⁴

Similarly, while political and/or legal campaigning is present in the musical output and extra-curricular activities of some popular musicians, the current study examines the work of rock stars who are usually not obviously engaged with legality. Choosing less obvious points of comparison between popular music and jurisprudence allows for the exploration of deeper philosophical ‘common ground’ between the two areas. It is these similarities that make possible a jurisprudential reading. According to MacNeil, justification for a jurisprudential reading of the text can be found in the text’s ‘imagination’, as he demonstrates when addressing Harry Potter:

‘But despite their absence as characters from the *dramatis personae*, lawyers nonetheless may be the novel’s privileged implied readers because of their pervasive presence in the text’s setting, language, and theme: what James Boyd White would call its “legal imagination” and what in this text I call its *lex populi*.’²¹⁵

²¹³ Rowling (2000).

²¹⁴ MacNeil (2007), p 12.

²¹⁵ MacNeil (2007), p 12.

‘Anything fits, you know, if you’re tripping off on some trip,’ argued John Lennon to a confused fan who believed that the details of his life matched so closely Lennon’s songs that Lennon must have written the songs for the fan himself.²¹⁶ But while the fan was mistaken in his belief that Lennon’s songs were authored to address one listener’s particular concerns, it is not to say that the songs did not speak to those concerns generally. This thesis argues that the connections between certain concerns – in this case the concerns of jurisprudence – and a cultural text are not entirely arbitrary. Rather, the association between the two are based on the apprehension that both the legal philosophy and cultural text (the theorist and rock star in the case of this thesis) are similar in their preoccupations and the ways by which they contend with these issues.

Having paired an area of jurisprudence with a cultural text, the second step of reading jurisprudentially is to convey the issues that both are engaged with. In MacNeil’s reading of Harry Potter, J. K. Rowling’s ‘wizarding world’ is suffused with issues of liberal jurisprudence. Third, the reading uses this comparison to arrive at a new jurisprudential understanding by examining the ways in which the cultural text exposes and critiques the workings of jurisprudence. Read this way, *Harry Potter and the Goblet of Fire* highlights the shortcomings of liberal concepts such as rights and justice. The formal structure fashioned by these concepts produces inadequate results, and the novel suggests that the improvement of this area of legal thought is to come through the ‘transformative potential of substantive justice...’²¹⁷ Bringing jurisprudence to Harry Potter reveals to jurisprudence something about itself that it could not recognise on its own. It is such jurisprudential insight that this thesis searches for in popular music.

²¹⁶ Solt (2006) *Imagine: John Lennon*.

²¹⁷ MacNeil (2007), p 27.

By what method are jurisprudence and rock music to ‘come together’?²¹⁸

This study conducts jurisprudential readings of legal philosophers through select rock stars. On the main, the rock stars chosen do not discuss concrete political matters as does the music of, say, Bob Dylan²¹⁹ or The Clash.²²⁰ Instead, the sampled rock stars engage with cultural issues on a more general plane, addressing broad matters of freedom and identity, for example. Involvement at this overarching level allows the rock stars to communicate with the abstract systems conceived by mainstream jurisprudences of the 20th century, where society is viewed in terms of detached concepts such as justice and rights.

It is not argued, however, that jurisprudence and rock music are alike or analogous in every way. This is especially so as rock stars are provocative; they carry out their work at sites of cultural contestation and unsettle the mundane and complacent. Dealing in the contentious, rock stars are performative of the conflicts over understandings of the law itself (i.e. jurisprudence). Applying rock stars to jurisprudence highlights the tensions, inconsistencies and paradoxes of the latter. Rather than claiming a total correlation between jurisprudence and rock, this study identifies number of particular connections that help deepen understanding, an approach explained by Lewis Hyde in his comparison of the artist and the mythical archetype of the trickster:

‘My own position, in any event, is not that the artists I write about are tricksters but that there are moments when the practice of art and this myth coincide. I work by juxtaposition, holding the trickster stories up against specific cases of the imagination in action, hoping that each might illuminate the other. If the method works, it is not because I have

²¹⁸ The Beatles (1969) ‘Come Together’ *Abbey Road*.

²¹⁹ Dylan (1964) ‘The Times They Are a-Changing’ *The Times They Are a-Changing*.

²²⁰ The Clash (1977) ‘White Riot’ *The Clash*.

uncovered the true story behind a particular work of art but more simply that the coincidences are fruitful, making us think and see again.’²²¹

Hyde does not claim to expose any essence or paramount quality in that which he analyses, but is attentive to the presence of comparisons that are worthwhile because they are helpful in explicating certain issues. This study regards the connections between rock stars and jurisprudence in the same way; as being helpful to jurisprudence.

The features of the rock star that can be usefully applied to jurisprudence are numerous. In his semiotic and sociological examination of Madonna, for example, Georges-Claude Guilbert identifies multiple facets that are socially significant and can be used as data for analysis:

‘I consider the whole of Madonna’s work *and* the whole of her person as a sum of signs lending themselves to analysis. Her songs, her videos, her movies, her book, her interviews, her TV appearances, as well as the outfits she wears, her hairstyles and her makeup constitute a vast text that I read...’²²²

Accordingly, this study takes as data the rock stars’ music, as well as album art accompanying these recordings, books of photographs, concert footage that demonstrates attire and performance, audio and textual recordings of interviews, and biographical and journalistic information. In developing an understanding of the rock stars and their significance to jurisprudence, the study is attentive to aesthetic qualities of the rock stars’ music and performativity. In doing so, the study follows Caudill, who utilised the aesthetic characteristics of musical activity, such as

²²¹ Hyde (1998), p 14.

²²² Guilbert (2002), pp 1-2.

instrumentation, performance styles and musicians' appearance.²²³ The study does not treat music as a solely literary enterprise by analysing only lyrics. Attention is also given to sound; to the rhythms, melodies, and sonic textures of the songs that are examined. The study also uses cultural studies research as supportive data in places where a cultural understanding reveals important facets of the rock stars' operations. A preview of the implementation of this method for each chapter is offered in the following section.

Playlist

This thesis is comprised of eight chapters. The following chapter, chapter 2, details the philosophical themes shared by the legal philosophers and rock stars that are subject to analysis. Each subsequent chapter reads a legal philosopher or philosophers through the work of a particular rock star. The theories under examination are some of jurisprudence's 'greatest hits': justice, sovereignty, the good life, rights, and rules. The legal philosophers that represent these themes were selected due to their canonical status within 20th century jurisprudence. Each rock star was prominent in the culture of their era. These rock stars have insights to contribute to the workings and repercussions of the law. Together, the chapters present a broader depiction of what rock musicians might have to show about jurisprudence. Rock stars are presented chronologically, although there is significant overlap in the careers of all involved. Furthermore, as Manderson notes:

'The relationship between law and music across the centuries shows striking parallels and echoes. If we study them carefully each can

²²³ Caudill (1999), p 1575.

illuminate the other, binding them together so that we can see them as two aspects of the same process and the same history.²²⁴

Often, the jurisprudes and rock stars allied in this thesis share the same nationality, occasionally they come from similar backgrounds, and some connect through an echo of the times.²²⁵ The order in which theorists and rock stars are presented constitutes a narrative whereby each pair responds to or proceeds from the work and times of the previous duo.

Chapter 3, *The Law of the (Electric Lady)Land: Jimi Hendrix on Justice*, begins the narrative with John Rawls' formulation one of jurisprudence's oldest concepts: justice. Under examination is Rawls' attempt to entice people towards a society founded upon distributive principles. Rawls finds his rock star counterpart in Jimi Hendrix, the virtuosic guitar player who takes listeners on journeys to psychedelic worlds and demonstrates the hallucinatory, unreachable nature of Rawls' vision.

Chapter 4, *Dear (Juris)Prudence: John Lennon as Sovereign*, calls upon the writings of Thomas Hobbes, Carl Schmitt, and Giorgio Agamben to discuss sovereignty. This dark art of jurisprudence finds its popular musical expression in

²²⁴ Manderson (2010), p 1.

²²⁵ Each combination of jurisprude and rock star in this thesis is presaged by a quote from the contemporaneous work of another musician. These quotes act as 'counter-points' that help expose the kernel of importance in the analysis of that chapter's rock star, and consequently, in the legal philosophy under examination. Chapter 3 starts by quoting a Frank Zappa song that attacks the psychedelic counter-culture. The song was released in 1968; arguably the peak year of Jimi Hendrix's musical career. A U2 song is offered at the beginning of chapter 4. It dates from 1980, the final year of John Lennon's life, and is sung by Bono, whose rock star saviour tendencies are not totally dissimilar to Lennon's. Chapter 5 sees the transatlantic meeting of rock intellectuals, bringing Steely Dan into contact with David Bowie by way of a quote from 'the Dan's' debut album, which took to stores the same year as Bowie's *The Rise and Fall of Ziggy Stardust and the Spiders from Mars*. 'Ambitious', a song from Jeff Beck's *Flash* album is the source of the quote used at the outset of chapter 6. Beck worked on the album with producer Nile Rodgers. At the same time, Rodgers was producing Madonna, and Beck lamented that he was often overlooked by Rodgers in favour of the pop star: Carson (2001), p 176. The music video for 'Ambitious' includes the appearance of a Madonna look-alike: Power (2011), pp 315-316; Beck, Jeff (1985) *Ambitious* video. Chapter 7 quotes from Jamiroquai in 1994, the year of Oasis' *Definitely Maybe*, to associate two of English rock's likely lads: Jay Kay and Liam Gallagher.

John Lennon, a sovereign-style figure trying to usher in something akin to a state of exception to deal with what he perceived as the inability of the 1960s counter-culture to neutralise human conflict and create a better world. Lennon contests the notion of statehood instantiated by Hendrix, offering his vision of a violent world that requires the presence of a supreme legal power, and demonstrating the dangerous repercussions of the suspension of normativity.

Natural law offers an alternative to sovereignty's belief in humanity as a quarrelling mass. In chapter 5, *The Rise and Fall of Ziggy Stardust and Natural Law*, John Finnis' bid at restoring an older, more expansive view of human nature is assessed through David Bowie. The brazenly artificial Bowie pits the transformative against the timeless, a contravention of nature which suggests that Finnis' natural law may be less about universal human experience than it is about the internal world of the individual.

Continuing this focus on the self is chapter 6, *Confessions on a Dance Law: Madonna and Rights*, which casts Madonna's performative acts of identity creation as assertions of individual rights in keeping with the liberal jurisprudence of Ronald Dworkin. This comparison highlights the paradoxical consequences of legal rights, exposing them as constructs intended to maintain the integrity of individuals but requiring a collectivity against which they can be contrasted.

The collective is the starting point of chapter 7, *You Gotta Rule with It: Liam Gallagher and Legal Positivism*, which examines how H.L.A Hart's positivist system of law attempts to secure acquiescence from its subjects. The powerful singing style of Liam Gallagher, the frontman of defunct English rock band Oasis, is used to show that the rules and processes that supposedly validate Hart's system may be inseparable from the force it wields to ensure compliance.

Each analysis connects jurisprudence's detached theorising with the visceral medium of rock music. Although seemingly disparate, law and music are both concerned with creating and transforming. As will be discussed in the following chapter, is Nietzschean philosophy that exposes the common ground that jurisprudence and rock share because of their processes. Throughout, and especially at the culmination of each analysis in this thesis, Nietzsche's *ubermensch* figure is applied to the interpretation of the endeavours of law and music. Nietzschean philosophy affords both vertical and horizontal integration to the subjects of this thesis; it unites jurists and musicians with each other but also provides consistency of understanding within each discipline. The Nietzschean interpretations found in each chapter relate specifically to each chapter's particular legal philosophy. In the final chapter, the scope of these Nietzschean interpretations will be broadened to take in the implications of the rock star for jurisprudence generally.

The jurisprudence of rock music reaches the end of its performance in the 1990s, but not before an 'encore' in chapter 8, *Sympathy for the Legal: The End of the Rock Star?*, which discusses the freedom, flourishing, and flaws that have been presented on this journey through the intellectual constructs of legal thinkers and the imaginary worlds of visionary musicians. The aftermath of these legal and musical projects is revealed, and it is questioned as to what happens when the show is over. But for now, the band is warming up and the show is soon to start.

‘Hi guys. By the way, are you aware you’re being illegal? It’s making your saviour
behaviour look evil.’

– Arcadia.¹

¹ Arcadia (1985) ‘Election Day’ *So Red the Rose*.

Chapter Two

Hot for Nietzsche:² Philosophical Orientation

The legal philosophers and rock stars under examination in this thesis are fundamentally concerned with the same cultural issues. In confronting these issues, the jurisprudes and rock stars, to varying degrees, conform to a thematic identifiable in the philosophy of Friedrich Nietzsche. This thematic, of individual responsibility for authentic living through creativity, appears vividly in Nietzsche's work *Thus Spoke Zarathustra* (henceforth 'Zarathustra').³ In *Zarathustra*, society is depicted as an environment that demeans its inhabitants, depriving them of access to fundamental human joys by binding them in routine and constricting their imaginations. Liberation can only occur when a superman, or 'ubermensch', exercises his will to break through the strictures of this oppressive culture. The ubermensch narrative will be explained in detail in section one of this chapter. Sections two and three will identify the presence of the Nietzschean thematic in mainstream legal philosophy and rock music of the 20th century.

I – The Nietzschean Thematic

The character Zarathustra is an emissary for the practices and attitudes towards life propounded by Nietzsche.⁴ Zarathustra preaches the ubermensch, a creature transformed into something beyond man [sic] by his escape from 'nihilism,

² Van Halen (1984) 'Hot for Teacher' 1984.

³ Nietzsche (1999).

⁴ Spinks (2003), p 116.

ressentiment and the reactive values of slavish nature.⁵ It is uncertain whether Zarathustra himself is an *ubermensch* or whether he is merely a prophet working to provoke the arrival of this new being. Inspection of Zarathustra's activities does not clarify his status. He appears before mankind as a traveller, a teacher, and a leader; tasks that may be undertaken by man and *ubermensch* alike. There is evidence that Zarathustra has moved at least some distance from man. An elderly fellow, the first other Zarathustra encounters in the story, identifies him as a changed being.⁶ Throughout the text, Nietzsche attributes to Zarathustra the joyous outlook and affirmative disposition the *ubermensch* embodies.⁷ Furthermore, an episode where Zarathustra ignores constant disparaging remarks to climb ever higher up a mountain⁸ suggests that Zarathustra is engaged in his own project of overcoming, rather than only entreating others to progress beyond man. Conversely, Zarathustra might only glimpse the coming of the *ubermensch* rather than live his in this evolved state. *Zarathustra* is anxious to convince the reader that its protagonist is joyous; a central quality of the *ubermensch*, but at least one commentator finds the story unsuccessful on this front.⁹ These possibly strained expressions of exultation suggest an ambivalence and perhaps even a melancholy to Zarathustra and to his attempt at surpassing of man: because Zarathustra does not describe exactly how to identify the *ubermensch*,¹⁰ it cannot be judged how successful his transformation has been; how far he has moved towards a new state of being. It is argued here that *Zarathustra*'s ambiguity does not deprive the book of its usefulness. Instead, the text is inclusive of a richness of meaning. It provides a way of approaching the complexities,

⁵ Spinks (2003), p 116.

⁶ Nietzsche (1999), p 2.

⁷ For example, Nietzsche (1999), p 2, where Zarathustra is said to move 'like a dancer'.

⁸ Barrett (1962), p 193.

⁹ Tanner (1994), p 46.

¹⁰ Tanner (1994), p 48; p 50.

uncertainties, and paradoxes of the legal philosophers and rock stars discussed in this study. Therefore, this thesis takes Zarathustra to be an *ubermensch*. He is not necessarily a fully realised specimen, but the imperfections of his character and story connect with the inevitable shortcomings of human endeavour. His narrative is suitable for use in an exploration of the dilemmas, challenges, and unexpected consequences of trying to create value in worlds of law and music. This narrative will now be described and the central ideas of transformation, activity and reactivity, and self-determination will be elucidated.

Zarathustra commences with its titular character, who has spent a decade alone in contemplation on a mountain, deciding to re-enter society to bring light to others.¹¹ Zarathustra proceeds to a town, and in its marketplace he declares to the crowd ‘I teach you the Superman. Man is something that is to be surpassed.’¹² ‘What have ye done to surpass man?’ he asks.¹³ Zarathustra argues that by focusing on ‘superearthly hopes’,¹⁴ which are imagined qualities beyond lived existence, most people distract themselves from the challenges and pains of life, and in consequence, are weak of character. In contrast, the *ubermensch* engages with earthly phenomena and creates meaning through the exertion of will.¹⁵ Every person is responsible for living their life fully, and there can be no intermediaries for this task. What is required is an unflinching confrontation with life’s terrors and adversities.¹⁶ The people in the marketplace ridicule Zarathustra and disregard his teachings.¹⁷ Zarathustra responds by describing the behaviour that has transformed mankind into the ‘last men’, contemptible creatures that can only be redeemed by abandoning

¹¹ Nietzsche (1999), p 1.

¹² Nietzsche (1999), p 3.

¹³ Nietzsche (1999), p 3.

¹⁴ Nietzsche (1999), p 3.

¹⁵ Nietzsche (1999), p 3.

¹⁶ Stern (1978), p 88.

¹⁷ Nietzsche (1999), p 4.

‘man’ and progressing to a new state of being.¹⁸ The last men inhabit hospitable climes, avoid illness, anaesthetise their minds with substances, work and acquire wealth in moderation, and are equal to each other rather than lapsing into inferiority or striving for superiority.¹⁹ Though they think themselves to be intelligent and knowledgeable and tease others because of it, the last men are not vindictive, as they avoid going to extremes.²⁰ In satisfaction of this commitment to mediocrity, the last men also indulge themselves only in small amounts.²¹ The consolation and protection of the group insulates these people from hardship and prevents them from becoming stronger by exerting themselves in confronting difficulties.²² For a second time Zarathustra fails to convince the townspeople to forsake their adherence to consoling values and become supermen. Zarathustra resolves to entice individuals away from the general population rather than try to reform the entire ‘herd’.²³ Zarathustra wishes to avoid being a herdsman, and instead wants to teach the ‘creators, the reapers, and the rejoicers’ how to become supermen; recognition that a group cannot be made into supermen by addressing the group as a whole.²⁴ Becoming an *ubermensch* requires fidelity to the personal, and only individuals can make this transformation.

The idea of transformation is fundamental to Nietzsche’s characterisation of man and *ubermensch*. This is true not only in the sense that man has to be escaped through transformation, but also in that inertia, a lack of transformation, is man’s defining feature. Stagnancy exists because for ‘man’ to remain a stable category the

¹⁸ Nietzsche (1999), p 6.

¹⁹ Nietzsche (1999), p 7.

²⁰ Nietzsche (1999), p 7.

²¹ Nietzsche (1999), p 7.

²² Stern (1978), p 75.

²³ Nietzsche (1999), p 11.

²⁴ Nietzsche (1999), p 11.

values ascribed to this concept cannot change.²⁵ It must be explained why this static condition is seen by Nietzsche as an undesirable state of existence. ‘Active and reactive forces’ can be detected throughout history, channelled by humanity in the structuring of existence.²⁶ To act is to affirm, to will and create, and so is ‘noble’, while to react is to follow and so is ‘slavish’.²⁷ Aligning one’s being with the concept of ‘man’ and its static values is a reactive, and thus loathsome, deed.²⁸ In explication of this notion; to independently define one’s being is to be active. To live in accordance with the pre-existing definition of ‘man’ is reactive as it means following an indiscriminately applied injunction (because everybody is ‘man’ everybody must act in keeping with man’s definition), sacrificing one’s initiative, fidelity to one’s uniqueness, and relinquishing one’s will. To be ‘man’ is to inhabit a state of meaninglessness or nihilism.²⁹ Again, to elucidate; man obeys fossilised values by synchronising his life with who he has been told he is. Humanity has become overwhelmingly reactive.³⁰ Its will is now only used to react.³¹ This situation has been arrived at through a history of reactive events.³² A new societal order defines itself in relation to its deposed predecessor, for example.³³ The exercise of will must not occur as a reaction but should proceed solely from affirmation.³⁴ The metaphysical realm, the place where God dwells, is the consummate reactive creation.³⁵ The metaphysical lies beyond the direct apprehension of life, and is the

²⁵ Spinks (2003), p 116.

²⁶ Spinks (2003), p 116.

²⁷ Spinks (2003), p 116.

²⁸ Spinks (2003), p 116.

²⁹ Spinks (2003), p 116.

³⁰ Spinks (2003), p 116.

³¹ Spinks (2003), pp 116-117.

³² Spinks (2003), p 117.

³³ Spinks (2003), p 117.

³⁴ Spinks (2003), p 117.

³⁵ Spinks (2003), p 118.

standard against which life is assessed and always found to be inadequate.³⁶ When humanity loses the confidence to fashion values for itself, it seeks with urgency something outside of itself to obey.³⁷ Motivated by this fear, faith in the metaphysical may persist after the death of God.³⁸ Science, for example, may occupy the place where God once was.³⁹ This point will be further developed by Nonet in part two of this chapter. Life without the metaphysical requires people to accept for themselves the responsibility to produce meaning.⁴⁰ Zarathustra illustrates how the *ubermensch* creates values when he teaches a young man of the ‘three metamorphoses’, a metaphor for the process of becoming an *ubermensch*. The first transformation sees the spirit of the prospective *ubermensch* as a camel.⁴¹ The camel symbolises a person encumbered by the values ascribed to ‘man’.⁴² The camel initially bears this weight, but when it no longer accepts the burden it becomes a lion.⁴³ The lion is scornful of the values society imposes and seeks to destroy them. These values then reveal themselves as a dragon.⁴⁴ The dragon claims that there are no values left to create and demands that the spirit submit to the dragon’s commandments.⁴⁵ The lion combats the dragon, and, defeating it, earns for the spirit freedom to create its own values and imbue life with meaning through the exertion of will.⁴⁶ Self-determination is the goal of the *ubermensch*. The human being is separate from the natural world in that he is not compelled by unthinking drives and so has

³⁶ Spinks (2003), p 118.

³⁷ Spinks (2003), p 118.

³⁸ Spinks (2003), pp 118-119.

³⁹ Spinks (2003), pp 118-119.

⁴⁰ Spinks (2003), p 119.

⁴¹ Nietzsche (1999), p 13.

⁴² Tanner (1994), p 51.

⁴³ Tanner (1994), p 52.

⁴⁴ Nietzsche (1999), pp 13-14.

⁴⁵ Nietzsche (1999), pp 13-14.

⁴⁶ Nietzsche (1999), pp 13-14.

control over the meaning of his existence and the definition of his self.⁴⁷ Self-determination is a possibility for man because of the courageousness that lies within the species.⁴⁸ Courage is the core quality of the ubermensch, who has to constantly divest himself of beliefs in a life beyond the physical as well as the solace provided by these beliefs.⁴⁹ In abandoning the metaphysical, a person is able to confront the realities of life. Tevenar observes that the type of freedom secured by the lion, ‘freedom from’ values, is not the freedom most highly prized by Zarathustra.⁵⁰ ‘Freedom from’ is merely a prerequisite to being ‘free for’ self-determination.⁵¹ Zarathustra is concerned with what people make of themselves once they are free to create themselves.⁵² To invent new values the spirit must undertake its final transformation and become a child.⁵³ While the lion has the ferocity to deny the dragon, to issue a ‘nay’ to the dragon’s demands for subservience, the child is suffused with the innocence that allows for a ‘yea’ to life and the act of value creation.⁵⁴ The transformative process involves the attainment of a ‘contempt’ for received values, the recognition that they have constrained the will by moulding it into rigid forms.⁵⁵ However, a person must not remain in this destructive reactive phase.⁵⁶ Its purpose is only to create the freedom needed to define the meaning of one’s existence.⁵⁷ Spinks provides Kurtz from *Heart of Darkness*⁵⁸ as an example of someone trapped by the reactive force. Kurtz senses the untamed energies at play in

⁴⁷ Barrett (1962), pp 179-180.

⁴⁸ Barrett (1962), p 185.

⁴⁹ Barrett (1962), p 185.

⁵⁰ von Tevenar (2008), p 130.

⁵¹ von Tevenar (2008), p 130.

⁵² von Tevenar (2008), p 139.

⁵³ Nietzsche (1999), p 14.

⁵⁴ Nietzsche (1999), p 14.

⁵⁵ Spinks (2003), p 120.

⁵⁶ Spinks (2003), p 122.

⁵⁷ Spinks (2003), p 122.

⁵⁸ Conrad (2007).

nature, but cannot fashion anything meaningful from them.⁵⁹ He is anti-colonial but, because he fixatedly wishes to destroy the colonial, he reinscribes its power relationship in his dealings with the African people he subjugates.⁶⁰ Becoming a twisted god to these followers, Kurtz's reactivity sustains humanity's enslavement to the metaphysical.⁶¹ Under Spinks' reading, Nietzsche does not advocate such resentful fixations.⁶² What Nietzsche communicates through Zarathustra is that the metaphysical denigrates humanity because it steals from people the capacity to invent themselves through the exercise of will.⁶³ Once this power is reclaimed it should be used joyously by creating values that affirm life. Lastly, Zarathustra advises his young pupil that these newly created values should be a matter for the individual, and should not be named. Values must remain ineffable so that they cannot be imposed on others, dampening their creativity, their opportunity for authentic living. Zarathustra realises the stagnancy of man's present state and announces the need for transformation. Being unable to persuade the entire collective to undertake this metamorphosis, Zarathustra targets smaller groups, showing them how to create new values through a process of destruction and affirmation. The *ubermensch*, as taught by Zarathustra, represents Nietzsche's aspirations for humankind. The *ubermensch* is supposed to jettison the frailties and indulgences of man, create affirmative values, and help others free themselves.

However, critical analyses of *Zarathustra* expose a tension between Zarathustra's intervention in the herd's way of life and the content of his message to the herd; challenge the extent to which the ideal of the *ubermensch* is achievable, revealing complexities present in the attempt to surpass human weaknesses and

⁵⁹ Spinks (2003), p 122.

⁶⁰ Spinks (2003), p 122.

⁶¹ Spinks (2003), p 122.

⁶² Spinks (2003), p 123.

⁶³ Spinks (2003), p 123.

confidently manufacture new values; and question what happens to the relationship between the *ubermensch* and the herd after the *ubermensch* sheds the values of the collective. These three critiques are examined below for their contributions to the philosophical foundations of this thesis.

First, there is a tension between the kind of being Zarathustra believes humankind needs to become and the way such transformation is started. Zarathustra diagnoses the shared values of the herd as a malady afflicting the human. Having uncovered this truth, it is notable that Zarathustra is not content with his own freedom from the collective. Beyond this, he resolves to help others free themselves. This mission coaxes Zarathustra from the mountain; it prompts his return to civilisation. Zarathustra commits ‘saviour behaviour’ (in the words of Simon Le Bon⁶⁴) throughout his story. That Zarathustra is a saviour is consistent with the style in which his story is written. Commentators such as Tanner and Ridley have observed that *Zarathustra* parodies the Bible.⁶⁵ However, *Zarathustra* is not merely parody. There is a sincere, if not always conscious, religiousness to Nietzsche’s philosophical undertaking. In his formative years, Nietzsche knew a reality where God presided over man, man was superior to animal life through God’s grace, and man would live on after death.⁶⁶ Once science had shown him (what he believed was) irrefutable evidence of the non-existence of God, the similarity of man and animal, and the finality of death, Nietzsche began a project to extinguish and replace the metaphysical.⁶⁷ He:

‘...put forward three hypotheses which, whether he intended it or not, offered naturalistic substitutes for God, divine grace and eternal life:

⁶⁴ Arcadia (1985) ‘Election Day’ *So Red the Rose*.

⁶⁵ Ridley (2007), p 90; Tanner (1994), p 46.

⁶⁶ Hollingdale (1999), p 164.

⁶⁷ Hollingdale (1999), p 164.

instead of God: the superman; instead of divine grace, the will to power;
and instead of eternal life – the eternal recurrence.’⁶⁸

As Hollingdale describes it, Nietzsche’s attempt to save humankind is double: people must be delivered not only from belief in God, but from the death of God as well, a task to be fulfilled by positing the *ubermensch*. But the details of the *ubermensch*, the vessel of salvation, are often vague or absent in Zarathustra’s teachings. Zarathustra does not explain how the *ubermensch* is to be initiated, how to identify him, and what task is to occupy this being.⁶⁹ He provides few specifics at all when profiling the *ubermensch* beyond stating that his central characteristic is affirmative behaviour.⁷⁰ Adding to this the poetic nature of Zarathustra’s oratory results in teachings that are problematic to decode.⁷¹ Tanner concludes that Zarathustra is uncertain about the insight he is supposed to convey.⁷² Zarathustra’s saviour activities are fraught with contradiction. Zarathustra wants a compliant audience to which he can ‘teach the superman’, yet he has an aversion to followers.⁷³ This aversion is evident in *Zarathustra*’s narrative, where Zarathustra recruits disciples, instructs them, and repeatedly sends them away.⁷⁴ If Zarathustra reveals, believing that he is correct, the condition of man and the necessary response to this ailment, it is strange for him to deter obedience to his teachings.⁷⁵ Rather than describing Zarathustra as uncertain about what to teach, it might be more accurate to say he is conflicted as to how much he should tell others.⁷⁶ The source of the conflict is as follows: Zarathustra is seemingly the only one to realise what is wrong with

⁶⁸ Hollingdale (1999), p 164.

⁶⁹ Tanner (1994), p 48; p 50.

⁷⁰ Ridley (2007), p 90.

⁷¹ Tanner (1994), p 47.

⁷² Tanner (1994), p 46.

⁷³ Tanner (1994), p 46.

⁷⁴ Ridley (2007), p 89.

⁷⁵ Tanner (1994), p 46.

⁷⁶ Ridley (2007), p 95.

man and what must be done. If Zarathustra does not inform the people of his discovery, they will likely keep on living the deadened life dictated to them by the values engraved deep into their minds.⁷⁷ However, humanity must respond to the condition of man by freeing themselves individually and creating their own values. If Zarathustra delivers his message of liberation indelicately, the group will likely ‘misunderstand it... as an externally imposed set of commands...’, the very thing he is trying to free them from.⁷⁸ Ridley suggests that Zarathustra can try to avoid this tension by offering his insights as recommendations rather than as commands, letting people’s minds seize upon his ideas for themselves.⁷⁹ This does not defuse the tension, however, as most people within the herd do not want to change. If they did, then a saviour such as Zarathustra may not be required. Ridley acknowledges the rigidity of man’s mind when he says that the people’s values are deep-seated. Nor does ruling over the collective accomplish Zarathustra’s goal, as it maintains the slavish attitude the ubermensch wants to eradicate. This is the sort of dilemma Bob Dylan wryly expresses in coupling liberation and injunction when singing ‘don’t follow leaders, watch your parking meters,’ in *Subterranean Homesick Blues*.⁸⁰ It is a tension that makes Zarathustra a wavering saviour.

Second, it is questionable whether man can be surpassed as completely as Zarathustra suggests in his three metamorphoses, leaving behind resentment, regret, and other human frailties. A person’s history and unique self, with its triumphs and fears, cannot be escaped. They form the luggage that U2 call ‘all that you can’t leave behind’.⁸¹ The quest to become an ubermensch is motivated by the desire to escape the limitations of man, but the ubermensch really carries his flaws with him. They

⁷⁷ Ridley (2007), p 96.

⁷⁸ Ridley (2007), p 96.

⁷⁹ Ridley (2007), p 95.

⁸⁰ Dylan (1965) ‘Subterranean Homesick Blues’ *Bringing It All Back Home*.

⁸¹ U2 (2000) ‘Walk On’ *All That You Can’t Leave Behind*.

are the very source of his power. There is a distinction between the ubermensch and a 'complete and whole man'.⁸² The immense powers of the ubermensch are fuelled by incompleteness and insecurity.⁸³ This accounts for Tanner's disbelief in Zarathustra's seeming confidence and joy and his contention that nostalgia and regret infiltrate *Zarathustra's* text.⁸⁴ Perhaps Nietzsche is overanxious to stress Zarathustra's joyfulness because it turns out that the ubermensch retains impurities that were supposed to have been purged during his transformation. Feelings such as regret are opposed to affirmation and Nietzsche may have been eager to distract attention from them. Because the ubermensch is walled off from his negative feelings, he has no way to shake compulsions motivated by insecurity. Barrett argues that Nietzsche 'did not come to terms with his own devil'.⁸⁵ In other words, Nietzsche does not admit to the anxieties that motivate the ubermensch. He depicts this lack of self-awareness in *Zarathustra*. For some of the book, Zarathustra is accompanied by a dwarf that rides on his back as he climbs a mountain. Barrett interprets this dwarf to be an incarnation of Zarathustra's devil.⁸⁶ Zarathustra abandons the dwarf when the dwarf cautions Zarathustra as to the dangers of his actions.⁸⁷ That Zarathustra climbs away from the airing of his weaknesses supports the contention that the behaviour of the ubermensch is motivated by human qualities.⁸⁸ Because of his delusional self-regard, Zarathustra expects his devil to be an immense and impressive figure, rather than an exemplification of the banality and mediocrity that he truly fears.⁸⁹ Although banality and mediocrity are qualities that,

⁸² Barrett (1962), p 192.

⁸³ Barrett (1962), p 192.

⁸⁴ Tanner (1994), p 46.

⁸⁵ Barrett (1962), p 192.

⁸⁶ Barrett (1962), p 193.

⁸⁷ Barrett (1962), pp 192-193.

⁸⁸ Barrett (1962), pp 192-193.

⁸⁹ Barrett (1962), p 194.

as argued, society attempts to force on to individuals, these qualities may also exist within. Zarathustra fails to identify the dwarf as part of himself. For Zarathustra to acknowledge and claim the dwarf, and his humanity along with it, would require greater courage than would shedding the dwarf and trying to outclimb his weaknesses.⁹⁰ The mentality of the ubermensch prohibits him from admitting to his humanity.⁹¹ Consequently, the ubermensch will always continue climbing; keeping on with the project that is designed to stamp out his insecurities but only inflames them.

Third, and finally, the ubermensch's freedom from collective values raises uncertainties as to how he will relate to the collective. Even though the ubermensch is focused on the creation of personal values, that Zarathustra deliberately and repeatedly goes back to engaging with other humans suggests that the ubermensch is not a solitary creature. However, while the ubermensch may interact with members of the collective, he does not do so within the parameters of the group. Instead of relying upon society's values, the ubermensch connects with the energetic, wild, and exuberant elements of human existence. People are to cultivate individuality by returning to impulses that have been stifled by convention and by sourcing power in that which lies outside of society.⁹² A person who has reintegrated these previously estranged components of humanity may not be compatible with others.⁹³ The individual's channelling of wild energies, to commit acts of self-creation, might harm the collective, at least by the collective's standards.

In summary, *Zarathustra* presents the ubermensch, a figure that has freed himself from the inhibiting values imposed in mundane realm of the collective. The

⁹⁰ Barrett (1962), p 194.

⁹¹ Barrett (1962), p 194.

⁹² Barrett (1962), p 191.

⁹³ Barrett (1962), p 191.

ubermensch moves beyond man as a state of being through a process of transformation driven by the creation of new values. Zarathustra involves himself in the collective to show others the need to surpass man. Critiques of Zarathustra's mission include the difficulties of teaching freedom, the potential impossibility of surpassing man, and harm that Zarathustra may do to the collective.

The Nietzschean thematic appears throughout the work of the jurisprudes and rock stars examined in this thesis. To prepare for these readings of legal philosophers and rock musicians that are to be united by Nietzschean philosophy as discussed thus far, the Nietzschean qualities of law and rock music generally will be identified, starting with law.

II – Nietzsche's Presence in Jurisprudence

In Nietzsche there is scarcely any express engagement with law.⁹⁴ However, there is legality to Nietzsche's philosophy. Nietzsche condemns obedience to lifeless values:

‘Overturning the old tables is here again a call to life and will, an invocation that Nietzsche explicitly formulates in terms of waking the sleeping, inciting the weary, and arousing the slothful. Their conjoint sin is that of loving the past, the dead, more than the living, and it is that pious desire for death, for “the backworld” that gains expression in a law of the final or complete inscription, for the already fully written, for the image of a graven law.’⁹⁵

The laws of the past are embodied in the self that is dictated by others. Surpassing the self, a central charge in Nietzsche's philosophy, is a task that requires

⁹⁴ Goodrich and Valverde (2005), p 1.

⁹⁵ Goodrich and Valverde (2005), p 16.

subjection to one's own law.⁹⁶ The ubermensch acts as a legislator over himself, writing laws that are universally inapplicable.⁹⁷ To Zarathustra, a law cannot be blanketed across everyone, because, as has been shown above, to do so would ossify the concept of humanity.⁹⁸ That Zarathustra forbids the imposition of law upon others might seem destructive of theories about legal systems that unite or encompass collectives. Actually, Zarathustra's description of legislating as an individual enterprise helps explain how the law is constituted. As Douzinas and Gearey explain, while discussing Kafka's *Before the Law*,⁹⁹ individuals are responsible for creating and sustaining the law:

‘The man [before the law] believed that the law was universal and open to everyone. The vision before his death leads to the discovery that the law was only his own and that law's universality is its utter uniqueness. What type of law is unique in its ability to universalise and remains singular in all its general applications? Two come to mind immediately, aesthetic judgement and death.’¹⁰⁰

As was stated in the previous chapter, law is both individual and societal, formed in the minds of people and existing in ‘the space between’¹⁰¹ them. Like the act of aesthetic appraisal, where personal preferences are expressed in the service of overarching concepts such as ‘beauty’, particular visions of the law are offered up to the ideal of law that remains always to come. In a Nietzschean understanding, every individual is responsible for the creation of the law, and as Nonet demonstrates, the creation of law is founded upon will.

⁹⁶ Hollingdale (1999), p 159.

⁹⁷ Spinks (2003), p 124.

⁹⁸ Ridley (2007), p 95.

⁹⁹ Kafka (1948).

¹⁰⁰ Douzinas and Gearey (2005), p 361.

¹⁰¹ Roxy Music (1982) ‘The Space Between’ *Avalon*.

In Nonet's view, Nietzsche's assertion of the superiority of the will is perceptible in positive law.¹⁰² According to legal positivism, the validity of a law is not dependent on its faithfulness to abstract ideals such as moral codes. Severing law from these higher considerations is an expression of Nietzsche's belief that the *ubermensch* must free himself from metaphysics and will his own values. Furthermore, in the legal realm, a will that is able to elicit obedience to its command has made effective law.¹⁰³ This conception of positivism differs from that expounded by some legal philosophers. Here, compliance with a law is proof of both its existence and its validity.¹⁰⁴ Nonet explains that unlike, for example, Hans Kelsen's system of norms, which places a 'grundnorm' or legitimating principle beyond the manifest legal system, this kind of positivism requires no metaphysical justification.¹⁰⁵ If positivism is to be the foundation of law, it must find authority within itself rather than having recourse to some externality.¹⁰⁶ Nietzsche set down the will to power as the fundamental element of human behaviour,¹⁰⁷ and so the will that creates the law is the justification for law. Because of its foundational character, the will needs nothing outside of itself to be legitimate.¹⁰⁸ When living under a higher law, man does not create his own values. Under positive law, however, man embraces his being and takes for himself the entitlement to determine values.¹⁰⁹ To Nietzsche, this exercising of the will, rather than being 'enslaved' by values of others' makings, constitutes justice, and so posited law, a creation of will, is the true

¹⁰² Nonet (1990), pp 667-668.

¹⁰³ Nonet (1990), pp 667-668.

¹⁰⁴ Nonet (1990), p 668.

¹⁰⁵ Nonet (1990), p 669.

¹⁰⁶ Nonet (1990), p 670.

¹⁰⁷ Barrett (1962), p 200.

¹⁰⁸ Nonet (1990), p 670.

¹⁰⁹ Nonet (1990), p 671.

source of legal legitimacy.¹¹⁰ By locating justice in positive law, the usual relationship between positivism and natural law is inverted. Nietzsche's philosophy sees the ascension of posited law while higher law is made its inferior.¹¹¹ Positivism characterises the law as it now is.¹¹²

Nonet calls positive law nihilism.¹¹³ As used by Spinks, 'nihilism' describes the condition of man, who, in adhering to the values imposed on him, lives a meaningless life.¹¹⁴ Nonet's use of the word differs somewhat, instead referring to the blankness upon which the individual can exert will.¹¹⁵ Nihilism in this sense strips values of their binding quality so that new values may be established.¹¹⁶ A particular target of Nietzsche's nihilism is metaphysics. Metaphysics constructs a world outside the one communicated to people by their senses, and dismisses the aesthetic world as erroneous.¹¹⁷ To metaphysicians, goodness and beauty are inaccessible as they do not reside in the sensory world.¹¹⁸ To Nietzsche, this conception of existence represents an aversion to 'appearance, change, becoming, death, wishing, [and]... longing', which together comprise the substance of life.¹¹⁹ Metaphysics deprives people of the ability to thrive through the pursuit of the good.¹²⁰ However, Nietzsche's famous proclamation of the death of God is not the end of metaphysics. Metaphysics is a way of thinking that seeks to verify a truth beyond immediate human experience, and as God's existence was found to be

¹¹⁰ Nonet (1990), p 669.

¹¹¹ Nonet (1990), p 669.

¹¹² Nonet (1990), p 669.

¹¹³ Nonet (1990), p 672.

¹¹⁴ Spinks (2003), p 116.

¹¹⁵ Nonet (1990), pp 671-672.

¹¹⁶ Nonet (1990), pp 673-674.

¹¹⁷ Nonet (1990), p 672.

¹¹⁸ Nonet (1990), p 672.

¹¹⁹ Nonet (1990), p 672.

¹²⁰ Nonet (1990), p 672.

unprovable, God became untrue.¹²¹ Science's promises of advancement then took the place in the metaphysical realm once occupied by God.¹²² Like God, science encourages complacency and mediocrity by attempting to eradicate hardship.¹²³ In the sense that it examines and debunks values, the project of nihilism strives for truth.¹²⁴ Paradoxically, however, without also debunking truth, nihilism cannot complete its task, as something new will always appear to occupy the metaphysical space vacated by its 'untrue' predecessor. Truth will remain intact and the metaphysical will survive.¹²⁵ Nihilism must turn against truth and against itself, and in doing so, end its mission.¹²⁶ Following this, the will finds itself subject to no master.¹²⁷ In this state, the will may forge new values to create a richer way of life.¹²⁸ For Nietzsche, the deaths of God and truth are not to be conceptualised as the departure of the things that gave life meaning, because life should not be dependent on an external source of meaning.¹²⁹ The act of creating values, which is also the act of making law, is how life should be given meaning.¹³⁰ That something emanates from the will is sufficient justification for its existence.¹³¹ Nietzsche argues that the nihilistic phase will conclude once it has abolished pre-existing values,¹³² and it was Nietzsche's view that when positive law rose to dominance, nihilism had achieved its task and moved beyond its valueless state.¹³³ However, it is possible that the destructive approach of the nihilistic phase may be carried over into the subsequently

¹²¹ Nonet (1990), p 673.

¹²² Nonet (1990), p 673.

¹²³ Nonet (1990), pp 673-674.

¹²⁴ Nonet (1990), p 674.

¹²⁵ Nonet (1990), p 674.

¹²⁶ Nonet (1990), p 674.

¹²⁷ Nonet (1990), p 675.

¹²⁸ Nonet (1990), p 676.

¹²⁹ Nonet (1990), p 676.

¹³⁰ Nonet (1990), p 676.

¹³¹ Nonet (1990), pp 676-677.

¹³² Nonet (1990), p 679.

¹³³ Nonet (1990), p 672.

posited laws.¹³⁴ The continuation of this destructive attitude results in the ‘debasement’ of law.¹³⁵ The nihilistic process is supposed to topple all values. However, Nietzsche’s approach preserves a value in his assumption that ‘gods and laws count as values’.¹³⁶ As value, law must be reduced to the role of servant.¹³⁷ Because law now functions as a tool of the will (rather than a constraint on will), it can no longer dictate actions and function as a standard against which conduct is judged.¹³⁸ Nonet conveys the subordinate position of willed law by asking ‘...what reverence could man have for such “gods” of his making?’¹³⁹ It is possible that turning law into a subordinate of will means that law no longer functions in a legal way.¹⁴⁰ Something that is not binding cannot be described as law. Nonet’s interpretation of legality in Nietzsche’s work is not that positive law encourages a command mentality, but that humans’ creative activity takes the form of command.¹⁴¹ To be creative involves using things towards an end. People are like positive law in that their efficacy proves their existence.¹⁴² Taking the Nietzschean view of life as being made up only of that which is communicated by the senses, the will can experience nothing outside willing.¹⁴³ As the will cannot see its effect on other things, it cannot perceive the destruction it may cause.¹⁴⁴ But in addition to simply disguising this destructiveness, the will appears to be that which keeps a being from the nothingness of a life where it is unable to exercise itself through

¹³⁴ Nonet (1990), p 680.

¹³⁵ Nonet (1990), p 680.

¹³⁶ Nonet (1990), p 681.

¹³⁷ Nonet (1990), p 681.

¹³⁸ Nonet (1990), p 680.

¹³⁹ Nonet (1990), p 681.

¹⁴⁰ Nonet (1990), p 681.

¹⁴¹ Nonet (1990), p 682.

¹⁴² Nonet (1990), p 682.

¹⁴³ Nonet (1990), p 682.

¹⁴⁴ Nonet (1990), p 682.

creativity (the creation of values/law).¹⁴⁵ Nonet's account of legality in Nietzsche exhibits the dilemmas faced by the *ubermensch*, including the tension between saving and enslaving, or between command and freedom, the difficulties of trying to completely erase one's values and begin anew, and the troubling possibilities of how the *ubermensch* might interact with the collective.

Berkowitz critiques Nonet's Nietzschean reading of positive law, resisting its implication that concepts such as natural rights, once considered superior to human law, are arbitrary human inventions.¹⁴⁶ Positive law is not founded on the Nietzschean proposition of the death of God, Berkowitz argues, and in an accurate description of legal positivism, concepts such as truth and justice are not absent from law because these concepts are imaginary, but because they have been deliberately excluded due to political, moral, and religious beliefs that this is the proper arrangement.¹⁴⁷ Without a law higher than his will the *ubermensch* would have no constraints other than himself.¹⁴⁸ Berkowitz warns that such an unrestrained figure would enslave the populace, using the people for its own ends.¹⁴⁹ Showing a concern for the welfare of the citizenry, Berkowitz avoids confronting the demise of the metaphysical by arguing the exclusion of higher values from positive law. While neither Nonet nor Berkowitz's positions as to the existence or non-existence of metaphysics is empirically verifiable, Nonet's interpretation of law is more consistent with the Nietzschean thematic of individual responsibility for the creation of values, and thus is a more appropriate standpoint to adopt for use in the present study. Furthermore, it is argued that Berkowitz misapprehends the repercussions of

¹⁴⁵ Nonet (1990), p 682.

¹⁴⁶ Berkowitz (1990), p 721.

¹⁴⁷ Berkowitz (1990), p 721.

¹⁴⁸ Berkowitz (1990), p 721.

¹⁴⁹ Berkowitz (1990), pp 721-722.

the will's role in creating law. Berkowitz assumes that the will results in laws that subjugate through force. However, according to Goodrich and Valverde:

‘The doctrine of the will to power might be mistaken as leading to an arbitrary, might-makes-right positivism, but this would ignore Nietzsche’s systematic critique of nihilism. First things first, he is not a positivist for the same reason that he is not a *fin de siècle* nihilist: he does not believe that, when the twin Gods of legal philosophy – medieval natural law and Enlightenment liberalism – have been extirpated, any existing law is as good as any other. Some legal codes promote what Nietzsche calls “life” – vivacity, rhapsody; others (Jewish and Christian, liberal and secular) suppress life and deny temporality.’¹⁵⁰

The will is to create values, laws, that affirm life. Gearey is one who sees the opportunity to recreate the law as containing hopeful possibilities. Gearey emphasises the aesthetic element of Nietzsche’s work in examining how the values of law can be Re-Made/Re-Modelled (as Bryan Ferry might have put it).¹⁵¹ Law is not a permanently entrenched expression of goods that reside in the metaphysical world, but a product of will that can be reshaped through a revaluation of the morality sanctioned by the collective.¹⁵² As Nietzsche advocates the idea that the world is created by the senses, altering one’s moral structure is an act of world-changing potential.¹⁵³ Inspection of law’s origins yields the insights that law is born out of conflict, and that, because of law’s conflicted beginnings there is always possibility within the law for the law to be remade.¹⁵⁴ Critically examining the law involves conflict between two conceptions of law. First, there is the ‘law of truth’,

¹⁵⁰ Goodrich and Valverde (2005), p 2.

¹⁵¹ Roxy Music (1972) ‘Re-Make/Re-Model’ *Roxy Music*.

¹⁵² Gearey (2001), pp 51-52.

¹⁵³ Gearey (2001), p 52.

¹⁵⁴ Gearey (2001), p 64.

which demands obedience to the collectively sanctioned worldview.¹⁵⁵ Truth is law because to acknowledge something as truthful affords that thing an authority and results in a duty to abide by that truth. Second, there is the ‘obligation to create’, which, rather than unthinking obedience, demands of the individual that they critique existing laws and give rise to new laws that enable life to be lived fully.¹⁵⁶ The remaking of the law is justified through aesthetics.¹⁵⁷ As people are aesthetic beings, they should live their lives under values that are faithful to how they experience the world. The values of existing law represent how others have seen things. Therefore, the individual’s project of revaluation requires the assumption of responsibility for one’s own interpretative activity. Gearey equates the birth of law with the advent of ‘weights and measures’ and also notes that ‘measurer’ is the word by which Nietzsche etymologically accounts for the word ‘*mensch*’.¹⁵⁸ ‘Weights’ are the values, or interpretations, attributed to things, and these values are determined by measuring. The *ubermensch* is required to measure everything for himself to ascertain what value each thing should be afforded in his new system of perceptions.¹⁵⁹ Such novelty makes the individual-as-masurer a potentially destructive force that threatens the cohesion of the collective by calling into question the values that apply to all.¹⁶⁰ This is seen in *Zarathustra* itself, where Zarathustra expects to earn the resentment of the ‘herdsmen’ both for stealing people away from their number and because he ‘breaketh up their tables of values’.¹⁶¹ However, as Red Hot Chili Peppers’ Anthony Kiedis sings: ‘Destruction leads to a very rough road but

¹⁵⁵ Gearey (2001), p 52.

¹⁵⁶ Gearey (2001), p 52.

¹⁵⁷ Gearey (2001), p 63.

¹⁵⁸ Gearey (2001), p 61.

¹⁵⁹ Gearey (2001), p 63.

¹⁶⁰ Gearey (2001), pp 67-68.

¹⁶¹ Nietzsche (1999), p 11.

it also breeds creation.’¹⁶² Gearey is optimistic about the outcomes of the ubermensch’s revaluations. The ubermensch challenges society in order to serve it. In the law’s undoing, law is honoured. ‘Writing tends both to preserve and distort the law’.¹⁶³ When a value is extracted from the circumstances that gave rise to it, when it is displaced from the individual and raised up into law, the value no longer serves the purpose for which it was enshrined in law to begin with.¹⁶⁴ While one way of contending with this problem is for an authority to impose an interpretation of the law on the populace, Nietzsche’s mandate of responsibility disallows the individual from relying upon others’ interpretations.¹⁶⁵ The ubermensch must create law that reflects his own meanings. This inventive task is to be performed through the exercising of the will to devise new ethical understandings.¹⁶⁶ Ethics are concerned with the individual’s relationship to the other and are relevant to the creation of law, which is fundamentally occupied with guiding human interactions.¹⁶⁷ Gearey argues that Nietzsche’s call to reconsider values does not necessitate the abandonment of ethical mindfulness and that, conversely, investigating the consequences of the imposition of values by authorities allows for the rehabilitation of values so that their use can once again result in good ends.¹⁶⁸

Nietzsche’s project deals in particulars instead of constructing an overarching theoretical framework. Therefore, the development of a systematic Nietzschean jurisprudence may be impossible. Nonetheless, elements of Nietzsche’s work can be mobilised for theorising the law. Some of these themes are ‘sampled’ (as the language of modern music would have it) for use in this study’s analysis. The

¹⁶² Red Hot Chili Peppers (1999) ‘Californication’ *Californication*.

¹⁶³ Gearey (2001), p 71.

¹⁶⁴ Gearey (2001), p 65.

¹⁶⁵ Gearey (2001), pp 71-72.

¹⁶⁶ Gearey (2001), p 64.

¹⁶⁷ Gearey (2001), p 64.

¹⁶⁸ Gearey (2001), p 64.

ubermensch and the concern with creativity are particularly helpful in understanding 20th century jurisprudence. Producing value against a background of meaninglessness is the challenge of the times, as Nietzsche identifies it. In other words, a response is needed to what can be labelled ‘the tragedy of modernity’,¹⁶⁹ where ‘the order of the world is no longer pre-determined by a divine will, but is instead the outcome of human action.’¹⁷⁰ The mention of ‘order’ in the preceding quote highlights the jurisprudential importance of this problematic. Forming order is a task of law. Law attempts to raise a structure within which meaningful life can be realised. While the iconoclastic Nietzsche would likely not approve of a lot of what has been written by the canonical jurists analysed below, their theories of law can be interpreted as responses to the challenge of meaning-making that Nietzsche strikingly emphasises. At this point, an illustration may strengthen the claim that 20th century jurisprudence is, at least in part, consistent with the shouldering of creativity that is called for in *Zarathustra*. H.L.A. Hart described the condition the study of law was in when he came to it: ‘I can only tell you really about jurisprudence, which I thought was in a very bad way. It had no broad principles, no broad faith; it confronted no large questions.’¹⁷¹ Hart wanted to restore life and significance to jurisprudence, so he remade it.

Douzinas and Gearey have emphasised that individuals create the law. This creative act, argues Nonet, is founded upon will in a nihilistic environment. Legal positivism is the reality that jurists must now engage with. Gearey sees that through this creative autonomy there is the chance to breathe new life into the law. The legal philosophers analysed in this study are Nietzschean in that they have

¹⁶⁹ Reano (2009), p 111.

¹⁷⁰ Reano (2009), p 111.

¹⁷¹ Sugarman and Hart (2005), pp 275-276.

realised new visions of the law to create value within nihilism. Presented below is an overview of how these legal philosophers correlate to the ubermensch thematic. These summaries are precursors to the weaving of Nietzschean philosophy throughout this study. The theorists do not compare to the ubermensch in every respect. The aim is merely to identify intersections between the ubermensch thematic and jurisprudes that can be used to associate the latter with the figure of the rock star.

The values that Rawls places at the centre of his interpretation of the law are principles of justice. Rawls acknowledges that he is occupied with creating value; at the beginning of *A Theory of Justice* he calls justice ‘the first value of social institutions’.¹⁷² A nihilistic legal system is a meaningless construction and must be dismantled and transformed: ‘...laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust.’¹⁷³ After the destructive phase, new values are created by using the principles of justice to inform the structuring of society.¹⁷⁴

For Schmitt, it is the sovereign who defines values by deciding who is friend and who is enemy: ‘...it is clear who the sovereign is. He decides whether there is an extreme emergency as well as what must be done to eliminate it.’¹⁷⁵ A meaningful legal system is created when the sovereign imposes order upon the random violence of the state of nature. Dwelling outside of this order,¹⁷⁶ the sovereign has complete discretion.¹⁷⁷ Thus, the free exercise of the sovereign’s will grounds the law.

Zarathustra teaches that the values of the group cannot be unquestioningly accepted. Likewise, to Finnis, mere institutional validity is insufficient justification

¹⁷² Rawls (1972), p 3.

¹⁷³ Rawls (1972), p 3.

¹⁷⁴ Rawls (1972), p 4.

¹⁷⁵ Schmitt (2005), p 7.

¹⁷⁶ Schmitt (2005), p 7.

¹⁷⁷ Hobbes (2008), p 119.

for law. Finnis argues that: ‘...the act of ‘positing’ law (whether judicially or legislatively or otherwise) is an act which can and should be guided by ‘moral’ principles and rules... and that those same moral norms justify... the very institution of positive law...’¹⁷⁸ In natural law Finnis finds a process of reflection by which the values of existing laws can be assessed and the creation of new laws can be guided.¹⁷⁹ The ubermensch’s reappraisal of values ‘looks at what values do and what form of life they promote.’¹⁸⁰ So too does Finnis wish to create and/or recreate laws that direct people towards the good life.¹⁸¹

Dworkin focuses on judicial decision making, particularly ‘hard cases’ where the law apparently offers no instruction.¹⁸² In these situations, values coalesce out of the law’s seemingly disparate constituents. This is because there is the possibility of discovering ‘principles that ‘underlie’ or are ‘embedded in’ the positive rules of law.’¹⁸³ An ubermensch is required to fully discern these values, as Dworkin divulges when using the fictional judge Hercules, ‘a lawyer of superhuman skill, learning, patience and acumen’,¹⁸⁴ to illustrate how this task is to be achieved.

Even Hart, who purportedly establishes a system where laws properly enacted are valid regardless of their content,¹⁸⁵ cannot help but introduce values. Values first enter when Hart allows judges to look outside of the law for guidance in deciding hard cases.¹⁸⁶ A formulation of humanity that is not solely defined by the legal collective is thereby admitted to Hart’s system of rules. But Hart does not only

¹⁷⁸ Finnis (1980), p 290.

¹⁷⁹ Finnis (1980), p 290.

¹⁸⁰ Spinks (2003), p 116.

¹⁸¹ Finnis (1980), p 85.

¹⁸² Dworkin (1977), p 81.

¹⁸³ Dworkin (1977), p 105.

¹⁸⁴ Dworkin (1977), p 105.

¹⁸⁵ Hart (1994), pp 107-108. See also Hart (1958).

¹⁸⁶ Hart (1994), p 130, where it is stated that some judicial interpretation is to be conducted in ‘in the light of social aims.’

give passage to value through this limited window. In the postscript to *The Concept of Law*, he concedes that, for the officials who recognise the legal system: ‘...the ultimate criteria of legal validity might explicitly incorporate, besides pedigree, principles of justice or substantive moral values...’¹⁸⁷ In writing this, Hart lets values fully permeate his account of law.¹⁸⁸

Appearances of the Nietzschean thematic throughout these legal imaginings have been identified instead of requiring of each a strict adherence to a checklist of Nietzschean features. This establishes a commonality between the theorists while maintaining their idiosyncrasies. Diversions from Nietzschean philosophy are preserved while similarities are highlighted. The *ubermensch* thematic is common ground on which legal philosophers and rock stars may relate to each other, and the Nietzschean qualities of rock stars will now be specified.

III – Rock Stars as Nietzschean Figures

Zarathustra’s religious-style salvific role is paralleled by the relationship between the rock star and their audience. Linking rock music to religion, Weinstein proclaims that the banishment of the sacred supposedly heralded by Nietzsche’s ‘death of God’ never eventuated.¹⁸⁹ Religions endure but have been marginalised and the sacred has been displaced.¹⁹⁰ Organised belief systems may have diminished in social significance, but the sacred – that is, experiences of the spiritual – are present in other forms of human activity such as music. It is argued that Weinstein’s assertion of the incompleteness of the death of God does not run counter to the reality expressed in *Zarathustra* and the figure of the *ubermensch*. The enduring herd

¹⁸⁷ Hart (1994), p 247.

¹⁸⁸ See also Fuller’s (1958) criticism of the porous division between law and morality in Hart.

¹⁸⁹ Weinstein (1995), p 185.

¹⁹⁰ Weinstein (1995), pp 185-186.

mentality of the people in Zarathustra affirms that the ‘death of God’ was never fully realised, and the ‘saviour behaviour’ Hollingdale observes in Zarathustra the suggestion that the sacred has been ousted rather than terminated. No longer confined to its own domain, the sacred spreads through all of life and art becomes salvific.¹⁹¹ Rock music is suffused with the sacred.¹⁹² There are two ways in which this is so.¹⁹³ First, there is religious content in rock music¹⁹⁴. Rock musicians integrate religion into the work through ‘song lyrics and other textual signifiers such as band names as well as album and song titles.’¹⁹⁵ Religion is discussed and opinions on the subject put forward through this work. Weinstein lists examples of Christian, Satanist, and anti-religious rock musicians, including, as an exemplification of the latter, John Lennon’s entreaty to picture religion’s absence from the world.¹⁹⁶ Second, and more importantly, rock music can provide access to the sacred, can confer spiritual experiences.¹⁹⁷ The sacred emerges in rock music from the interaction between rock star and audience.¹⁹⁸ This interaction is structured by both parties’ shared understandings of the rock stars’ purpose. The rock star is an ‘artist-hero’, a figure regarded as wielding exceptional abilities in the pursuit of artistic goals that necessitate and validate the rock star working outside of societal parameters.¹⁹⁹ The rock star, as artist-hero, is like Zarathustra, who is a ‘poet and a prophet’.²⁰⁰ Both these figures are free from the constraints of the group, and their fashioning of new values is intertwined with artistic creativity. Also, like

¹⁹¹ Weinstein (1995), pp 185-186.

¹⁹² Weinstein (1995), p 186.

¹⁹³ Weinstein (1995), p 186.

¹⁹⁴ Weinstein (1995), pp 186-187.

¹⁹⁵ Weinstein (1995), p 187.

¹⁹⁶ Weinstein (1995), p 188.

¹⁹⁷ Weinstein (1995), p 187.

¹⁹⁸ Weinstein (1995), p 189.

¹⁹⁹ Weinstein (1995), p 189.

²⁰⁰ Red Hot Chili Peppers (1991) ‘Give It Away’ *Blood Sugar Sex Magik*; Tanner on Zarathustra’s poetic style and the challenges this style presents: Tanner (1994), p 47.

Zarathustra's life, spent teaching and travelling, the rock star has a specialised function and it is expected of them that they maintain a narrow focus in fulfilment of their role. Personal and communal repercussions are irrelevant as the rock star pursues their artistic mission.²⁰¹ In return, the audience will revere the rock star in a way that Weinstein regards as 'a form of worship.'²⁰² The convergence of rock star and audience in live performance sees the culmination of this relationship.²⁰³ The rock concert provides intense access to the sacred, strengthening the audience's feeling of community and reinforcing the supremacy of the rock star.²⁰⁴

Rock music as generative of community has previously been explored by Martin, who also observes the presence of the sacred in rock, and maintains that the music serves the purpose of 'celebrating and reinforcing group integration'.²⁰⁵ Not only does rock music assemble communities, but those participating are sufficiently aware of this to celebrate the congregation as it occurs. For example, the Red Hot Chili Peppers' singer and lyricist Anthony Kiedis explains the lyrics to the band's song 'Stadium Arcadium':

'Quite specifically, the imagery involved is that of a group of people out in the middle of nowhere listening to music together in the middle of the night and creating a light which is reflecting the, sort of, heavens above. 'Cause that song is really about connecting to people by way of music for the sake of honouring the universe and feeling connected to the universe.'²⁰⁶

²⁰¹ Weinstein (1995), p 189.

²⁰² Weinstein (1995), p 189.

²⁰³ Weinstein (1995), p 192.

²⁰⁴ Weinstein (1995), p 192.

²⁰⁵ Martin (1979), p 89.

²⁰⁶ Warner Bros (2006) *Red Hot Chili Peppers Stadium Arcadium Limited Special Edition DVD*, Album Commentary Chapter 4.

‘Stadium Arcadium’ is alert to rock music’s prowess in ‘reinforcing group integration’. Keidis describes the establishing of community (‘connecting to people’) in terms of the sacred, described as the ‘heavens above’ and ‘the universe’. Rock music as conduit for the sacred is also conveyed through the song’s title. Stadiums are often used as venues for large concerts and ‘Arcadium’ evokes ‘Arcadia’, a bucolic paradise.²⁰⁷

The forming of community may appear to be anti-Zarathustrian, given the ubermensch’s focus on self-definition. However, rock’s communality is a paradoxical combination of unity and disruption.²⁰⁸ Rock audiences join together ‘through the common pursuit of the symbolism of disorder and ambiguity.’²⁰⁹ The objective is the definition of identity through symbolic gestures.²¹⁰ This is achieved through clothing, music, and association with an emblematic rock star.²¹¹ The invention of self is necessitated by the death of God, by the understanding, as was taught by Zarathustra, that identity cannot be received any more but must be made. The culture of the West can no longer offer its people a sense of self that is attached to place nor can it confidently guide its people’s behaviour.²¹² This situation provides greater scope for individuals to create unique selves.²¹³ The 1960s counter-culture (to which two rock stars analysed in this thesis, Jimi Hendrix and John Lennon, were important) publicised this change in society, making it known that the cultivation and communication of individuality was now accessible to the public where formerly it had been the prerogative of a privileged few.²¹⁴ These early few included the

²⁰⁷ Arcadia, Dictionary.com, <http://dictionary.reference.com/browse/arcadia?s=t>

²⁰⁸ Martin (1979), p 89.

²⁰⁹ Martin (1979), p 89.

²¹⁰ Martin (1979), p 88.

²¹¹ Martin (1979), p 87.

²¹² Martin (1979), p 88.

²¹³ Martin (1979), p 88.

²¹⁴ Martin (1979), pp 88-89.

Romantics of the 19th century, to which both Martin and Weinstein partially attribute the development of the artist-hero role.²¹⁵ Arguably, Nietzsche is one of these romantics.²¹⁶ Heedless of mundane affairs, the romantic was artistically focused.²¹⁷ Personal expression was the romantic's goal, and it was to be founded upon the possibilities discovered amongst the debris of the old artistic forms the romantic had destroyed (hence Martin's statement that rock music is disorderly).²¹⁸ Zarathustra's metamorphoses affirm life through a similar process.

In keeping with Weinstein and Martin, music journalist Craig Schuftan views the rock star as derived from the romantic.²¹⁹ They share 'Self-expression, the rejection of institutions, individualism, questing spirituality, the desire to escape society, the strong identification with criminals and madmen, the divinity of sin...'²²⁰ Schuftan exhibits the influence of Nietzsche on rock musicians through case studies which will be related in this section. Schuftan discusses Depeche Mode singer Dave Gahan, rapper Kanye West, and David Bowie's portrayal of the rock messiah character Ziggy Stardust.²²¹ As has been shown above, Nietzsche proposes a rejection of societal values so that individuals may define themselves and, in doing so, live authentically, and Zarathustra condemns the moderation practiced by the unenlightened and advises that the people be less parsimonious in their contravention of morals.²²² Schuftan connects the Nietzschean rejection of values that prevent the individual from flourishing with the decadent behaviour of David Gahan.²²³ Gahan decided to behave callously through excessive drinking of alcohol and consumption

²¹⁵ Weinstein (1995), p 189; Martin (1979), p 89.

²¹⁶ Schuftan (2009), p 3.

²¹⁷ Martin (1979), p 89; Weinstein (1995), p 189.

²¹⁸ Martin (1979), p 89.

²¹⁹ Schuftan (2009), p 3.

²²⁰ Schuftan (2009), p 3.

²²¹ Also, McCombe (2011) associates the Beatles with Romanticism.

²²² Schuftan (2009), p 250.

²²³ Schuftan (2009), pp 251-252.

of illicit drugs, a surfeit of casual sex, the intentional sabotaging of his personal relationships, and the wanton destruction of property.²²⁴ Gahan later expressed his excitement and fulfilment at having behaved in this way.²²⁵ Pursuing a decadent lifestyle was an exhilarating and satisfying project for Gahan, argues Schuftan, because, he acted according to values of his own creation.²²⁶ Having ceased to follow the dictates of society that keep his energies in check, the person who pursues their own selfhood feels like a being whose function exceeds that of ordinary people.²²⁷ Such an exceptional individual often takes on the role of prophet to remain amongst those who adhere to conventional values.²²⁸ Gahan acted out this prophetic role in his musical performances and personal behaviour. To convey that he had assumed the role of prophet Gahan used his appearance to evoke Jesus, growing long hair and a beard and imitating the posture of crucifixion during musical performances.²²⁹ The Depeche Mode song 'Personal Jesus'²³⁰ proposes a 'secular messiah' and that helps redeem another individual.²³¹ Indeed, this messiah is preaching not religion, where every person is bound together in belief, but proposing a Nietzschean individuality. Living as a prophet requires the individual to go without the comforts and consolations of regular society. According to Schuftan, when the individual is unable to sustain this life, they become martyr to it.²³² Schuftan cites 'Walking in My Shoes',²³³ a song released on the album subsequent to that on which 'Personal Jesus' appeared, as an example of Gahan moving from the role of messiah to that of martyr.

²²⁴ Schuftan (2009), p 251.

²²⁵ Schuftan (2009), p 251.

²²⁶ Schuftan (2009), pp 251-252.

²²⁷ Schuftan (2009), p 252.

²²⁸ Schuftan (2009), p 252.

²²⁹ Schuftan (2009), p 253.

²³⁰ Depeche Mode (1990) 'Personal Jesus' *Violator*.

²³¹ Schuftan (2009), p 252.

²³² Schuftan (2009), p 252.

²³³ Depeche Mode (1993) 'Walking in My Shoes' *Songs of Faith and Devotion*.

The song conveys that Gahan following his own values has not meant only pleasurable indulgence, but that the singer has brought profound suffering upon himself in choosing to live outside of conventional morality.²³⁴ Those that comprise society enjoy the homogenising effects of equality.²³⁵ They are absolved by the collective of the obligation to will themselves and are suspicious towards extremities of behaviour. When the *ubermensch* breaks from this stifling regime, the complacency of those belonging to society is threatened. These people often fail to perceive the worth of the *ubermensch*'s project, and react with hostility, attempting to pull the *ubermensch* back to the realm of mediocrity.²³⁶ This reaction threatens to obstruct the endeavours of the *ubermensch*. Through his music, rapper Kanye West often depicts himself as a genius who has to survive the attempts of lesser minded people to stop him from defining and expanding his self through his creative activities.²³⁷ In 'Stronger',²³⁸ West sketches out this predicament. West acknowledges that there are 'haters' of his work, but persists in his creativity, and acknowledges that struggling against such obstructions is important, quoting Nietzsche's dictum that 'What does not kill me makes me stronger'.²³⁹ The *ubermensch* will not be deterred by the protestations of the masses, as the *ubermensch*'s activities are worthier than those of the rest of the population. West expresses belief in his superiority in a line in 'Stronger' when he compares himself to a person who is part of regular society: 'There's a thousand yous there's only one of me.' David Bowie's performance as the character Ziggy Stardust exemplifies this discrepancy between the *ubermensch* and regular men. In 'Ziggy Stardust', Ziggy is

²³⁴ Schuftan (2009), p 253.

²³⁵ Schuftan (2009), p 256.

²³⁶ Schuftan (2009), p 256.

²³⁷ Schuftan (2009), p 256.

²³⁸ West (2007) 'Stronger' *Graduation*.

²³⁹ Schuftan (2009), p 256; p 258.

described as ‘the special man’, separate from others.²⁴⁰ Bowie ensured that Ziggy Stardust was vividly differentiated from the collective. Ziggy is a rock star and a Martian and for whom Bowie created a distinctive identity through departures from the conventional morality of the time in which Bowie performed as the character, for example declaring himself to be gay while remaining unaffiliated even with outsider collectives such as gay activist groups.²⁴¹ Ziggy differentiates himself because the aesthetic approach requires fidelity to one’s individual perceptions. The Nietzschean belief that the world is best engaged with as an aesthetic activity, finds expression in Ziggy’s story in the line ‘I could make it all worthwhile as a rock and roll star’.²⁴² Although the *ubermensch* fulfils a prophetic role by showing others how flourish, the *ubermensch*’s salvific practices do not include the formation of community. Schuftan writes that Ziggy’s program for redeeming people’s lives does not involve ‘tolerance, forgiveness and brotherly love’.²⁴³ Tolerance and forgiveness excuse timidity, and brotherly love shelters the individual from the encounters with adversity that are necessary for growth. Instead of consolation, Ziggy offers provocation so that people might be prompted to exceed their current limitations.²⁴⁴ The *ubermensch* must be an opponent in order to be a help.

In addition to David Bowie, the other rock stars sampled in this thesis evidence the Nietzschean thematic. Jimi Hendrix avoided being part of any group, either conservative or counter-cultural, wishing to avoid conforming to ways of seeing that were not his own so that he could remain loyal to his unique psychedelic interpretation of the world. In addition to possessing the *ubermensch*’s belief in the importance of self-definition, Hendrix was motivated by the potentially conflicting

²⁴⁰ Schuftan (2009), p 265.

²⁴¹ Schuftan (2009), pp 265-266.

²⁴² Schuftan (2009), p 266.

²⁴³ Schuftan (2009), p 265.

²⁴⁴ Schuftan (2009), p 265.

wish to direct others towards a vision of a better world. In relation to Bob Dylan, a major influence on Hendrix,²⁴⁵ MacDonald succinctly describes the rock star's tension between individuality and the difficulty of communicating this message to others: 'Nagged by some missionary infection which he can't shake... Dylan seems fated to forever oscillate between wanting to tell us something and wanting to be left alone.'²⁴⁶ Like Zarathustra and Dylan, Hendrix wants to enlighten but does not want followers.

In John Lennon there is also the tension between alerting others to an independent way of life and the danger of reinscribing their subjugation. Lennon disapproved of people being told what to do, viewing normative systems as unjustified controls over human activity. However, believing violent behaviour to be caused by adherence to 'establishment' values, Lennon also found it necessary to instruct others how to surpass the harmful conception of life imposed upon them by the group.

Vividly exemplifying the ubermensch's transformative existence, Madonna continually distinguishes herself from the values of the collective through a ceaseless series of reinventions. Through her lyrics and behaviour, Madonna advocates the distinguishing of the self as an undertaking of primary importance. As with the other rock stars, these teachings have a paradoxical effect on her audience, who adopt Madonna's example not always in an emancipatory fashion.

Finally, Liam Gallagher displays the ubermensch's commitment to values that are founded on a personally tested sense of truth. The singer's forceful delivery and confident attitude show how the will is foundation for the recreation of the world. Parallel to the Nietzschean thematic, the aforementioned rock stars separate

²⁴⁵ Perry (2004), p 107; p 112. See also Boyd, Head, and Weis (1973) *Jimi Hendrix*.

²⁴⁶ MacDonald (2003a), p 4.

themselves from group values to define unique interpretations of the world. Also motivated by the impulse to create meaning and share it with others, the rock stars communicate their aesthetic experiences through music.

Tuning Up

Legal philosophers and rock stars appear dissimilar. On the surface, different attitudes are observable in either pursuit: order and disorder, intellect and feeling, prudence and hedonism. Nevertheless, associating these two forms of creativity is a worthwhile juxtaposition, one that ‘shines a light’²⁴⁷ on jurisprudence. The reason for Nietzsche’s presence in this thesis is to get jurisprudes and rock stars ‘in tune’ with each other, inspired by Nietzsche’s union of the Apollonian and Dionysian in *The Birth of the Tragedy*.²⁴⁸ To this end, the Nietzschean thematic discussed in this chapter will be used throughout the subsequent analysis in explaining the activities of these two groups and discussing the implications of what they do. The next chapter stages the first of these ‘jams’ examining John Rawls together with Jimi Hendrix.

²⁴⁷ Rolling Stones (1972) ‘Shine a Light’ *Exile on Main St.*

²⁴⁸ Nietzsche (1993).

The Gig

‘Discorporate and come with me.’

– Frank Zappa.¹

¹ The Mothers of Invention (1968) ‘Absolutely Free’ *We’re Only in It For the Money*.

Chapter Three

The Law of the (Electric Lady)Land: Jimi Hendrix on Justice

To enter the story of law and music, this thesis ‘turns on’ and ‘tunes in’² to the late 1960s. The progressive rock of this time, with its atmosphere of exploration and advancement, resonates particularly with the era’s ‘counter-culture’, a movement that attempted to remake and improve society.³ What can this ‘psychedelic’, or ‘soul revealing’,⁴ music make known about law? Progressive rock and counter-cultural efforts often expressed a desire for personal autonomy. In doing so they echo liberalism and invite consideration of justice, one of jurisprudence’s main concerns. Around the time of the counter-culture, the leading liberal writer on justice was John Rawls, whose work envisions society as a framework providing opportunities for substantive individual freedom.⁵ In what follows, Rawls’ theory will be read through the words and music of Jimi Hendrix. Hendrix, a virtuosic musician, mind-altering showman, and ‘high priest’ to the counter-culture⁶ might seem an unlikely figure to place alongside the comparatively upper-class⁷ Princeton-educated Harvard professor. However, there are points of similarity in the personalities, backgrounds, and activities of the two men. Pogge described Rawls as ‘shy’⁸, while Maffettone called him ‘witty, timid, gentle, and modest.’⁹ Hendrix too was ‘gentle, shy’ and had

² Leary (1990), p 253.

³ Whiteley (1992), p 1.

⁴ Online Etymological Dictionary, ‘Psychedelic’:
http://www.etymonline.com/index.php?term=psychedelic&allowed_in_frame=0

⁵ Pogge (2007), p 28.

⁶ Chenoweth (1971), p 26.

⁷ Lehning (2009), p 1; Maffettone (2010), p 3.

⁸ ‘Pogge: John Rawls’: <http://www.youtube.com/watch?v=r9yUJLBzGX8> Also, Pogge (2007), p ix describes Rawls’ ‘...modesty ...insecurity ...and conciliatory attitude...’

⁹ Maffettone (2010), p 2.

a 'sly, street-smart wit'.¹⁰ Both suffered childhood losses of immediate family members, both served in the military (although Rawls went to war while Hendrix did not),¹¹ and neither was of average means. Exposure to death, as well as the over- (Rawls¹²) and under- (Hendrix¹³) privileged conditions of their upbringings, are the kind of experiences that bestow an appreciation of the role of chance in defining a person's circumstances.¹⁴ Both Rawls and Hendrix wrestled with circumstances to ensure freedom for self-determination. Hendrix responded to contingency¹⁵ by overcoming his lack of opportunities through profound dedication to practicing the guitar,¹⁶ and with his theory of justice, Rawls, from his more privileged position, sought to minimise the extent to which external forces hinder self-determination.¹⁷ Liberalism, therefore, is the theory chosen by Rawls and developed in his work, and the theory to which Hendrix is relevant, because it provides an environment where the individual can realise, free from interference, the life they envision. Hendrix's music, particularly his concert performances and completed studio albums (*Are You Experienced*, *Axis: Bold as Love*, and *Electric Ladyland*¹⁸), can offer insight into Rawls' *A Theory of Justice* (henceforth '*ATOTJ*', a work completed in 1971, the year

¹⁰ Perry (2004), p 26.

¹¹ Freeman (2007), p 10, Lehning, John Rawls: An Introduction, pp 1-2. Hendrix's mother died age 33: Roby and Schreiber (2010), p 4. Hendrix in the military: Roby and Schreiber (2010), p 10. Hendrix mentions military service: <http://www.youtube.com/watch?v=4Gc0B3vNV0> A further similarity is that Rawls and Hendrix were both autodidacts. Hendrix taught himself guitar: Roby and Schreiber (2010), p 14, and, as per Freeman (2007), p 13: 'Rawls was largely self-taught in political philosophy.'

¹² Lehning (2009), p 1.

¹³ Friedlander (1996), p 220. Roby and Schreiber (2010), p 3 describes Hendrix's childhood as an 'almost Dickensian struggle for survival'.

¹⁴ Lehning (2009), p 1.

¹⁵ Sandel (2007), p 203 says of Rawls' theory: '...imagine a social contract that would not be subject to these *contingencies* [my emphasis].'

¹⁶ Chas Chandler, Jimi Hendrix's former manager, remarked: 'There was no question about it, Jimi was tremendously gifted. He was meant to play guitar. But, by hell, he worked at it.' Chandler (1997) *Classic Albums The Jimi Hendrix Experience Electric Ladyland*.

¹⁷ Lehning (2009), p 1, Mandle (2009), p 24.

¹⁸ Hendrix (1967) *Are You Experienced*, Hendrix (1967) *Axis: Bold as Love*, Hendrix (1968) *Electric Ladyland*.

after Hendrix's death).¹⁹ Rawls sought to establish a just society on principles discovered in an abstract scenario of his own making; Hendrix attempted to free the minds of his listeners by depicting, through his surreal lyrics and prismatic guitar playing, mental journeys to other worlds. Reading Rawls through Hendrix elucidates the difficulties of utilising the abstract in order to improve real world justice. Hendrix's depictions of ineffable internal states highlight that Rawls' work is too disconnected from substantial concerns to be effective and thus accepted by others. This is not to say that either Rawls or Hendrix were careless or simplistic in their work; both men were sophisticated artisans. Hendrix was no mere noisemaker. He possessed 'an *ear*', a delicate musical perceptiveness, and 'a fine, sly sense of humour that – with characteristic lightness of touch – he was able to express in music.'²⁰ A 'lightness of touch' is also evident in Rawls, whose *ATOL* 'has a unity and elegance'.²¹ Through a finely detailed argument, Rawls advocates a society that prioritises just order rather than forcing its citizens to achieve a particular conception of the good life. The principles of justice that guide the creation of such a framework can be discovered by those who have shed their personal characteristics and so are unable to structure the system to their advantage.²² The principles are supposedly made compelling by the fairness of this process. However, the principles are less convincing to those outside of the abstract world in which they were selected. A duality thereby emerges whereby Rawls has immense creative power in the world of the mind but is relatively ineffective in the world of the concrete. This leads to further reliance upon the abstract to try and convert others to Rawls' perspective and convince of the need for change. Piling more and more onto their mental creations

¹⁹ Rawls (1972).

²⁰ Perry (2004), p 30.

²¹ 'Pogge: John Rawls': <http://www.youtube.com/watch?v=r9yUJLBzGX8> See also Pogge (2007) p vii, which calls *A Theory of Justice* '...an elegant and amazing unified intellectual structure...'

²² Sandel (2007), p 203.

(countless notes delivered at a lightning-fast pace, in Hendrix's case, and the numerous pages of Rawls' lengthy *ATOTJ*, which Simmonds calls a 'massive book'²³), however, fails to strengthen the connection of Rawls' and Hendrix's abstract worlds to the concrete.

Jimi Hendrix's LSD-inspired mental landscape is analogous to the abstract scenario that yields Rawls' principles of justice. Jimi Hendrix therefore affords the opportunity to vividly perceive the envisioning of, and attempts at realising, justice in Rawls. This chapter's examination of Rawls' vision of justice juxtaposed with Jimi Hendrix occurs in three parts. The abstract world in which justice can be discerned, as well as the method of accessing this place, are detailed in section one. The second section explains the principles of justice that are to be brought back to the concrete world and used to structure society. Third are the difficulties of establishing this framework.

I – Journeying to Justice

There are two initial points of comparison between Rawls and Hendrix. First, Rawls formulates justice as an environment: as a structure and a space. This corresponds to Hendrix's depiction of the psychedelic state. Second, the perception necessary to recognise Rawls' principles as just sits at a distance from usual consciousness, and this perception must be travelled to, similar to the 'mind blowing' referenced in, and aimed for by Hendrix's music. Of course, there are differences, too. Rawls' thought experiments are rational ruminations, meticulous constructions, while Hendrix's music is full of dream-like mental discoveries and sonic

²³ Simmonds (2002), p 48. In an almost Hendrixian turn of phrase (ala 'Purple Haze'), Pogge (2007), p vii refers to the book, as '...“green monster,” *alluding to its size* [my emphasis] and the color of the first edition.' According to Wolff (1977), p 3: 'It [*A Theory of Justice*] is extremely long...'

adventuring. Nonetheless, Hendrix has in common with Rawls an awareness of the malleability of the mind and its perception of the world, of space.

Matsuda is one commentator who identifies that Rawls' justice might take the form of a location; writing 'There is, as Rawls suggests, a place called Justice...'²⁴ The principles of justice are used to shape the social space.²⁵ Justice is to be manifested through institutions.²⁶ Rawls writes that in his theory:

'...the primary subject of justice is the basic structure of society, or more exactly, the way in which the major social institutions distribute fundamental rights and duties and determine the division of advantages from social cooperation.'²⁷

Justice pervades structure because structure can be agreed upon by all citizens and because it creates a society that is respectful of individuals (a dream of co-existence mirrored in the *Woodstock*²⁸ era?). Given the assortment of opinions on the good life,²⁹ there is an apparent unlikelihood of defining justice in such a way as can be universally consented to.³⁰ However, in a liberal account of justice such as Rawls', the varying ambitions and values that constitute personal interpretations of the good life (and which may clash with each other, hindering agreement on how society should be arranged) are separated from the social structure that provides a venue for their realisation.³¹ As will be discussed later, Rawls argues that if people temporarily abandon their conceptions of the good life in order to agree upon a space

²⁴ Matsuda (1986), p 630.

²⁵ Hayden (2002), p 23.

²⁶ Rawls (1972), p 4.

²⁷ Rawls (1972), p 7.

²⁸ Wadleigh (1970) *Woodstock*.

²⁹ Mandle (2009), p 11.

³⁰ Graham (2007), p 20. See also Rawls (1972), p 5.

³¹ Generally: Simmonds (2002), p 48. On social structure: Mandle (2009), p 12. On Rawls as liberal: Freeman (2007), p 44.

in which they can pursue those goods, consensus is possible.³² Liberalism may therefore be able to bring people to agreement in their shared acceptance of justice as an environment allowing for diversity in the values of its population.³³ In devising a societal framework that all can agree upon, Rawls is developing a social contract theory.³⁴ However, he discards the utilitarianism common to previous versions of this theory, as utilitarianism does not respect the uniqueness of individuals.³⁵ Rather, a utilitarian system uses its subjects in order to attain a particular conception of the good. The privileging of a single telos³⁶ means utilitarianism cannot provide an environment in which values coexist. Conversely, in Rawls' theory, 'the good' is deprioritised in favour of 'the right'.³⁷ Individuals are justly treated as the social framework protects their ability to pursue individual conceptions of the good life.³⁸ No assortment of institutions realistically capable of being implemented provides full expression of every value that might be used to constitute society.³⁹ However, Rawls' belief is that liberalism and the prioritisation of justice provide the most accommodating possible arrangement.⁴⁰ Lehning says that 'Rawls is convinced that a just liberal society is the one that has far more space than other social worlds.'⁴¹ Here it can be seen that Rawls' system is spatial not only in the sense that justice is secured by structure, but also in that Rawls' justice is concerned with providing

³² Rawls (1972), p 5: 'Those who hold different conceptions of justice can, then, still agree that institutions are just...' Graham (2007), p 20 highlights consensus: '...the key issue is not about obedience to the state but about how we stabilize a political order on the basis of agreement...' Pogge (2007), p 34: 'We can live together in harmony despite conflicting ideals of the good human being... so long as we know that we share a moral commitment to our society's basic structure. For Rawls, this is one of the most important lessons of modernity...'

³³ See above footnote. Also, Freeman (2007), p 44.

³⁴ Rawls (1972), p 11, Wolff (1977), pp 16-17; p 20; pp 61-62 on the possibility in Rawls of a social contract that could attract unanimous assent.

³⁵ Lehning (2009), pp 17-18, Rawls (1972), p 22; p 27; p 29.

³⁶ Rawls (1972), p 30.

³⁷ Rawls (1972), p 31.

³⁸ Rawls (1972), p 25; p 27; p 31, Freeman (2007), p 44.

³⁹ Lehning (2009), p 16

⁴⁰ Rawls (1972), p 302.

⁴¹ Lehning (2009), p 16.

freedom, a space without obstructions. As Hendrix puts it: 'Freedom, give it to me. That's what I want now. Freedom, that's what I need now. Freedom to live, freedom so I can give.'⁴² Also like Rawls, Hendrix conceptualises relations between people as capable of improvement by situating humanity in the correct environment. In 'Third Stone from the Sun',⁴³ Hendrix's portrayal of the Earth describes 'strange beautiful grass of green', 'majestic silver seas', and 'mysterious mountains'.⁴⁴ It is a place that is both familiar and alien, imminent yet distant.⁴⁵ Hendrix references an improved version of the world in 'Up From The Skies',⁴⁶ singing 'I wanna know about the new mother earth.' 'Voodoo Chile'⁴⁷ details further exotic worlds, with Hendrix singing of 'liquid gardens' and 'Jupiter's sulphur mines'. Hendrix's distant place offers a life free of the problems that beset the present. For example, in '1983... (A Merman I Should Turn To Be)',⁴⁸ Hendrix relates the story of a couple who escape the violence that ravages the world by starting a new life undersea. On land, 'war is here to stay' and 'every inch of earth is a fighting nest', so the man and his lover 'decide to take a last walk through the noise to the sea, not to die but to be reborn, away from the land so battered and torn.' Despite the protestations of those around the narrator, who doubt that technology will be able to sustain his life underwater and say that 'it would be beyond the will of God and the grace of the King' to live an undersea life, the man and his lover make for their new place, an 'aqua world', where they meet a friendly reception from undersea creatures and commence a peaceful existence. Furthermore, the most clearly defined presentation of a just and distant world in Hendrix's work is that of Electric Ladyland, introduced in 'Have You Ever Been (To

⁴² Hendrix (1971) 'Freedom' *Cry of Love*.

⁴³ Hendrix (1967) 'Third Stone from the Sun' *Are You Experienced*.

⁴⁴ Hendrix (1967) 'Third Stone from the Sun' *Are You Experienced*.

⁴⁵ Gilroy (2004) calls Hendrix's envisioned world the 'not-yet'.

⁴⁶ Hendrix (1967) 'Up from the Skies' *Axis: Bold as Love*.

⁴⁷ Hendrix (1968) 'Voodoo Chile' *Electric Ladyland*,

⁴⁸ Hendrix (1968) '1983... (A Merman I Should Turn To Be)' *Electric Ladyland*.

Electric Ladyland)',⁴⁹ as a 'love land', superior to the current world in that, instead of being in conflict, 'good and evil lay side by side' and 'electric love penetrates the sky'. It is not only in Hendrix's lyrics, however, that a sense of place is communicated. Hendrix also used sound to conjure up environments. The Hendrix who created *Electric Ladyland* was 'a musician/composer who was thinking increasingly in terms of broad soundscapes'.⁵⁰ Perry details Hendrix's abilities on this front:

'With nothing more than a stock guitar, amp and a couple of very basic pedals, he could do a great deal more than play tunes. He'd recreate the sound of desert winds or the Doppler-shift of a passing motorcycle, the 'bo-i-i-i-n-g' of the Roadrunner's cartoon arrow or, as in "1983", evoke a convincing seascape complete with waves, gulls, fog-horns and bell buoys.'⁵¹

'By turning his amp up high and treading the [wah] pedal he found he could modulate the natural hiss of amplifier valves, producing sounds of gentle breezes, howling storms or susurrations of waves on a beach...'⁵²

Hendrix evokes blissful scenes and Rawls offers a just world. How, then, to reach these promised lands? It must be noted that these places are far-off (or far-out!). Rawls writes that his '...aim is to present a conception of justice which generalizes and carries to a *higher level of abstraction* [my emphasis] the familiar theory of the social contract...'⁵³ Rawls' theory has been abstracted away from the tangible world and resides on a loftier plane. Justice is remote and, although it can be glimpsed at from afar, it must be travelled to in order to be understood and accepted.

⁴⁹ Hendrix (1968) 'Have You Ever Been (To Electric Ladyland)' *Electric Ladyland*.

⁵⁰ Perry (2004), p 11.

⁵¹ Perry (2004), p 29.

⁵² Perry (2004), p 30.

⁵³ Rawls (1972), p 11.

Examined directly, the principles of justice may not be convincing.⁵⁴ However, Rawls believes that they will be acceptable to all when the process by which they were selected is explained.⁵⁵ To be convinced by the principles of justice, one must travel along with this process. Then, what appear as strident, controversial assertions will be exposed as logically progressing from undisputed notions.⁵⁶ Specifically, the principles are compelling because they originated in a construct defined by parameters of fairness.⁵⁷ This founding scenario bestows upon Rawls' theory its title 'justice as fairness'.⁵⁸ Justice as fairness is the journey that Rawls invites the reader to undergo. A sense of travel is conveyed in a lot of Hendrix's songs, including 'I Don't Live Today';⁵⁹ 'I wish you'd come and rescue me so I can be on my miserable way', 'Wait Until Tomorrow';⁶⁰ 'you said you wanted to run off with me today', 'Crosstown Traffic';⁶¹ 'I'm trying to get on the other side of town', 'Gypsy Eyes';⁶² 'I'll try to meet you by the old highway', and 'Voodoo Child (Slight Return)';⁶³ 'And if I don't meet you no more in this world, then I'll meet you in the next one, and don't be late' and 'Are You Experienced?';⁶⁴ where Hendrix ferries others to this fantastical world, singing 'trumpets and violins I can hear in the distance' and 'maybe now you can't hear them but you will if you just take hold of my hand.' More specifically, in 'Spanish Castle Magic',⁶⁵ Hendrix sings of a 'really groovy place' that is 'very far away. It takes about a half a day to get there if we travel by

⁵⁴ Rawls (1972), p 121: '...the acceptance of these principles is not conjectured as a... probability.'

⁵⁵ Rawls (1972), pp 120-121. Graham (2007), p 26 on process: 'The validity of principles derives from the *procedure* [original emphasis] by which they are chosen...', and on acceptability: 'People will be motivated to respect principles which they recognise they have chosen, or would choose...'

⁵⁶ Rawls (1972), p 121: 'The argument aims eventually to be strictly deductive.'

⁵⁷ Rawls p (1972), p 120, Freeman (2007), pp 142-143, Graham (2007), p 26.

⁵⁸ Rawls (1972), p 11, Daniels (1975), p xiv.

⁵⁹ Hendrix (1967) 'I Don't Live Today' *Are You Experienced*.

⁶⁰ Hendrix (1967) 'Wait Until Tomorrow' *Axis: Bold as Love*.

⁶¹ Hendrix (1968) 'Crosstown Traffic' *Electric Ladyland*.

⁶² Hendrix (1968) 'Gypsy Eyes' *Electric Ladyland*.

⁶³ Hendrix (1968) 'Voodoo Child (Slight Return)' *Electric Ladyland*.

⁶⁴ Hendrix (1967) 'Are You Experienced?' *Are You Experienced*.

⁶⁵ Hendrix (1967) 'Spanish Castle Magic' *Axis: Bold as Love*.

dragonfly.’ Electric Ladyland is reached by magic carpet.⁶⁶ For Hendrix and the counter-culture, journeys were ‘trips’, with LSD on blotting paper serving as one’s ‘magic carpet’, or mode of transport.⁶⁷ The just world is to be reached by altering one’s perceptions. The (oftentimes drug-induced) psychedelic ‘experience’, the experience Hendrix asks whether others have been through (in the line ‘Are you experienced?’), makes a person sufficiently perceptive to glimpse a better world. In ‘Up From The Skies’⁶⁸ Hendrix sings ‘I wanna see and hear everything’. Here, Hendrix announces his ambitions to expand his senses and take in the world lying outside of one’s usual mindset. Similarly, Rawls maintains that the abandonment of some elements of everyday physical reality is necessary in one’s search for the principles of justice by which institutions are to be organised. Rawls calls this altered state the ‘original position’.⁶⁹ The original position is a way of thinking by which participants negotiate and decide upon the principles of justice.⁷⁰ The original position does not reconstruct the events of some actual historical agreement.⁷¹ Instead, it is hypothetical.⁷² Actors in the original position are to select the principles of justice from behind a ‘veil of ignorance’, that strips them of their social standing, their mental and physical endowments, and their personal beliefs about what constitutes the good life.⁷³ Rawls argues that being deprived of these idiosyncrasies ensures the parties can bargain as equals and will not select principles that privilege people with particular characteristics.⁷⁴ Agreement on principles will be reached

⁶⁶ Hendrix (1968) ‘Have You Ever Been (To Electric Ladyland)’ *Electric Ladyland*.

⁶⁷ It should be noted, however, that while LSD is symbolic of the kind of beatific thinking Hendrix conveys, this mental state is not only accessible via drugs. As Hendrix says in ‘Are You Experienced’ (1967) *Are You Experienced*: ‘Not necessarily stoned, but beautiful’.

⁶⁸ Hendrix (1967) ‘Up from the Skies’ *Axis: Bold as Love*.

⁶⁹ Rawls (1972), p 121.

⁷⁰ Rawls (1972), p 11.

⁷¹ Rawls (1972), p 12.

⁷² Rawls (1972), p 12.

⁷³ Rawls (1972), p 12; p 137.

⁷⁴ Rawls (1972), p 12; p 136.

while in the original position because parties are unaware of the exact differences between each other in the real world, and will thus be convinced only by rational arguments.⁷⁵ The individual in the original position is not without any guidance, however, as the idea of the good life does not wholly evaporate. Instead, it is reduced to a ‘thin’ conception, which directs one’s choice of principles.⁷⁶ Certain goods are still desirable when separated from one’s complete idea of the good.⁷⁷ The goods that remain in the original position either enable or at the very least do not obstruct the accomplishment of an individual’s objectives, whatever those objectives may be.⁷⁸ Arguably, the goods opted for in the original position lead to principles that support acquisitive individuality.⁷⁹ However, this is not fatal to the argument for justice as fairness as the argument’s convincingness primarily inhabits the agreed upon premises from which justice as fairness is extrapolated rather than its practical consequences.⁸⁰ Therefore, while a system of justice as fairness will not be equally encouraging of every way of life, it will not prohibit differing ideas of the good from being realised as would a system that intervenes to promote or ensure particular consequences.⁸¹ In summary, the original position is an abstract state of mind in which people will rationally devise a system that affords the greatest amount of freedom for all people.

Akin to Rawls’ disembodied hypothetical, Hendrix asserts that abstraction from the real world, in his case through dreaming, is a path to the discovery of a

⁷⁵ Rawls (1972), p 139.

⁷⁶ Rawls (1972), p 396; Mandle (2009), p 109.

⁷⁷ Rawls (1972), p 397; Pogge (2007), p 73.

⁷⁸ Rawls (1972), p 397; Mandle (2009), p 111.

⁷⁹ Based on the assumption in Rawls (1972), pp 142-143 that people ‘...prefer more primary social goods rather than less’.

⁸⁰ Mandle (2009), p 110.

⁸¹ Simmonds (2002), p 68.

better order. For example, in 'Spanish Castle Magic',⁸² the 'really groovy place' is reached by using 'just a little bit of day-dream here and there,' and in 'May This Be Love',⁸³ Hendrix sings 'some people say day-dreaming's for all the lazy minded fools with nothing else to do. So let them laugh, laugh at me, so just as long as I have you to see me through I have nothing to lose.' However, it is not only through day-dreaming that this state of mind might be invoked. There are elements of the original position that match the LSD-consciousness portrayed by Hendrix. Hayden describes the original position as:

'...a scenario in which individuals representing several generations are to be abstracted from time and space and required to choose principles for an actual society, into which they would be eventually returned, which they could all agree to support as the most just possible.'⁸⁴

Being 'abstracted from time and space', as well as what Douzinas and Gearey call the 'destruction of identity'⁸⁵ that occurs in the original position, is reminiscent of the cosmic impressions of an LSD trip and the all-encompassing care for humanity that sometimes results (for example, MacDonald writes that LSD worked on John Lennon '...to elevate his psychologically conditioned sympathy for the underdog into a universal concern for love and peace...' ⁸⁶). In the case of the original position, this mindset of 'universal concern' is manifested as a preoccupation with fairness and unanimous agreement on the principles of justice. In 'Are You Experienced',⁸⁷ Hendrix invites the listener to accompany to a different state of consciousness: 'If you can just get your mind together then come across to me, we'll

⁸² Hendrix (1967) 'Spanish Castle Magic' *Axis: Bold as Love*.

⁸³ Hendrix (1967) 'May This Be Love' *Are You Experienced*.

⁸⁴ Hayden (2002), pp 1-2.

⁸⁵ Douzinas and Gearey (2005), p 127.

⁸⁶ MacDonald (2003b), p 99.

⁸⁷ Hendrix (1967) 'Are You Experienced?' *Are You Experienced*.

hold hands and then we'll watch the sunrise from the bottom of the sea'. Hendrix's invitation summarises Rawls' approach to founding a just world. By getting one's mind 'together', or changing one's thinking by inhabiting the original position, it is possible to 'come across' to other people⁸⁸ and agree on how institutions should be structured. This agreement leads to the arrival of a just world, represented in 'Are You Experienced'⁸⁹ as a place at the 'bottom of the sea'. Just as Rawls necessitates, while in the original position, the removal of the differences that lead to inequality, Hendrix's dreamlike or drug-borne journeys provoke the traveller to jettison their personal concerns (or veil them in a cloud of 'purple haze'⁹⁰). In 'Have You Ever Been (To Electric Ladyland)',⁹¹ Hendrix expresses his desire to escort the listener to the 'love land' of Electric Lady, and sings 'it's time we take a ride, we can cast all your hang-ups over the side.' In earlier songs, such as 'Have You Ever Been (To Electric Ladyland)',⁹² in which Hendrix describes the use of LSD to a potential tripper, he predicts, 'I know, I know, you'll probably scream and cry that your little world won't let you go', suggesting that a new user of the drug might be reluctant to abandon the conventions and concerns of their concrete reality. In response to the possible unwillingness of the other to abandon themselves to the psychedelic experience, Hendrix emphasises the hindrances that can be posed by this normal plane of existence. To the reluctant tripper he retorts 'but who in your measly little world are you trying to prove that you're made out of gold and can't be sold?' To Hendrix, the normal reality is 'measly' compared to what one might see or come to understand in the course of a trip. Hendrix says 'I just wanna know about the rooms

⁸⁸ Part of the experience behind the veil, as Kelly (1996), p 364 describes it, is that one is sojourning in a state of pure imagination that allows for supremely effective communication with others.

⁸⁹ Hendrix (1967) 'Are You Experienced?' *Are You Experienced*.

⁹⁰ Hendrix (1967) *Purple Haze*.

⁹¹ Hendrix (1968) 'Have You Ever Been (To Electric Ladyland)' *Electric Ladyland*.

⁹² Hendrix (1968) 'Have You Ever Been (To Electric Ladyland)' *Electric Ladyland*.

behind your minds,’ (in ‘Up From The Skies’⁹³). Behind the mind is the thought processes of the ‘rational’ and ‘free’ actor in the original position. This is affirmed by Hendrix’s suggestions that a person’s anxieties will disappear once they have shed their personal concerns. In ‘May This Be Love’,⁹⁴ Hendrix depicts this peaceful state through cool, trickling guitar lines while singing ‘waterfall, nothing can harm me at all. My worries seem so very small with my waterfall.’ Similarly, going to the ‘really groovy place’ in ‘Spanish Castle Magic’⁹⁵ ‘puts everything else on the shelf.’ In a placid state of mind, a person will be capable of the kind of thinking necessary to recognise and agree to the appropriate principles upon which to found a just society. While there, Hendrix advises; ‘Don’t think your time on bad things. Just float your little mind around.’ Separated from the imperative to advance one’s particular interests, people’s minds are free to move, or ‘float’ on to more universal conceptions of justice.

While bereft of their particular interests and abilities, people in the original position share with each other several characteristics that allow them to choose, for their conception of justice, between the various principles on offer.⁹⁶ All people are in free and rational pursuit of self-interested goals when negotiating the principles of justice by which they will form a society.⁹⁷ Rawls also includes a ‘special assumption’ that people in the original position (although not in the real world⁹⁸) are ‘mutually disinterested’,⁹⁹ or pursue their own goals while being unconcerned with

⁹³ Hendrix (1967) ‘Up from the Skies’ *Axis: Bold as Love*.

⁹⁴ Hendrix (1967) ‘Up from the Skies’ *Axis: Bold as Love*.

⁹⁵ Hendrix (1967) ‘Spanish Castle Magic’ *Axis: Bold as Love*.

⁹⁶ Rawls (1972), p 143.

⁹⁷ Rawls (1972), p 11; p 142.

⁹⁸ Rawls (1972), p 148.

⁹⁹ Rawls (1972), p 13. Just as Hendrix focused on his own project of creativity without being callous, Mandle (2009), p 60 states that ‘The assumption of “mutual disinterest” among the parties does not reflect an extreme individualism or selfishness, but rather the fact that they [those behind the veil of ignorance] cannot assume that any particular conception of the good will be universally shared.’

the relative success enjoyed by others in achieving their goals.¹⁰⁰ In both his personal conduct and music, Hendrix evidences this kind of disinterest in the relative fortunes of other people. While Hendrix was an icon to the counter-culture, he did not participate in counter-cultural organisations. For example, Whiteley notes that Hendrix declined invitations from the Black Panther party to identify with the group.¹⁰¹ While labelled as ‘The Wild Man from Borneo’ by some white critics,¹⁰² and having his music dismissed as excessively white by some African American people,¹⁰³ Hendrix continued to pursue his personal musical agenda regardless of the responses he elicited. Hendrix outlines the freedom that comes from his disinterest in ‘Stone Free’,¹⁰⁴ a song in which he communicates disapproval towards people doing things relative to each other instead of following their own interests; ‘Every day in the week I’m in a different city. If I stay too long people try to pull me down. They talk about me like a dog. Talk about the clothes I wear. But they don’t realise they’re the ones who’s square.’ By remaining unconcerned about what others are doing, Hendrix is ‘stone free to do what I please. Stone free to ride the breeze.’ Perhaps the central and most clearly expressed statement of Hendrix’s *Easy Rider*¹⁰⁵-style mutually-disinterested, self-interested approach is the counter-cultural anthem ‘If 6 Was 9’.¹⁰⁶ In this song, Hendrix explains that his goals in life are not dependent on others, as expressed in the lines ‘I’ve got my own world to live through and I ain’t gonna copy you’ and ‘nobody know what I’m talking about. I’ve got my own life to live. I’m the one that’s gonna have to die when it’s time for me to die, so let me live my life the way I want to.’ How others pursue their goals does not interest Hendrix,

¹⁰⁰ Rawls (1972), p 143.

¹⁰¹ Whiteley (1992), p 4.

¹⁰² Friedlander (1996), p 222.

¹⁰³ Perry (2004), p 14.

¹⁰⁴ Hendrix (1966) ‘Stone Free’ *Hey Joe*.

¹⁰⁵ Hopper (1969) *Easy Rider*.

¹⁰⁶ Hendrix (1967) ‘If 6 Was 9’ *Axis: Bold as Love*.

and he says, by way of example, that ‘if all the hippies cut off all their hair, I don’t care.’ Furthermore, Hendrix’s activities will carry on in spite of people trying to advance their interests at his expense; ‘White collar conservatives flashing down the street pointing their plastic finger at me. They’re hoping soon my kind will drop and die but I’m gonna wave my freak flag high.’ ‘Fall mountains, just don’t fall on me. Point on Mr. Businessman, you can’t dress like me.’ Through his disinterest towards others and self-interested pursuit of his music and visions of a better world, Hendrix acts as a kind of ‘original position man’, able to glimpse at something akin to Rawls’ principles, which allow people to pursue their ends in a just fashion. Hendrix is outside of the mundane, lacking the attachments to position and property. The ‘Mr. Businessman’ figure, by contrast, is representative of the kind of encumbrances that Rawls insists must be shed in order to discern justice’s principles.

In Rawls’ procedure for arriving at these principles, glimmers of Zarathustra’s three metamorphoses are visible. Like the ‘camel’ noticing the cumbersome values that have been unduly imposed upon it, Rawls begins by recognising that the shape of people’s lives is often imposed upon them: they are deprived of the opportunities needed to create themselves as they wish to. The ‘lion’, the next phase of Zarathustra’s metamorphic sequence, repudiates established values, clearing the field for the creation of new ones. Similarly, Hendrix’s visions are a place of freedom and beautiful possibility, and Rawls’ original position is a space where, without interference, a better society can be planned. Zarathustra takes sanctuary on a mountaintop and spends a long time in thought. Musician and jurist also retreat and reflect. Hendrix day-dreams¹⁰⁷ and Rawls’ theory strives

¹⁰⁷ Waksman (2006), p 64.

for 'reflective equilibrium' through contemplation.¹⁰⁸ Zarathustra identifies the need to exceed one's current self. Reminiscent of this, a person in the original position sheds their identity in exchange for the perceptiveness needed to create a just society. The third phase is an evolution beyond reactivity, represented by the 'child', whose innocence resembles that of the person in the original position; selfless due to their lack of attachments and allegiances. As the child says 'yea' to life, the person transported to the original position will affirm the principles of justice.

Acceptance of Rawls' principles is inspired by understanding; specifically, understanding of the process by which these principles come about. This approach reverberates with Zarathustra's effort to change people's ways without repeating their subjugation; without perpetuating their thoughtlessness. Zarathustra wants people to take responsibility for their own emancipation. He tries to make people realise for themselves the need to create new values. By inviting people to situate themselves in the original position, Rawls makes forming an appreciation for his principles an individual (or personal) and active process. Furthermore, the crux of the similarity with Rawls here is not just in motive, but in method. Zarathustra teaches in metaphors and stories. Escorting people to the original position and letting them witness the process by which the principles of justice are selected, Rawls takes his readers through a narrative: a story is being told. Ideally, people do not submit to Rawls' principles because they are told they should, as if the principles were commands that have been imposed. The principles do not demand allegiance outright. They are merely the encapsulation of a journey of understanding that has been presented. The reader (with the text as their guide) is asked to find the value of

¹⁰⁸ Rawls (1972), p 48.

justice for themselves. In *ATOJ*, justice is the product of human creativity. People assemble, deliberate, and agree to will it into being.

The principles of justice have been a ‘riff’; recurring throughout the first section of this chapter. They define the structure through which justice permeates. It has been shown that this structure is a place that must be travelled to and that the journey supposedly alters the consciousness of the traveller so that they become accepting of Rawls’ principles. It will now be explained specifically how these principles are to build a framework for justice.

II – Building the Just World

Seeing the shape taken by Rawls’ framework requires examination of the principles of justice and the issues encountered in their implementation. Rawls argues that those in the original position would agree to two principles of justice.¹⁰⁹ It is assumed that if given a choice, people are desirous of a greater amount of goods over a smaller amount.¹¹⁰ Accordingly, the first principle specifies that everyone is equally entitled to a share in the largest amount of liberties to which access can be equally granted.¹¹¹ The fundamental liberties under this principle (all of which are equal) are ‘political liberty’, ‘freedom of speech and assembly’, ‘liberty of conscience’, ‘freedom of thought’, ‘freedom of the person’, ‘the right to hold (personal) property’ and ‘freedom from arbitrary arrest and seizure’.¹¹² As previously argued, Hendrix waves his ‘freak flag high’,¹¹³ pursuing a personal artistic vision and attempting a way of life counter to the majority. For example, Hendrix maintained an

¹⁰⁹ Rawls (1972), p 14.

¹¹⁰ Rawls (1972), p 142.

¹¹¹ Rawls (1972), p 302.

¹¹² Rawls (1972), p 61.

¹¹³ Hendrix (1967) ‘If 6 Was 9’ *Axis: Bold as Love*.

outlandish appearance, adorning himself with ‘boldly coloured and frilly shirts, embroidered jackets and vests, scarves, headbands, and jewellery’.¹¹⁴ Hendrix also unconventionally expressed himself through an energetic and sexually suggestive playing style and through his music, which Zak states was ‘an assertion of independence from expectations both social and musical’.¹¹⁵ This personalisation and differentiation from the collective demonstrates the same importance afforded to personal freedoms in Hendrix’s project as is evidenced in the liberties of Rawls’ first principle.

The second principle of justice administers society’s ‘distribution of social and economic advantages’.¹¹⁶ This principle has two components. It holds that ‘social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone’s advantage, and (b) attached to positions and offices open to all.’¹¹⁷ Rawls further develops these two components under the names of ‘the difference principle’ and ‘fair equality of opportunity’. The difference principle element allows for inequalities in the distribution of goods, but unlike utilitarianism, requires that all of society, rather than a simple majority, must benefit from the inequality.¹¹⁸ The superior prospects of the more privileged must in turn increase the prospects of the less advantaged.¹¹⁹ Rawls provides the example of entrepreneurs, whose greater access to the benefits of society compared to unskilled labourers is likely to encourage innovation and confer material benefits upon the rest of society.¹²⁰ Rawls denies that allowing inequalities that benefit all of society

¹¹⁴ Friedlander (1996), p 223.

¹¹⁵ Zak (2004), p 139.

¹¹⁶ Rawls (1972), p 61.

¹¹⁷ Rawls (1972), p 60.

¹¹⁸ Rawls (1972), p 15; 61.

¹¹⁹ Rawls (1972), p 75.

¹²⁰ Rawls (1972), p 78.

creates a meritocratic arrangement.¹²¹ While the disparity between people's abilities is not entirely evened out, the disparity is utilised to improve the lot of the less fortunate.¹²² Efficiency considerations are not privileged. Rather, the fruits of individuals' skills are conceptualised as resources to be shared amongst all.¹²³ As Rawls says, 'those who have been favoured by nature, whoever they are, may gain from their good fortune only in terms that improve the situation of those who have lost out.'¹²⁴ While occupying the relatively better-off position of being a rock star, and enjoying greater attention, influence, and financial remuneration than many others, Hendrix's technical virtuosity and creative genius help him to 'improve the situation' of others. Hendrix's mission, as with the counter-culture, was to advance the conditions of society by 'expanding' people's minds and introducing superior ways of living. Hendrix depicts himself as a powerful figure capable of instituting this change in songs such as 'Voodoo Chile',¹²⁵ where he claims to have been raised by an eagle which took him 'to the outskirts of infinity' and gave him a 'Venus witch's ring'. As further evidence of the extent of his travels (with journeying, as previously suggested, being equated by Hendrix with the acquisition of knowledge or understanding), Hendrix's 'arrows are made of desire, desire from far away as Jupiter's sulphur mines' and he is in possession of a hummingbird that 'hums so loud you think you were losing your mind.' In the similarly titled *Voodoo Child (Slight Return)*, Hendrix is able to 'stand up next to a mountain and chop it down with the edge of my hand' and 'pick up the pieces and make an island'. In other songs, including *Are You Experienced?*, Hendrix comes across as a paternal figure, offering his 'experience' with the use of psychedelic drugs to guide the first-time user of

¹²¹ Rawls (1972), p 100.

¹²² Rawls (1972), p 101.

¹²³ Rawls (1972), p 101.

¹²⁴ Rawls (1972), p 101.

¹²⁵ Hendrix (1968) 'Voodoo Chile' *Electric Ladyland*.

LSD.¹²⁶ Here Hendrix presents himself ‘as a teacher of sensory awareness’.¹²⁷ Hendrix often appears in a friendly or helpful guise, aided, as Whiteley observes, by his conversational singing style,¹²⁸ and by informal references to himself; such as ‘this is Jimi talking to you’, as he says in ‘Fire’.¹²⁹ Hendrix justifies the inequality of his position by inhabiting the role of psychedelic mentor for the rest of society. This role of consciousness expanding leader was a position available to Hendrix in keeping with the fair equality of opportunity element of Rawls’ second principle, which requires that offices of government are fairly available to all.¹³⁰ Even though, in keeping with the difference principle, everyone would benefit from the inequalities that would result if some were not entitled to hold office, Rawls argues that the disqualified ‘would be deprived of one of the main forms of human good’ if they were ‘debarred from experiencing the realisation of self which comes from a skilful and devoted exercise of social duties’, resulting in an injustice.¹³¹ ‘Move over Rover and let Jimi take over,’ Hendrix commands in ‘Fire’,¹³² and he fulfils the requirements of fair equality of opportunity by ‘taking office’ as a rock star and instiller of cosmic consciousness in spite of an underprivileged background that included foster homes, a single-parent family, time in the army, gruelling and unrewarding work as a backing musician, and as starving artist in New York City, and in spite of the racism that made it difficult for him to gain initial recognition in the United States.¹³³ While his race and social circumstances might have barred him from gaining an audience as a musician, the world that Hendrix presents is one

¹²⁶ Whiteley (1992), p 26.

¹²⁷ Chenoweth (1971), p 31.

¹²⁸ Whiteley (1992), p 27.

¹²⁹ Hendrix (1967) ‘Fire’ *Are You Experienced*.

¹³⁰ Rawls (1972), p 302.

¹³¹ Rawls (1972), p 84.

¹³² Hendrix (1967) ‘Fire’ *Are You Experienced*.

¹³³ See Roby and Schreiber (2010).

where all should be allowed to develop themselves by taking office in their chosen pursuits. Providing fair equality of opportunity, as well as redressing imbalances of distribution, through the second principle, and protecting liberties through the first, gives structure to Rawls' just society and can be used to reform existing institutions. Even though people in the concrete world are not lacking in points of social, physical, and mental dissimilarity, indifferent to the fortunes of others, or given the opportunity to accept or reject the forms of government they find themselves subjected to, Rawls argues that institutions conforming to the principles of justice would be accepted by people were they given the opportunity to discuss and select principles in the original position.¹³⁴ Any system conforming to these principles, therefore, nears being a society whose citizens would agree to be part of.¹³⁵ Similarly, Hendrix believed the original position-like visions he presented to others would better direct people as to how to arrange society than would political processes in which people retained their 'egos', or differentiated social standing and personal preferences, and that people would willingly follow this direction:

'Pretty soon, I believe that they're [people are] going to have to rely on music to, like, get some kind of peace of mind or satisfaction. Direction, actually. More so than politics, because, like, politics is really an ego scene', Hendrix remarked, in affirmation of this view.¹³⁶

To Hendrix, his music created an institution in the concrete world; the 'electric church'.¹³⁷ When asked to explain the concept of the electric church, Hendrix said 'we're playing for our sound to go inside the soul of the person,

¹³⁴ Rawls (1972), p 13.

¹³⁵ Rawls (1972), p 13.

¹³⁶ 'Jimi Hendrix on the Dick Cavett Show' (7 July 1969)

<http://www.youtube.com/watch?v=4Gc0B3vNV0>.

¹³⁷ 'Jimi Hendrix on the Dick Cavett Show' (7 July 1969)

<http://www.youtube.com/watch?v=4Gc0B3vNV0>.

actually, you know. And see if they can awaken some kind of thing in their minds, you know. 'Cause there's so many sleeping people. You can call it that if you want to.'¹³⁸ Justice is to be delivered to society by reforming or replacing institutions with the electric church. However, there are issues with the mechanics of the principles of justice that complicate this renovation of real world institutions.

Three difficulties in realising the principles of justice will be voiced here: the potential discriminatory operation of the difference principle; Rawls' lack of an account of production; and the failure of the principles of justice to guide the establishment of institutions able to effect redistribution. The first of these critiques is less an argument that realising the principles is a matter of practical impossibility, and more a contention that Rawls' principles may fail to secure the personal freedom that is a major objective of his theory. The potentially self-defeating operation of the theory of justice is brought about by a contradiction between Rawls' assertion of the equal moral worth of all individuals and the way in which the difference principle holds that individuals' abilities should be utilised as assets to improve the lot of everyone in society. This criticism originates from a camp of liberalism, distinct from Rawls', called libertarianism. Libertarianism is an earlier form of liberalism which limits the state's role to maintaining individual freedom and private ownership.¹³⁹ In contrast, the liberalism that informs Rawls' theory permits state intervention in matters of distribution.¹⁴⁰ Under this approach, the state is allowed to intrude upon individual rights if doing so is necessary to rectify matters of deprivation.¹⁴¹ Libertarians, such as Nozick,¹⁴² believe that liberty and private

¹³⁸ 'Jimi Hendrix on the Dick Cavett Show' (7 July 1969)
<http://www.youtube.com/watch?v=4Gc0B3vNV0>.

¹³⁹ Kukathas and Pettit (1990), p 74.

¹⁴⁰ Kukathas and Pettit (1990), p 74.

¹⁴¹ Kukathas and Pettit (1990), p 74.

¹⁴² Kukathas and Pettit (1990), p 76.

property must not be violated and disagree with Rawls' vision because its distributive program permits such trespasses.¹⁴³ To Nozick, redistribution is not liberal as it persecutes those with a particular (material) conception of the good:

‘Why should the man who prefers seeing a movie (and who has to earn money for a ticket) be open to the required call to aid the needy, while the person who prefers looking at the sunset (and hence need earn no extra money) is not? Indeed, isn’t it surprising that redistributionists choose to ignore the man whose pleasures are so easily attainable without extra labor, while adding yet another burden to the poor unfortunate who must work for his pleasures? If anything, one would have expected the reverse.’¹⁴⁴

To libertarians, treating individuals as means to the improvement of society is an intrusion upon the integrity of the individual, an integrity that Rawls establishes as one of the foundations of his theory.¹⁴⁵ While it might be suggested that people’s abilities are distinct from people themselves, separating people from their activities significantly complicates and possibly thwarts the entire conception of the liberal individual.¹⁴⁶ Hendrix himself demonstrates why such intervention in personal freedom might be damaging. For almost the entirety of the time that he was a popular musician, Hendrix was subjected to a gruelling schedule of constant touring, which exhausted and depressed him and increasingly stifled his creativity.¹⁴⁷ On tour, it was Hendrix himself who was being used, or ‘distributed’, rather than just his abilities.

¹⁴³ Kukathas and Pettit (1990), p 75.

¹⁴⁴ Nozick (1974), p 170.

¹⁴⁵ Nozick (1974), p 228.

¹⁴⁶ Sandel (1982), p 78.

¹⁴⁷ Chandler (1997) *Classic Albums The Jimi Hendrix Experience Electric Ladyland*, on the Jimi Hendrix Experience’s touring schedule, Noel Redding (bassist): ‘It was silly, really. I’m glad I’m still here.’ Mitch Mitchell (drummer): ‘[the touring arrangements were]...giant stupidity; from a management point of view, from agent’s point of view...’ Trixie Sullivan, Michael Jeffery’s [Hendrix’s manager’s] Personal Assistant: ‘...they put him [Jimi] on at one side of the country for one

Second, a difficulty in implementing the principles is the result of a clash between the difference principle and the veil of ignorance. The difference principle is reliant on the proposition that societal inequalities are compensated for by a redistribution of the surplus of goods that they create.¹⁴⁸ A full account of such a surplus would include an explanation of the origins of these goods.¹⁴⁹ However, the production of goods is occluded by the veil of ignorance.¹⁵⁰ Rawls' characterisation of the negotiations in the original position portrays the goods as being somehow bestowed upon people rather than being created by them.¹⁵¹ This lack of a real account of where goods come from may mean that Rawls' is 'a theory of pure distribution'.¹⁵² Similarly, the utopian world of Hendrix and the counter-culture, with 'free love' and unlimited visions supplied by LSD also obscures the role of people in the creation of goods.

Third, and finally, another difficulty of implementation comes from the absence of an explanation as to how the principles are actually used to select concrete institutions and form a government, prompting Wolff to claim that Rawls 'has no theory of the state.'¹⁵³ When combined with Rawls' non-existent account of production, his theory of justice lacks a sufficiently detailed argument as to how redistribution under the difference principle is to be effected in reality.¹⁵⁴ The redistribution of goods would be an involved process instituted through numerous techniques and regulations, and would require an enormous amount of power to be

day and you're supposed to be 3000 miles away the next day to do another gig. No one seemed to think of a schedule where he could go from one place to the other in a normal manner.'

¹⁴⁸ Wolff (1997), p 207.

¹⁴⁹ Wolff (1997), p 207.

¹⁵⁰ Wolff (1997), p 201.

¹⁵¹ Wolff (1997), p 207.

¹⁵² Wolff (1997), p 210.

¹⁵³ Wolff (1997), p 201.

¹⁵⁴ Wolff (1997), p 202.

consolidated in those responsible for administering the principle.¹⁵⁵ It is questionable as to who would be capable of attaining sufficient influence to properly tend to the difference principle and suggests issues with the ends to which they deploy this power.¹⁵⁶ Rawls theory is supposed to distribute goods, but lacks the mechanisms to do so. However, such powers only exist in the world of visions, not in the world of the concrete. In keeping with such practical challenges that Rawls' theory seems incapable of surmounting, Hendrix encountered similar difficulties in trying to manifest the world of visions to which he had access, and which inspired his music. Hendrix spoke of his frustrations;

““Most of the time I can’t get it on the guitar, you know? Most of the time I’m just laying around day-dreaming and hearing all this music. And you can’t, if you go to the guitar and try to play it, it spoils the whole thing, you know? – I just can’t play guitar that well, to *get* all this music together.””¹⁵⁷

The world to which Hendrix travelled in his mind was incapable of being wholly translated into something tangible. It was a world made up of ideas rather than specificities, as Hendrix decries in ‘Love or Confusion’:¹⁵⁸ ‘My mind is so messed up, going ‘round and ‘round. Must there be all these colours without names, without sound?’ Emphasising the abstraction of these visions, Hendrix frequently uses colour to describe states of mind, such as the title phrase in the song ‘Purple Haze’,¹⁵⁹ and ‘Bold as Love’,¹⁶⁰ which describes the colour-coded inhabitants of an imaginary world, each a representative for a particular emotion (such as ‘queen

¹⁵⁵ Wolff (1997), p 202.

¹⁵⁶ Wolff (1997), p 202.

¹⁵⁷ Waksman (2006), p 64.

¹⁵⁸ Hendrix (1967) ‘Love or Confusion’ *Are You Experienced*.

¹⁵⁹ Hendrix (1967) *Purple Haze*.

¹⁶⁰ Hendrix (1967) ‘Bold as Love’ *Axis: Bold as Love*.

jealousy, envy... her fiery green gown sneers at the grassy ground'). Hendrix's music has often been conceptualised as a response to his visions. For example, Chenoweth emphasises ideas such as 'non-verbal communication' as characteristic of the counter-cultural practices with which Hendrix was associated,¹⁶¹ Friedlander and Perry talk of Hendrix having a 'vision',¹⁶² and according to Waksman, in the studio, Hendrix carried out 'fantasies of sound'.¹⁶³ These nameless, soundless concepts give little direction as to how they are to be realised in the material. The same holds true of Rawls' abstract justice. It is difficult to ascertain whether Rawls' principles will actually result in the creation of a just society.¹⁶⁴ Despite the detail and sophistication with which Rawls describes the principles of justice, they are disconnected (or 'drop out') from 'social, economic, and political reality.'¹⁶⁵ It is this disconnect that explains why Rawls' principles cannot manifest a more workable system.

In attending to distribution and opportunity, the principles of justice are meant to structure a society that gives people control over their lives. The primacy of self-determination found in Zarathustra's teachings is evident here. Also similar are Rawls' concern for those who suffer from arbitrary inequalities and Zarathustra's sympathy for the outsider. However, the insubstantial plans for the implementation of Rawls' just society, as well as the abstraction that founds the principles of justice – a point at which *ATOJ* departs from Nietzsche – is where Nietzsche underlines a serious flaw in Rawls' work. Zarathustra preaches fidelity to the senses, whereas Rawls' principles and the world they entail might represent a world of distorted perceptions.

¹⁶¹ Chenoweth (1971), p 25.

¹⁶² Friedlander (1992), p 228; Perry (2004), p 3.

¹⁶³ Waksman (2006), p 64.

¹⁶⁴ Wolff (1997), p 195.

¹⁶⁵ Wolff (1977), p 195 observes that: '...Rawls says little or nothing about the concrete facts of social, economic, and political reality.'

This section examined Rawls' attempt ensure freedom and attend to distribution using the principles of justice, principles that might contradict each other, and abstractions from practicalities of production and distribution mean the principles are unlikely to be realised in a concrete social structure. This same abstraction from social realities is the reason that Rawls' theory does not induce universal acceptance of justice as fairness amongst real life people. This matter is discussed in the final section of this chapter.

III – Illusion and Justice

This section begins with a focused examination of how Rawls' theory fails to be convincing in the concrete world and then returns to Hendrix to help understand why this is so. A reiteration of Rawls' motivations for developing his theory will demonstrate that achieving universal agreement on justice is one of his main objectives: A fundamental assumption of liberalism is that individuals possess incompatible beliefs as to what counts as the good life.¹⁶⁶ A collective definition of the good life is therefore impossible under a liberal system as it would require sacrificing the kind of unencumbered citizenry and rational organisation that liberalism attempts to establish.¹⁶⁷ Rawls works from this assumption that people's notions of the good conflict and believes that it is possible to agree upon a structure within which conceptions of the good are pursued. To reach agreement, therefore, Rawls subordinates the good to the right.¹⁶⁸ Rawls relegates the good to a matter of personal concern and makes the structure of society central to his theory. Rawls' structure would appear to be convincing enough to secure agreement. It has been

¹⁶⁶ Douzinas and Gearey (2005), p 126.

¹⁶⁷ Douzinas and Gearey (2005), p 126; Fagan (2005), p 85.

¹⁶⁸ Douzinas and Gearey (2005), pp 126-127.

recognised as possessing attractive qualities. For example, Maffettone deems Rawls' theory to be complex and thoughtful, recognising in Rawls a mindfulness of the forces endangering liberalism not only from the outside but also from within.¹⁶⁹ In his theory Rawls also balances utopian ambitions and pragmatic concerns.¹⁷⁰ Because of the intellectually and aesthetically pleasing qualities of *ATOJ*, it may be surprising that Rawls' theory is not universally compelling, but it is these same rhetorical features that make the theory alienating. The fundamental method of justification in *ATOJ* is to alter people's consciousness using the original position. The original position is intended to make the principles of justice irresistible by showing how they came into being. It is this strategy which causes a break from social reality and makes the theory unacceptable. For example, there is no reason for the better-off to agree to the difference principle as an element of justice.¹⁷¹ Even though they might do so in the original position, when returned to the concrete world, they would have to find themselves in a society that was already without class stratification and inequalities of wealth to see redistribution an attractive proposition.¹⁷² The communitarian appraisal of Rawls is a preeminent critique that draws attention to how abstractness of argument makes his theory unconvincing.¹⁷³ The starting point chosen by liberal theories such as Rawls' is a site of critique for the communitarians.¹⁷⁴ Liberal theories commence by identifying the values that society should facilitate.¹⁷⁵ This kind of beginning is evident in Rawls' statement that 'justice is the first value of social institutions'.¹⁷⁶ Communitarians dispute liberal

¹⁶⁹ Maffettone (2010), p 2.

¹⁷⁰ Maffettone (2010), p 2.

¹⁷¹ Miller (1975), p 206.

¹⁷² Miller (1975), p 206.

¹⁷³ Maffettone (2010), pp 158-159.

¹⁷⁴ Kukathas and Pettit (1990), p 92.

¹⁷⁵ Kukathas and Pettit (1990), p 92.

¹⁷⁶ Rawls (1972), p 3.

theories' ordering of the relationship between principles and society and argue that the principles against which institutions are to be assessed are not antecedent to society but are descriptive of it.¹⁷⁷ While principles might explain societal structures, principles do not originate these interactions.¹⁷⁸ Because they are subordinate, principles lack argumentative force: 'practice precedes theory; and it is hard to see why persons in actual societies should take notice of such abstract principles or their deductive implications.'¹⁷⁹ This critique argues that, in the real world of the social, Rawls' principles are not necessarily worthy of notice. Sandel goes further, claiming that it is unrealistic for any person to undertake the change in thinking required to inhabit the original position. To agree to the logic of Rawls' justice one must entertain an abstract consciousness, but to reach this state of mind requires a person divest themselves of the preferences and allegiances that constitute their very existence.¹⁸⁰ There may be ethically unacceptable consequences to the way in which liberalism abstracts away from concrete community. Liberal frameworks are 'empty of ethical substance', as they require no particular content.¹⁸¹ Due to this emptiness, Rawls' theory is not faithful to people's actual interactions and communities.¹⁸² The complexity (a quality that suggests being attuned to real life) and superficial variety (such as the divergences of opinion between liberals such as Rawls and libertarians such as Nozick) of liberal theories disguises that these works are homogenous in their maintenance of the status-quo.¹⁸³ A liberal theory usually reinforces the

¹⁷⁷ Kukathas and Pettit (1990), p 92.

¹⁷⁸ Kukathas and Pettit (1990), p 92.

¹⁷⁹ Kukathas and Pettit (1990), p 92.

¹⁸⁰ Sandel (1982), p 175.

¹⁸¹ Douzinas and Gearey (2005), p 126, Fagan (2005) p 80.

¹⁸² Douzinas and Gearey (2005), p 126, Anderson (2003), p40 writes that '...Rawls's thought is a long lesson in how *not* to think [as in, avoid thinking] about politics [original emphasis].'

¹⁸³ Douzinas and Gearey (2005), p 126, Bielefeldt (1998), p 23 argues that '...those launching attacks again liberalism frequently turn out to be liberals themselves...'

distributive landscape of the present¹⁸⁴, instead of restarting it as the original position is supposed to. Furthermore, because liberalism sees justice as a matter of distribution in the first place, it commodifies people's dealings with each other and 'Justice becomes lawful possession'.¹⁸⁵ This is a state of nihilism because, in being commodified, every value becomes interchangeable.¹⁸⁶ If liberalism judges values it is to the extent that it must do so only maintain the integrity of its structure.¹⁸⁷ The original position makes everyone the same. Perhaps it does so out of 'the modern concern with, and fear of, the other person.'¹⁸⁸ Abstraction is effective in neutralising difference. In turning people into abstractions, *ATOJ* deprives people of their identities and experiences, such as 'pain and anger', and, in doing so, silences them.¹⁸⁹ Not only is it impossible to abstract away identity, but it is an injustice to attempt to do so. According to Matsuda, Rawls' principles are unacceptable because they are arrived at by way of abstraction.¹⁹⁰ The true dynamics of social interaction are omitted from the original position's portrayal of imaginary community.¹⁹¹ Rawls uses abstraction to insulate against viable competing accounts of the social and to make appealing the reason that lies within the bounds of this theory.¹⁹² While Rawls supposedly compares the society he has imagined to actual conditions, this outside world cannot really intrude upon his model because the select parameters of the original position prohibit its entry.¹⁹³ Comparing the outside world to the theory is impossible because it runs counter to the very idea of the original position, which is

¹⁸⁴ Douzinas and Gearey (2005), p 126.

¹⁸⁵ Douzinas and Gearey (2005), p 126.

¹⁸⁶ Douzinas and Gearey (2005), p 126.

¹⁸⁷ Douzinas and Gearey (2005), p 126.

¹⁸⁸ Douzinas and Gearey (2005), p 127.

¹⁸⁹ Douzinas and Gearey (2005), p 127.

¹⁹⁰ Matsuda (1986), p 613.

¹⁹¹ Matsuda (1986), p 613.

¹⁹² Matsuda (1986), p 613.

¹⁹³ Matsuda (1986), p 613.

designed to exclude such information. Through the original position, Rawls deems irrelevant most real-world considerations. A person within the original position is prohibited from knowing the outside world. The parameters of the original position are given force because the original position defines its inhabitants' entire reality. Matsuda calls this the 'internal logic' of the original position.¹⁹⁴ Because the outside world is unknowable, the appropriateness of the original position cannot be verified. Acquiescence to the original position is predicated 'on faith alone.'¹⁹⁵ The particular scheme by which competing accounts of the social are barred from Rawls' theory is selectively depriving original position inhabitants of qualities¹⁹⁶ and privileging the value liberty.¹⁹⁷ For example, it is questionable why self-interest and individuality remain as fundamentals in the original position when they too could have been removed.¹⁹⁸ While the person who has experienced the original position is permitted to return to the tangible world, they are meant to bring with them a new understanding of the importance of liberty and a commitment to justice as fairness.¹⁹⁹ The figures inside the original position inexorably opt for Rawls' principles, but this is only because Rawls has crafted them to do so.²⁰⁰ His original position does not provide understanding, but in fact occludes it.²⁰¹ Matsuda observes that while it seems Rawls removes certain knowledge from the original position to 'avoid skewing the outcome', the opposite is true, because Rawls is not conducting an impartial thought experiment but is attempting to convince the reader to adopt certain values: 'Abstraction never achieves the clarity of vision Rawls promises. The

¹⁹⁴ Matsuda (1986), p 613.

¹⁹⁵ Matsuda (1986), p 613.

¹⁹⁶ Matsuda (1986), p 613.

¹⁹⁷ Matsuda (1986), p 616.

¹⁹⁸ Matsuda (1986), p 628.

¹⁹⁹ Matsuda (1986), p 616.

²⁰⁰ Matsuda (1986), p 616.

²⁰¹ Matsuda (1986), p 617.

abstraction is necessarily weighted to derive a theory consistent with the liberal tradition, and alternative conceptions of the nature of humankind are ignored.’²⁰² In the original position, Rawls takes away people’s identities and imprints upon them his own construction of values:

‘There is really only one person on the abstract side of the veil of ignorance, because everyone there has the same limited information. My objection is that unavoidably the person behind the veil is John Rawls.’²⁰³

The occupants of the original position will agree to Rawls’ principles because those ‘behind the veil’²⁰⁴ are made in Rawls’ image. However, as the critics that decry Rawls’ abstract argument have demonstrated, because people in real life are not constructed according to Rawls’ values they often cannot and will not accept the original position.²⁰⁵ Most people would have to inhabit the original position in order to be convinced the logic of Rawls’ theory, but the original position is inaccessible, forever distant.²⁰⁶ Outside of the original position, Rawls’ principles are not universally acceptable because they are written to appeal to a construction of humanity that does not exist in the tangible world. So while, as acknowledged above, *ATOTJ* is not lacking in complexity, it fails to secure unanimity because people evaluate Rawls’ principles through their varying outlooks. Even though Rawls is

²⁰² Matsuda (1986), p 617.

²⁰³ Matsuda (1986), p 628.

²⁰⁴ Beck (1989) ‘Behind the Veil’ *Jeff Beck’s Guitar Shop*.

²⁰⁵ Rawls’ theory screens out constituents of identity such as culture: Bond and Park (1991), race: Mills (2005), and gender: Schwartzman (2012). Fejfar (1990), p 299 characterises the denial of self necessitated by the original position as an unhealthy repressive act. Gutiérrez (2005), p 740, meanwhile, contends that nobody can actually effect an escape from their identity, and Craig (1975), p 69 asserts that, concerning the philosophical matters addressed by Rawls, no ‘substantial consensus’ exists that can be escaped to.

²⁰⁶ Mandle (2009), p 22 states ‘...the goal of establishing the congruence of the right and the good for all (or most) citizens in a well-ordered society of justice as fairness remains *elusive* [my emphasis].’

aware of people's differences and seeks contain them in a liberal structure, he is unsuccessful in using abstraction to dissolve these dissimilarities.

At this stage, Hendrix can be reintroduced to show why, despite proceeding from an acknowledgement of people's differences, Rawls is unable to accommodate these differences in the justification for his theory. Like Rawls' just framework, the world of Hendrix's visions remains unrealised. This world is ever-imminent, but never present, like the story of his efforts to elope with a girl in 'Wait Until Tomorrow',²⁰⁷ where he is constantly thwarted by the girl's procrastination as she repeatedly offers him the line 'I think we better wait 'til tomorrow.' Rawls' vision has not been carried out: the argument made for it is rejected by others. Rawls sought to convince using the original position, a reality that he defined. Hendrix, too, communicated through a world of his own construction. Hendrix acts as a creator-god in his onstage performance style. Hendrix had an intense physicality to his playing, which included pretending to use his teeth on his guitar's strings and playing the guitar behind his back. Hendrix waved his hands around while playing, miming as if he was creating the sound with his bare hands like the god of 'Voodoo Child (Slight Return)',²⁰⁸ who could chop down mountains and raise islands. The well-documented sexuality of Hendrix's style also suggests an act of creation. Hendrix's guitar was 'played between his legs T-Bone Walker-style, symbolized a phallus and he'd often simulate sex with his guitar against the stack of amplifiers during his live performances'.²⁰⁹ The world that Hendrix creates through these actions is distanced from concrete communal reality. Zappa parodies this attitude in his anti-hippie

²⁰⁷ Hendrix (1967) 'Wait Until Tomorrow' *Axis: Bold as Love*.

²⁰⁸ Hendrix (1968) 'Voodoo Child (Slight Return)' *Electric Ladyland*.

²⁰⁹ Friedlander (1996), p 223.

consciousness song ‘Absolutely Free’:²¹⁰ ‘The first word in this song is disincorporate. It means to leave your body.’ ‘Disincorporate and we’ll begin. Freedom, freedom. Kindly loving. You’ll be absolutely free.’ Rawls and Hendrix have this ‘absolute freedom’ in the realms they oversee. Both have the power to construct these worlds as they wish, excluding and retaining features of reality as it suits them. Because of this, they are always distanced from others, marooned inside their own creations. Rawls’ abstractions find their equivalent in the tonality of Hendrix’s playing. Hendrix attempted to manifest the nameless, soundless colours of his visions through techniques in his guitar playing that lay outside of conventional musicality. According to Friedlander, Hendrix ‘...expanded guitar playing beyond a fusion of stylistic elements, past the borders of notated music into the realm of sounds.’²¹¹ In other words, Hendrix’s music involved not only the specificity of playing actual musical notes, but also drew upon more abstract noises in an attempt to convey the sensations of the world that lies beyond the tangible. Whiteley states the centrality of tone in the music of Hendrix:

‘...the Jimi Hendrix Experience was ultimately based on an immense vocabulary of sound. Volume-affecting sustain, wah-wah pedal, fuzz tone and reverb are especially important in a consideration of style...’²¹²

A distinctive characteristic of Hendrix’s music is his use of controlled feedback, the noise created by overloading amplification equipment.²¹³ Waksman says that ‘...his [Hendrix’s] array of bent, distorted notes teetering over the edge of tonality and feedback shrieks struggling to avoid the inevitability of sonic decay

²¹⁰ The Mothers of Invention (1968) ‘Absolutely Free’ *We’re Only in It For the Money*.

²¹¹ Friedlander (1996), p 220.

²¹² Whiteley (1992), p 27.

²¹³ Friedlander (1996), p 228.

introduced sounds that had really never been heard before in any musical setting.²¹⁴ All of this ‘heavy metal thunder’²¹⁵ is suggestive of the excess in *ATOJ* that is perhaps a reaction to the theory’s essential ineffability.

Two elements of the rhetorical style by which Rawls attempts to convince others of his just principles are repeating motifs and large amounts of textual embellishment. The first of these, the recursive style of Rawls’ writing, in which he reiterates a series of interdependent points,²¹⁶ is equivalent to Hendrix’s hypnotic riffing, which once again suggests a trip-like departure from concrete reality. Whiteley says of Hendrix’s ‘Purple Haze’,²¹⁷ for example, that: ‘The melody line is simple and based on a recurring motif which moves towards an incantatory, mesmeric effect. Again there is an indication that the song reflects the state of mind on a hallucinogenic trip.’²¹⁸ Second, the scale of Rawls’ and Hendrix’s outputs are similar. Rawls was a kind of virtuoso, capable of discharging words in the way that notes torrentially poured from Hendrix’s guitar, and in *ATOJ*, Rawls created a work equal in length and density to one of Hendrix’s marathon guitar solos. Rawls himself was surprised by the length of the book and later suggested that it was excessive.²¹⁹ The mesmerising recurrences and extensive detail of *ATOJ* do not help win people over to the theory, but multiply the very qualities that make it unpersuasive, as will now be explained.

According to Chenoweth, the ineffectiveness of those in the counter-culture to have an effect upon the real world lead to the finding of solace in the fantastical, in

²¹⁴ Waksman (2006), p 65.

²¹⁵ Steppenwolf (1968) ‘Born to Be Wild’ *Steppenwolf*.

²¹⁶ Wolff (1977), p 4 calls the book ‘labyrinthine’.

²¹⁷ Hendrix (1967) *Purple Haze*.

²¹⁸ Whiteley (1992), p 20.

²¹⁹ Aybar, Harlan and, Lee (1991), p 42.

the world of the mind.²²⁰ There is a similar retreat on Rawls' part. Rawls' theory ultimately fails to bring about change in society because of its continual return to an aesthetic of abstraction. In response to the ineffectiveness of this form of argument, Rawls can only offer more of it. Favouring logical insularity, attractive construction, and abstraction from the social world, Rawls repeatedly uses abstract reasoning to gain distance from the concerns of the tangible world instead of making a connection with this shared reality. This reality is lacking in important features. Hendrix was aware that visions, or trips, could go bad. The song 'Purple Haze'²²¹ conveys distress over LSD-induced psychedelic sensations,²²² a 'higher but disorientating state of consciousness'²²³ that, rather than bestowing understanding or guiding the tripper, instil confusion as to what is true and false. 'Don't know if I'm coming up or down. Am I happy or in misery?' and 'don't know if it's day or night', Hendrix sings, as well as calling out 'help me', 'oh no', 'can't go on like this'. Here, the visions are no longer a guide for the realisation of real world structures, but obscure in a haze an understanding of the concrete world. Both Rawls and Hendrix may have tried to escape this fate by embellishing their visions with details and complications, but their fantastical worlds inevitably collapse when they come into contact with the concrete. Hendrix may have been aware of this. In the song 'Castles Made of Sand',²²⁴ he narrates stories of people failing to achieve their aspirations and warns that 'castles made of sand fall in the sea eventually'. Rawls' and Hendrix's constructs have no answer to resistance from other people in the concrete world who do not accept their visions. While Rawls claims that the original position ensures a vision of justice that would be agreed to by all people wishing to treat others as equal

²²⁰ Chenoweth (1971), p 44.

²²¹ Hendrix (1967) *Purple Haze*.

²²² Whiteley (1992), p 17.

²²³ Friedlander (1996), p 223.

²²⁴ Hendrix (1967) 'Castles Made of Sand' *Axis: Bold as Love*.

and worthwhile, the original position includes biases that render it objectionable to some. The absence of widespread adoption of Rawls' principles is reflected in the experiences of the counter-culture, who, Chenoweth says, 'had originally assumed that education through their lyrics could prod a society to change' but 'quickly found that much of America was unreceptive and actually hostile to their ideals.'²²⁵ In 'Manic Depression',²²⁶ Hendrix communicates an awareness of the difficulties of manifesting a vision. He details the problem by singing 'I know what I want but I just don't know how to go about getting it. Feeling, sweet feeling, drops from my fingers. Manic depression has captured my soul,' and 'music, sweet music, I wish I could caress, caress, caress. Manic depression is a frustratin' mess.' Hendrix's vibrant, even manic performance style and certain of his songs, such as 'Voodoo Chile',²²⁷ and 'Voodoo Child (Slight Return)',²²⁸ express a confidence towards his abilities in the world of the abstract. Other songs, such as 'Purple Haze',²²⁹ 'Manic Depression',²³⁰ and 'Wait Until Tomorrow',²³¹ speak of dejection and depression at the ineffectiveness of these ideas in the concrete world. Rawls tries to establish a solid foundation for justice with principles that all could agree upon. Principles attracting such unanimity must necessarily be unassailable. Rawls found the source for these principles in abstraction. Similarly, Chenoweth describes Hendrix and the counter-culture as pursuing 'unattainable perfect goals of universal love, complete freedom, absolute nonconformity and massive change in the national character'.²³² Hendrix and the counter-culture saw themselves as godlike in the world of the

²²⁵ Chenoweth (1971), p 44.

²²⁶ Hendrix (1967) 'Manic Depression' *Are You Experienced*.

²²⁷ Hendrix (1968) 'Voodoo Chile' *Electric Ladyland*.

²²⁸ Hendrix (1968) 'Voodoo Child (Slight Return)' *Electric Ladyland*.

²²⁹ Hendrix (1967) *Purple Haze*.

²³⁰ Hendrix (1967) 'Manic Depression' *Are You Experienced*.

²³¹ Hendrix (1967) 'Wait Until Tomorrow' *Axis: Bold as Love*.

²³² Chenoweth (1971), p 43.

mind.²³³ However, their principles were impossible to institute because of their abstractness.²³⁴ This simultaneous internal self-appointed godliness and real life ineffectiveness Chenoweth calls ‘exaltant-despondent’ behaviour²³⁵ diagnosed by Hendrix as manic depression.²³⁶ Hendrix’s aimlessness intensified towards the end of his life. He flirted with the possibility of working in different genres but did not make a decisive step, instead remaining ‘drifting in a sea of excess freedom’, as Perry describes it.²³⁷ The indecision inspired by this ‘excess freedom’ demonstrates that the liberation from identity provided by Rawls’ original position alienates *ATOJ* from the particulars that make meaning out of people’s experiences of life and give a sense of necessity to their actions.²³⁸ Rawls does not secure assent to his theory because, in the state of total freedom he provides, the choice to agree is meaningless.

The obliteration of volition within the world of Rawls’ theory is made explicit by the first of the dilemmas (and potential critiques) of Zarathustra’s quest as set out in chapter 2: Nietzsche’s prophet must convince people to choose autonomy while preserving the autonomy of that choice. Rawls, wanting those in his social contract hypothetical to choose freely, strips them of their (supposed) constraints. However, the freedom he generates, leading inevitably to the principles of justice, paradoxically results in an environment of un-freedom where the only true choice may be to opt out of Rawls’ scenario. Critics’ apprehensive reactions to the original position are similar to Zarathustra’s experience in the marketplace. Zarathustra makes his way down from the mountain believing that the townspeople will embrace

²³³ Chenoweth (1971), p 43.

²³⁴ Chenoweth (1971), p 43.

²³⁵ Chenoweth (1971), p 28.

²³⁶ Manic depression is a stark counterpoint to the balanced state of mind that is Rawls’ ‘reflective equilibrium [my emphasis]’: Rawls (1972), p 48.

²³⁷ Perry (2004), p 3. Furthermore, on p 130: ‘In the late period interviews, he [Hendrix] certainly sounded depressed, lacking in direction.’

²³⁸ Gutiérrez (2005), p 740.

his teachings. Instead, they deride his message. Rawls, coming down from his 'trip' to the original position, encounters resistance to the type of consciousness he advocates. To be more convincing, the *LSD/ATOI* message of universality may need to be alloyed with an understanding the differing experiences of those subject to the law.

This disregard for difference is the result of the abstractness of Rawls' theory, abstractness which, as argued above, only increases as the text goes on. This problem corresponds to the second of chapter 2's critiques, which holds that *ubermenschen* risk magnifying the insecurities that drive them as well as exacerbating the problems they try to resolve. Rawls' response to the shortcomings of abstraction is more abstraction. In regards to this, *Zarathustra* highlights that the justice Rawls seeks will linger at a remove until the cycle of abstraction is broken and the (concrete) situations *ATOI* is meant to improve are actually acknowledged; something that the book does too little of. Rawls theory cannot remedy, and may even sustain indifference to the inequalities it seeks to address because its theoretical structure causes those crucial realities to disappear. As they fade from sight on the journey to the original position, justice recedes along with them. Rawls' theory will remain detached, floating in outer space until it interfaces with those it attempts to help, until it stages a true 'Be-In'²³⁹ with the actual people that are society's disadvantaged. Furthermore, this aloofness from the particulars of identity draws in the third critique of *Zarathustra*, which questions whether the *ubermensch*, after their transformation, is capable of relating to the society from which they separated. Being self-sufficient and unencumbered, the *ubermensch* has something in common with the self-interested and unconstrained individual of the original position who lives in full

²³⁹ The 'Human Be-In' was a counter-cultural gathering held in San Francisco, 1967.

enjoyment of opportunities and resources. This is a figure that may not always speak to the compromise, as well as the community, of the everyday.

Visible in this chapter are kaleidoscopic fragments of Rawls, Hendrix, and Nietzsche that overlap and come apart as the lens is turned. Rawls' strongly individualistic notion of justice and Hendrix's uniqueness and self-sufficiency are consistent with the *ubermensch*'s break from the homogenous ways of the collective. Hendrix's cosmic and science fiction inspired imagery²⁴⁰ echoes the cryptic metaphors of *Zarathustra*. Zarathustra's animals, the serpent and the eagle are both mentioned in *Electric Ladyland*: 'the eagle's wing' in 'Voodoo Chile'²⁴¹ and 'the serpents in the wishing well' in 'Burning of the Midnight Lamp'.²⁴² However, antithetical to Nietzsche are the vaporous landscapes and disembodied experience of Hendrix's psychedelia and of Rawls' abstractions. Hendrix and Rawls seem metaphysical as they abscond from earthy matters and subjective realities. However, this flight from the material realm has a Nietzschean dimension that can help clarify understanding of the problem faced here by theorist and rock star. Zarathustra climbed mountains, trying to exceed his limitations and avoid imperfections in the human character that are close by on the ground but not visible from the mountaintop. However, the higher Zarathustra climbed in furtherance of this ambition, the worse his insecurities became. His desperation increased and in response he went still higher, a strategy akin to 'putting out fire with gasoline.'²⁴³ Hendrix and Rawls evidence a similar recurring reliance on methods that are designed to ease their concerns, but only intensify them: Hendrix's countless notes, Rawls' detailed logic. Zarathustra is unable to accept shortcomings. The indecision

²⁴⁰ Perry (2004), p 103.

²⁴¹ Hendrix (1968) 'Voodoo Chile' *Electric Ladyland*.

²⁴² Hendrix (1968) 'Burning of the Midnight Lamp' *Electric Ladyland*.

²⁴³ Bowie (1983) 'Cat People (Putting Out Fire)' *Let's Dance*.

experienced by Hendrix in his realm of complete musical freedom evidences a desire similar to Zarathustra's for perfection: Hendrix, it seemed, searched for the utterly correct next move to make; the complete musical statement, the kind of perception that is impossible to find. The contingencies and necessities of the particular and the concrete make decisions much more difficult to forestall. Accordingly, Sen writes that 'The world in which we live is not only unjust, it is, arguably, extraordinarily unjust. It is not frivolous to seek a framework for a theory of justice that concentrates on advancement, not transcendence...' In abstracting people from their concrete realities, Rawls seems unable to accept the disadvantages and compromises of social life. Those in the original position and under the veil of ignorance have no history and no present, no blemishes on their lives or constraints upon their actions. Evident is Zarathustra's terror of limitations.

John, Jimi, and Another John

In looking for a foundation upon which to base societal change, Rawls and Hendrix had recourse to the abstract, using it to develop principles that, despite their virtuosic complexity, were unable to resonate with real social forces.²⁴⁴ In translating these imagined worlds into the concrete, their visions are revealed as hallucination. Without sufficient connection to certain realities and experiences, Electric Ladyland will remain forever 'up ahead',²⁴⁵ forever distant. As with some 1960s counter-cultural efforts to change society, there is hopefulness to Rawls' project.²⁴⁶ Rawls'

²⁴⁴ Mandle (2009), p 34: 'Although its centrality to contemporary philosophy is generally recognized, the arguments in *A Theory of Justice* are not, in fact, widely accepted.'

²⁴⁵ Hendrix (1968) 'Have You Ever Been (To Electric Ladyland)' *Electric Ladyland*.

²⁴⁶ Evincing this hopefulness, Rawls (1999), p 6 talks of 'realistic utopia', a phrase picked up on by several authors, including Freeman (2007), p 11 and Pogge (2007), p 27. Similarly, Wolff (1977), p 195 writes that '*A Theory of Justice* can be placed historically in the tradition of utopian liberal political economy...'

vision offered universal understanding (in Rawls' words: 'a society which...everyone accepts and knows that the others accept the same principles of justice...' ²⁴⁷) and believed that this goal was achievable (because a 'public sense of justice makes their secure association together possible...' ²⁴⁸) and would lead to an improved society ('Among individuals with disparate aims and purposes a shared conception of justice establishes the bonds of civic friendship...' ²⁴⁹). But the difficulty in effecting this change also parallels the incomplete achievements brought about by the 1960s counter-cultural movement and the kind of altered thinking portrayed by Hendrix. ²⁵⁰ In the following chapter, these perceived failures are reacted to by another John: John Lennon, who attends to society's problems with a more biting approach.

²⁴⁷ Rawls (1972), p 5.

²⁴⁸ Rawls (1972), p 5.

²⁴⁹ Rawls (1972), p 5.

²⁵⁰ Whiteley (1992), p 2.

‘And I felt like a star. I felt the world could go far if they listened to what I said.’

– U2.¹

¹ U2 (1980) ‘The Ocean’ *Boy*.

Chapter Four

Dear (Juris)Prudence: John Lennon as Sovereign

1967, and there is a feeling of excitement and change in some corners of England.² The eruptions of colour and of an optimistic sense of possibility within the culture were given prominent musical expression by the Beatles, one of the country's most significant rock groups.³ John Lennon enthusiastically took to,⁴ and as a member of the Beatles, helped raise the profile of psychedelia. Inspired by Timothy Leary's guide to consciousness-expanding drug use⁵ (incidentally, a tome that Lennon discovered while browsing a bookstore he had visited to procure a Nietzsche digest⁶), Lennon instigated 'Tomorrow Never Knows',⁷ the band's pioneering song of panoramic spiritual vistas.⁸ This outlook was ubiquitous on the Beatles' next album, *Sgt. Pepper's Lonely Hearts Club Band*,⁹ which included from Lennon

² MacDonald (2003b), pp 68-69: 'A sunny optimism permeated everything and possibilities seemed limitless.' Riley (2011), p 333: 'To this innocent, pre-Altamont culture, drugs promised an inner growth, an expansion of consciousness, the seeking out of hitherto-untapped worlds, and all the naïve talk that fuelled "Tomorrow Never Knows"...'.

³ MacDonald (2003b), p 69 on the Beatles' importance: 'The Beatles were... looked up to in awe as arbiters of a positive new age in which the dead customs of the older generation would be refreshed and remade through the creative energy of the classless young.' On the Beatles synchronicity with the zeitgeist: Norman (2008), p 436; p 498, Partridge (2005), pp 128-129, Riley (2011), pp 336-337.

⁴ On heavy LSD use: Riley (2011), p 337, Wenner (2000), p 52. However, as discussed below, Lennon's 'enthusiasm' for LSD may not have been motivated by optimism, as was others' use of the drug, but desperation.

⁵ Norman (2008), pp 430-431

⁶ Spitz (2005), p 600.

⁷ The Beatles (1966) 'Tomorrow Never Knows' *Revolver*.

⁸ Norman (2008), pp 436-437.

⁹ 'The climate was influenced by the psychedelic era.', said McCartney in *The Making of Sgt Pepper* (Part 3) <http://www.youtube.com/watch?v=koNFCcP9wp0&feature=relmfu> In contrast to the optimism often assumed of the times, Riley (2011), p 332 hears 'melancholy' as 'the giant subtext' to the *Sgt. Pepper* album. Of the Beatles, Lennon in particular led a troubled existence during the making of the album, one, as per Norman (2009), p 488: '...from which the only escape seemed [for Lennon] to lie in drugs.' Lennon's desire to escape from his problems suggests that, even during the psychedelic era, he possessed a sensitivity to the difficulties of human life, the regulation of which are this chapter's subject matter.

portraits of the things around him,¹⁰ viewed through the surreal perspective that had been usual for him since childhood, now intensified by LSD.¹¹ For a time it seemed that the path to enlightenment would have a paisley coating (or involve wearing a paisley coat!). It was not to be. There was a change in the aesthetic of the Beatles (as well as the Rolling Stones and others) after the acid dreamings of '67.¹² Gone were the multi-coloured finery and fairground tunes, exposing a less ornate sound. Moving away from psychedelia, Lennon was of the opinion that the sensibility was ineffective as a remedy for the problems that come with human association.¹³ Lennon's stance matches the argument in the previous chapter of this thesis that, despite the appeal of immaterial visions, the concrete must be taken into account. The concrete was a pressing concern in the Western world of 1968, which, with its wars, rallies, and riots (referenced in the Stones' 'Street Fighting Man'¹⁴ and the Beatles' 'Revolution'¹⁵), was not only physical, but immanently violent.¹⁶

Lennon often 'double tracked' his vocals, allowing him to sing in tandem with himself. Here, jurisprudence is doubled up with rock's migration from the ethereal world of the psychedelic by transitioning from Rawls' abstract liberalism to theories of sovereignty, including that of Thomas Hobbes, who concerned himself with a more tangible world; one of human bodies (and bodily metaphors such as the Leviathan), of violence and survival. Hobbes saw a combative humanity in need of

¹⁰ Such as an old circus poster in 'Being for the Benefit of Mr. Kite!', a television commercial for cereal in 'Good Morning Good Morning', and a newspaper in 'A Day in the Life'.

¹¹ Norman (2008), p 489 describes the fantastical as '...a mental hideout that for him long pre-dated LSD. His two favourite books in all the world were still Lewis Carroll's *Alice's Adventures in Wonderland* and *Through the Looking Glass*; indeed, acid only sharpened his delight in the surreal fantasies...'

¹² The Beatles transitioned from the psychedelia of *Sgt. Pepper* and *Magical Mystery Tour* to the stripped-back rock of *The Beatles* (aka *The White Album*), and likewise the Rolling Stones went from *Their Satanic Majesties Request* to *Beggars Banquet*.

¹³ In Wenner (2000), pp 106-107, Lennon was reproachful of the trappings of psychedelia.

¹⁴ Rolling Stones (1968) 'Street Fighting Man' *Beggars Banquet*.

¹⁵ The Beatles (1968) 'Revolution' *The Beatles*.

¹⁶ Riley p 369; pp 373-375. See also Lennon and Yoko Ono talking to Berkley rioters in 1969: <http://www.youtube.com/watch?v=g9pH4TJQ3zM> As for the realm of law, Tranter (2007), p 50, to take one example, emphasises the corporeal nature of violence in sovereignty.

supreme power to impose order. In his time as a solo artist from 1969 to 1980, Lennon reacted to the harshness of life by making more abrasive, personal music and arguing for peace. In stepping away from his band and acting as an individual and in using his commanding presence to try and pacify an antagonistic world, Lennon's activities are sovereign-like. The sovereign is a necessary presence in the world, according to Hobbes. As humanity is selfish, violent, and untrustworthy, coexistence is impossible without a dominant entity, free to act as it wishes, using strength and inspiring awe to maintain peaceful agreement between people.¹⁷ To theories of sovereignty, in which control over the human capacity for violence is central, liberalism is an undesirable model for a legal system.¹⁸ With its limited and separated government, liberalism lacks the unfettered and decisive power required to disincentivise acts of hostility and deception.¹⁹ Likewise, psychedelia had little success in pacifying the destructive, as Lennon points out:

‘The people who are in control and in power and the class system and the whole bullshit bourgeois scene is exactly the same... But we all dressed up. The same bastards are in control, the same people are running everything. It's exactly the same! They hyped the kids. We've grown up a little, all of us, and there has been a change and we are a bit freer and all that, but it's the same game. Nothing's really changed. It's the same!’²⁰

¹⁷ Hobbes (2008), p 91; p 116.

¹⁸ Dyzenhaus (1994), p 1. Although pre-dating liberalism, Hobbes (2008), p 114 similarly writes that: ‘Even if there is a great multitude, if their actions are directed according to their individual judgements and individual appetites, they can expect no defense nor protection against a common enemy or against the injuries of one another.’

¹⁹ Dyzenhaus (1994), p 5 outlines Schmitt's critique that: ‘Liberalism creates a society which desperately requires a sovereign decision but seeks at every point to postpone or prevent such a decision from being made.’ Also, Hobbes (2008), p 114: ‘They [the mass] will reduce their strength by mutual opposition to nothing...’ See, too, Dyzenhaus (1994), p 14, and McCormick (1998), p 172.

²⁰ Wenner (2000), pp 106-107.

Bright colours and kindness would not get through to the ‘blue meanies’,²¹ the perpetrators of violence, and convince them to act nicely to others. To theorists of sovereignty, it is misguided to use altruism, or Rawls’ ‘fairness’, to appeal to others. Physical force and duplicity advance human desires, and only a punishment greater than the benefits to be had from hostility will compel people to cease such violent tactics. Unlike the purification bestowed by the original position, theories of sovereignty admit to a cruelty within human nature that cannot be dissolved, but can only be controlled. Lennon, a man of acute fears and violent anger, intuitively understood the failure of psychedelia’s dayglo world to be a result of its avoidance of human darkness. An awareness of his own troubled mind gave Lennon insight into the centrality of violence in matters of peace. This orientation founds sovereignty. While both Rawls and Hobbes are social contractarians,²² for the latter it is not fellowship, not a ‘public sense of justice’,²³ that makes ‘secure association together possible’,²⁴ but the desire for peace in recognition of the harms that people may do to each other.²⁵ Liberalism safeguards freedoms. In sovereignty, freedoms are a source of conflict and are to be offered up for peace. Only the sovereign is free,²⁶ acting however is necessary to stop people from treating others badly. As a man who wished to be outside of all social constraints, Lennon aspired to a freedom akin to the untrammelled force of sovereignty. Strumming and snarling, Lennon delivers

²¹ Dunning and Abey (1968) *Yellow Submarine*.

²² Boucher (1994).

²³ Rawls (1972), p 5.

²⁴ Rawls (1972), p 5.

²⁵ Freeman (2007), p 155 on the differences between Rawls’ and Hobbes’ contracting individuals (Hobbes’ individual is not alienated from their characteristics by a veil of ignorance), Freeman (2007), p 15 on the similarities (both are self-interested and amoral). Tralau (2010), p 261 contrasts theorists of justice such as Rawls with theorists of sovereignty, stating that: ‘...these [sovereignty] thinkers averred that it is the problem of *order* – not redistribution – which is the fundamental concern for any society.’

²⁶ According to classic theorists of sovereignty such as Hobbes, the sovereign is an entity independent from the bodies of its subjects.

‘Working Class Hero’,²⁷ a song that catalogues his resentments towards the repression committed by social institutions: ‘When they’ve tortured and scared you for twenty-odd years then they expect you to pick a career, when you can’t really function you’re so full of fear.’ The world he describes is not one where institutions alone produce justice. It is a situation requiring an individual, uncontrolled by others’ expectations, able to speak a truth that will bring meaning and order to the world. At the end of 1968, Lennon began to move away from the institutions, including the Beatles, that he believed prevented him addressing the fundamentally important, and sovereign-like, concern of (internal, as in the painstaking self-examination of his *John Lennon/Plastic Ono Band* album,²⁸ and interpersonal, as in his anti-war activism) human strife and suffering.

Even though Lennon’s quest for peace entailed interactions with the political world, it is not argued that Lennon was actually sovereign of any legal system. The overlap between law and music occasioned by Lennon’s confrontation with the issues of peace and violence did not mean that Lennon’s popularity as a musician or notoriety in the news media translated into sovereign power. However, as a mark of how fully Lennon engaged with matters relevant to sovereignty, it is worth noting the great extent to which the U.S. government of the first half of the 1970s considered Lennon a threat to its authority.²⁹ Aspects of Lennon’s behaviour can be analogised to sovereignty, showing the repercussions of an unequivocal power being responsible for ensuring peace. Conflict is neutralised by the use of sovereign might to impose a definition of normality and prevent disagreement. It is well-documented that

²⁷ Lennon (1970) ‘Working Class Hero’ *John Lennon/Plastic Ono Band*.

²⁸ Lennon (1970) *John Lennon/Plastic Ono Band*.

²⁹ Lennon’s surveillance by the U.S. government: Riley (2011), p 550. See also Leaf and Scheinfeld (2006) *The U.S. vs John Lennon*.

Lennon's crusading was messianic.³⁰ By announcing his engagement with 'real' matters (the aforementioned human strife and suffering) and contrasting this to others' endeavours, which he viewed as less consequential,³¹ Lennon implicitly identifies himself as occupying a singular position. He alone is empowered to bring peace, just as only the sovereign is allowed to impose their view through the use of force. The injunctions contained in the various missives issued by Lennon through the popular media from the late 1960s to the mid-1970s can be likened to the sovereign's imposition of order. Lennon's 'sovereign power' includes his stardom and his outspokenness. In times of conflict, the sovereign declares a state of exception, creating an environment in which they can freely exercise their power and impose order. Lennon's candid song writing and volatile engagement with the press indicate an unrestrained approach comparable to the state of exception. Operating outside of social niceties and the pop conventions of the Beatles, Lennon was able to act in any way he believed was required to accomplish peace. It is this 'freewheelin''³² attitude that calls attention to potential implications of sovereignty and its unbridled power. The sovereign may prolong the state of exception in order to continue freely exercising their power. Analogous to the condition that results from the ongoing exception is this chapter's central image, that of the 'bed-in', a media event staged by Lennon and his wife Yoko Ono in 1969, where the couple promoted

³⁰ Lennon himself drew parallels with Christ on *The Ballad of John and Yoko*, singing '...they're gonna crucify me.' Norman (2008), p 596 notes at least a visual similarity during the bed-in period: '...John now grew a long, bushy beard... Framed by shoulder-length hair, it gave him a permanently tragic and aggrieved expression, like the stylised Christs in religious imagery of his boyhood...' Riley (2011), p 469 suggests a grandiosity to Lennon's deeds, where his '...curious humility sparred with hubris...' MacDonald (2003b), p 99 identifies in the Lennon of the late 60s '...a universal concern for love and peace which, striking him with the force of conversion, quickly inflated into messianism.'

³¹ According to Miles (1997), p 588, Lennon told McCartney that the latter was '...all pizza and fairy tales...' Additionally, in Wenner (2000), p 139, Lennon referred to Franz Zappa, somewhat dismissively, as a 'fucking intellectual' and at another time denigrated George Martin's 'production shit': <http://www.rollingstone.com/music/lists/100-greatest-beatles-songs-20110919/let-it-be-19691231>

³² Dylan (1963) *The Freewheelin' Bob Dylan*.

staying in bed and other usual activities as a way of working towards peace. Through the bed-in, Lennon transformed his everyday life into a site of political significance, into a way of dealing with what he perceived as an emergency situation. Lennon's conflation of the mundane and the emergency demonstrates that when the state of exception is protracted, the exception and the normal legal order become intermingled, forming a new and potentially dangerous situation.

In unfurling the narrative of sovereign power and its consequences, this chapter does not dwell on a single manifestation of the theory, but moves through the history of jurisprudence as a succession of theorists highlighting sovereignty's repercussions, each theorist teasing out the implications of the previous thinker's analysis. Three theorists are drawn upon for insight. In the first section, Thomas Hobbes' work establishes the necessity of sovereign power and describes how this power is instituted and wielded. The second section presents Carl Schmitt's examination of what he argues to be the sovereign's defining task: deciding whether there is a threat to the state and its people and instituting a state of exception to neutralise this conflict.³³ The repercussions of the sovereign decision are considered in the third section, which features Giorgio Agamben's contention that the continued suspension of law can lead to the intermingling of the norm and the exception.³⁴ To begin, the foundations of sovereignty as explained by Thomas Hobbes will be discussed.

³³ Schmitt (2005), p 6.

³⁴ Agamben (1998), p 20; p 22.

I - Thomas Hobbes on Establishing Sovereignty

This section presents three aspects of sovereignty described by Hobbes in *Leviathan*:³⁵ sovereign power as a necessary response to people's combative impulses, the creation of a sovereign through social contract, and, once established, the limitlessness of sovereign power. It is in these first of these, Hobbes' view of human nature, that Lennon's relevance to sovereignty can start to be appreciated in detail. Hobbes is far from contemporaneous with Lennon, but the two share an exposure to, and concern with, the human capacity for war. The approach of the Spanish Armada precipitated Hobbes' birth,³⁶ while, according to his Aunt Mimi,³⁷ Lennon arrived during the 'crossfire hurricane'³⁸ of a German bombing raid on England in World War II.³⁹ For Lennon's first half-decade this conflict stormed England. Hobbes lived to see the country affected by another conflict, this time the internal strife of civil war.⁴⁰ The insecurity of human associations was also experienced by the two men on a personal level. When his father absented himself, Hobbes was taken into the custody of his father's brother.⁴¹ Lennon was mostly raised by his mother's sister.⁴² Both men were attentive to, even pessimistic about, the harms people do to each other. Hobbes' portrait of humanity incorporates qualities that lead to conflict. By nature, people seek acquisitions, security, and status.⁴³ In Hobbes' assessment, individuals are more or less equivalent in their capabilities and have a comparable drive to fulfil their desires for the aforementioned

³⁵ Hobbes (2008).

³⁶ Martinich (1999), pp 1-2.

³⁷ Riley (2011), p 11 suggests that Mimi was mistaken in her account of Lennon's birth i.e. that there was no air-raid on that date. Nonetheless, this version of events is the one Lennon was raised with and that impacted upon him.

³⁸ Rolling Stones (1968) *Jumpin' Jack Flash*.

³⁹ Norman (2008), p 13.

⁴⁰ Lennon b. 1940, WWII ends 1945. Hobbes b. 1588 leaves England in 1640, Civil War in 1642.

⁴¹ Martinich (1999), pp 4-5.

⁴² Norman (2008), pp 29-30.

⁴³ Hobbes (2008), p 82.

things.⁴⁴ When their objectives coincide and they covet a benefit incapable of being shared, people fight with each other to secure their objective.⁴⁵ When not inhabiting ‘civil states’; societies over which sovereigns preside, every person is engaged in war on the individual level.⁴⁶ This is the state of nature. Historically, the state of nature never covered the globe, although Hobbes claims that it exists in numerous patches.⁴⁷ It is an undesirable situation. People are uncreative out of fear for what might happen to their efforts.⁴⁸ Productivity, knowledge, and culture are absent from the world while the possibility of attack instils constant fear.⁴⁹ Life is lived alone in impoverished circumstances and through malicious dealings.⁵⁰ Aggression and fear: characteristics of the state of nature also present in John Lennon and his work. At school, Lennon frequently tussled with other children and he was a ‘hitter’ of his female companions in the earlier part of his adult life.⁵¹ Lennon’s agitation and insecurity are evident in his album *John Lennon/Plastic Ono Band*⁵² (henceforth ‘*Plastic Ono Band*’), the first collection of songs he released after the Beatles disbanded. Here, Lennon discloses in specific detail the hurt he has suffered from others as well as his own misdeeds amidst angry and pained screaming of startling potency. Like Hobbes, Lennon sees all of humanity causing and feeling pain. His own aggression and fear are a microcosm of the harshness of life. In an interview with *Rolling Stone* around the time of *Plastic Ono Band*,⁵³ Lennon railed at length against numerous people he believed had wronged him and spoke about the

⁴⁴ Hobbes (2008), pp 81-82.

⁴⁵ Hobbes (2008), p 82.

⁴⁶ Hobbes (2008), p 83.

⁴⁷ Hobbes (2008), p 84.

⁴⁸ Hobbes (2008), p 83.

⁴⁹ Hobbes (2008), p 83.

⁵⁰ Hobbes (2008), p 83.

⁵¹ Norman (2008), p 35 on Lennon as a child: ‘‘If ever there was a scrap in the school yard, John was likely to be involved,’’ Sheff (1981): ‘I used to be cruel to my woman, and physically – any woman. I was a hitter.’ Also, Du Noyer (2006), p 2 mentions Lennon as a ‘hitter’.

⁵² Lennon (1970) *John Lennon/Plastic Ono Band*.

⁵³ Lennon (1970) *John Lennon/Plastic Ono Band*.

perniciousness of the world at large.⁵⁴ During the Beatles' trip to India in 1968, Lennon wrote 'Child of Nature'.⁵⁵ For its chorus he sings 'I'm just a child of nature. I don't need much to set me free.'⁵⁶ The song was not released on the 'white' album that followed the band's Indian experience. Instead, its lyrics were rewritten and, retitled 'Jealous Guy',⁵⁷ it was recorded for Lennon's 1971 album *Imagine*.⁵⁸ The lyrics quoted above were replaced with 'I didn't mean to hurt you. I'm sorry that I made you cry.' Comparing the two versions of the song demonstrates Lennon's shift from an optimism or contentedness more suited to the psychedelic era to the painful aspects of life he confronted thereafter. It is a move from being a child of nature to the harsh surrounds of the state of nature. However, 'Jealous Guy'⁵⁹ also shows that Lennon's conception of humanity alloys fear ('I was feeling insecure,') and aggression ('I began to lose control.') with wishes that run counter to hostility ('I didn't mean...'). These negative feelings towards violence suggest that humans have some motivation to seek peaceful cohabitation. This possibility is present, for example, in the song 'Imagine',⁶⁰ where it is possible to envision the world 'as one'. Lennon's was not a mind at peace, but a mind that sought it. He wrote songs like 'Imagine'⁶¹ not always as statements of the life he lived, but as images of the peace he strove for. Lennon's belief in the possibility of achieving peace is evident in the extensive campaign he and Ono conducted during 1969. 'War is over! If you want it.' read billboards they commissioned in major cities around the world.⁶² In Hobbes' construction of the human being there is also the potential for coexistence. Although

⁵⁴ Wenner (2000).

⁵⁵ Lennon 'Child of Nature'.

⁵⁶ 'The Beatles Demo John Lennon's "Child of Nature"'

<http://www.youtube.com/watch?v=g79wFG5BWpM>

⁵⁷ Lennon (1971) 'Jealous Guy' *Imagine*.

⁵⁸ Lennon (1971) *Imagine*.

⁵⁹ Lennon (1971) 'Jealous Guy' *Imagine*.

⁶⁰ Lennon (1971) 'Imagine' *Imagine*.

⁶¹ Lennon (1971) 'Imagine' *Imagine*.

⁶² Du Noyer (2006), p 59.

people in the state of nature may be unscrupulous and violent to each other, they are averse to harm and aspire to comfort and to be able to enjoy the benefits of their labour, making them amenable to peace provided that the darkness of every person's nature is kept in check.⁶³

‘Life is very short and there's no time for fussing and fighting, my friend.’:⁶⁴ Hobbes unfolds a reasoning that leads to a design for a peaceful society.⁶⁵ This sequence begins with the assertion that people in the state of nature are entitled to do whatever is necessary to survive (or, in Lennon's words, ‘whatever gets you thru the night’⁶⁶).⁶⁷ This entitlement is called ‘the right of nature’.⁶⁸ In consequence, every person has a right to everything so that they may sustain themselves.⁶⁹ A ‘law of nature’, yielded by reason, also prohibits self-destructive behaviour.⁷⁰ A person is justified in not doing anything that would jeopardise their existence. In pursuing whatever one seeks to obtain, peaceful dealings should be attempted to whatever extent possible, after which war is a permissible method.⁷¹ A second natural law holds that, to secure ‘peace and the defence of himself’, a person should relinquish their right to everything in conjunction with others making the same sacrifice.⁷² The mutuality of this surrender has to be ensured; otherwise a person would only be made vulnerable by giving up their right. As all people may do whatever is necessary to maintain themselves, nobody is compelled to act peacefully, even if they pledge to do so. Anyone who kept to this peaceful arrangement would be at a disadvantage to

⁶³ Hobbes (2008), p 84.

⁶⁴ The Beatles (1965) *We Can Work It Out*, Parlophone.

⁶⁵ Hobbes (2008), p 84.

⁶⁶ Lennon (1974) ‘Whatever Gets You thru the Night’ *Walls and Bridges*.

⁶⁷ Hobbes (2008), p 86.

⁶⁸ Hobbes (2008), p 86.

⁶⁹ Hobbes (2008), p 86.

⁷⁰ Hobbes (2008), p 86.

⁷¹ Hobbes (2008), p 87.

⁷² Hobbes (2008), p 87.

those who still exercised their right to everything. Therefore, people in the state of nature are justified in continuing to rely on war. In Hobbes' words:

‘...if other men will not lay down their right as well as he, then there is no reason for any one to divest himself of this right. To do so would be to expose himself to be preyed upon rather than to dispose himself to peace, which no man is bound to do.’⁷³

A covenant is made when one surrenders their right.⁷⁴ As demonstrated, there is nothing to hold an individual in the state of nature to the obligations of such an agreement.⁷⁵ To ensure that people fulfil their covenants, a superior entity, one that presides over all, is required.⁷⁶ This ‘common power’ must be authorised to enforce contractual duties and have the strength to be effective.⁷⁷ The power works on the people to ‘keep them in awe and tie them by fear of punishment to the performance of their covenants and the observation of the Laws of Nature.’⁷⁸ People are made to keep to their promises through the fear of a penalty that outweighs what may be gained from breach.⁷⁹

Agreeing to a common power results in the establishment of a commonwealth. To inhabit a commonwealth means resisting one's impulses towards personal freedom and the subjugation of everyone else, as well as the acceptance of limitations that allow for stability and productivity.⁸⁰ The protection offered by the sovereign is twofold. People are kept safe from violence perpetrated by fellow

⁷³ Hobbes (2008), p 87.

⁷⁴ Hobbes (2008), p 89.

⁷⁵ Hobbes (2008), p 91.

⁷⁶ Hobbes (2008), p 91.

⁷⁷ Hobbes (2008), p 91.

⁷⁸ Hobbes (2008), p 113.

⁷⁹ Hobbes (2008), p 96.

⁸⁰ Hobbes (2008), p 113.

citizens and from threats originating outside their commonwealth.⁸¹ Lennon also focused on intra- and international violence: he was both ‘anti-establishment’, as in ‘Working Class Hero’s’⁸² admonishing description of the ‘machine’⁸³ of society, and anti-war, campaigning against violence amongst nations. A single method exists for building a common power.⁸⁴ Hobbes says that ‘This way is to confer all of their power and strength upon one man, or upon assembly of men, that will reduce all of their wills, from a plurality of voices into one will.’⁸⁵ People do not provide a mere expression of support for the common power; rather they fuse together to create this entity.⁸⁶ All people agree to surrender their self-determination provided that all others do so as well.⁸⁷ The resulting being Hobbes calls ‘Leviathan’, a ‘mortal god’ that achieves peace and security.⁸⁸ Hobbes uses the voice to describe a population uniting under a common power. It is with his voice that Lennon forms a collective. According to Frith, Lennon ‘was the only rock singer who ever sang ‘we’ convincingly.’⁸⁹ Empowering the singular voice is the ‘we’, and entity comprised of the multitude. The frontispiece of Hobbes’ *Leviathan* shows a king whose torso and arms are made up of a crowd.⁹⁰ As a ‘mortal god’, the leviathan rules the masses, bestowing safety on them. The images of security in Lennon’s songs are offered to all people, the largest ‘mass’ possible. ‘Hold on world, world hold on. It’s going to be alright. You’re going to see the light,’ he sings in ‘Hold On’.⁹¹ ‘And when you’re one, really one, well you’ll get things done like they’ve never been done.’ In

⁸¹ Hobbes (2008), p 116.

⁸² Lennon (1970) ‘Working Class Hero’ *John Lennon/Plastic Ono Band*.

⁸³ Pink Floyd (1975) ‘Welcome to the Machine’ *Wish You Were Here*.

⁸⁴ Hobbes (2008), p 116.

⁸⁵ Hobbes (2008), p 116.

⁸⁶ Hobbes (2008), p 116.

⁸⁷ Hobbes (2008), p 116.

⁸⁸ Hobbes (2008), p 116.

⁸⁹ Frith (1988), p 74.

⁹⁰ Östman, The Frontispiece of Leviathan – Hobbes’ Bible Use:
<http://www.akademeia.ca/index.php/main/article/view/ea0112/40>

⁹¹ Lennon (1970) ‘Hold On’ *John Lennon/Plastic Ono Band*.

‘Imagine’:⁹² ‘I hope someday you’ll join us and the world will be as one.’ As with the leviathan, here safety comes from unity, from a world ‘as one’. With this influx of the people’s will, the leviathan wields concentrated power and induces fear to secure peace.⁹³ Lennon’s power is star power. The leviathan channels people’s will, Lennon channels attention. His media events were taken notice of. The actions he took were treated as significant because they were the actions of John Lennon. The person who wields the power of the people is called sovereign.⁹⁴ It is this focused power that makes the sovereign an effective means of securing order. MacDonald observes Lennon and Ono in their campaigning ‘behaving as if they had personally invented peace,’⁹⁵ an attitude that, while possibly unrealistic for musicians to hold, is a mentality that accurately portrays sovereignty’s function. The fact is that the sovereign individual is responsible for the creation of peace and solely capable of achieving the task. The ‘messianism’⁹⁶ of Lennon’s campaign; a project where the people in general are to be saved by a single being, elucidates that sovereignty operates through the superiority of an individual. As Hobbes says, all who are not sovereign are subjected to the sovereign’s power.⁹⁷ The masses make themselves inferior; they submit to the sovereign so that the sovereign may act freely and instil order. The people exchange their right to do anything for a life of security. Lennon posits himself as an authority of sorts. He proactively organised ‘happenings’ (performative undertakings) such as the bed-ins, disseminating his views. Hobbes viewed the monarch as the best kind of sovereign authority, as the monarch’s fortunes are tied to those of the people and so will act in the interest of their

⁹² Lennon (1971) ‘Imagine’ *Imagine*.

⁹³ Hobbes (2008), p 116.

⁹⁴ Hobbes (2008), p 116.

⁹⁵ MacDonald (2003a), p 100.

⁹⁶ MacDonald (2003a), p 99.

⁹⁷ Hobbes (2008), p 116.

subjects.⁹⁸ Lennon's aesthetic during the bed-in period of 1969 has a kingly aspect. Bearded, like an old fashioned patriarch, Lennon sat side by side with his wife Ono as if they were King and Queen,⁹⁹ holding court in media events. In particular, it is working towards peace that elevates Lennon's position. It is the regulation of violence, a core element of human behaviour, that distinguishes sovereignty from other activities.

Having sketched out the sovereign's authority, in this part it only remains to mention some of the features of this dominant position that the sovereign occupies. The subjects are forbidden from creating a new sovereign or altogether dissolving the leviathan.¹⁰⁰ Emancipation from the sovereign cannot occur based on the sovereign's conduct as it is impossible for the sovereign to be in contravention of the agreement with their subjects.¹⁰¹ The sovereign cannot wrong their subjects as they have consented to the sovereign's supremacy and any harm done by the sovereign is less damaging than the absence of a sovereign.¹⁰² No subject has the authority to punish the sovereign.¹⁰³ Hobbes also writes that '*The sovereign is judge of what is necessary for the peace and defense of his subjects* [original emphasis].'¹⁰⁴ This determination is the sovereign decision, a task which is the focus of this chapter's next section. For now, it can be noted that in being able to decide what must be done for peace, the sovereign enjoys the right to unlimited action that everybody possesses in the state of nature.¹⁰⁵ The privileges of sovereignty match the unconstrained existence to which

⁹⁸ Hobbes (1962), p 143.

⁹⁹ Ono could be regarded as 'co-sovereign' with Lennon, as a single sovereign in multiple bodies along with Lennon, or as the 'power behind the throne.' Because the extent of Ono's influence on Lennon is indeterminate to the outside observer, Ono is depicted here as forming a relatively straightforward relationship of King and Queen with Lennon.

¹⁰⁰ Hobbes (2008), p 118.

¹⁰¹ Hobbes (2008), p 119.

¹⁰² Hobbes (2008), p 121.

¹⁰³ Hobbes (2008), p 121.

¹⁰⁴ Hobbes (2008), p 121.

¹⁰⁵ Hobbes (2008), p 199.

Lennon aspired. Lennon felt that living within social structures, such as the schools and careers witheringly critiqued in 'Working Class Hero',¹⁰⁶ was enervating. For example, he was aggrieved by the failure of his teachers and aunt to sufficiently appreciate his artistic activities.¹⁰⁷ Lennon sought to deal with more important concerns instead of performing any of the mundane tasks sanctioned by the establishment. Freedom to do so required that he operate outside of the system. In sovereignty, this external position is a dominant one. In opting out of the usual social order, Lennon implicitly places himself in a position of superiority by favouring his own values over those given to him. Sovereign authority requires the ruling entity to privilege their judgement thus.

Nietzschean elements collect around the role of sovereign. Sovereignty arises out of a social condition that is in some ways similar to the oppressive state of affairs identified in Lennon's 'Working Class Hero'.¹⁰⁸ People are kept from living fully and creativity due to an all-consuming preoccupation with danger. While the oppression Zarathustra pits himself against is rooted more in complacency, the *ubermensch* and sovereign both find the solution to their constricting environments in escape, subjectivity, and will. In regards to escape, the *ubermensch* breaks from the herd to enjoy boundless possibilities. The sovereign likewise acquires their limitless power by going outside of the legal system. As for subjectivity, the *ubermensch* honours their senses and launches themselves at the challenges posed by hardship. Lennon focused on the pain of life, rejecting the distractions favoured by the last men (of which Lennon would likely offer Paul McCartney as an example) and strove for 'real' music. Rather than shirk from it, the sovereign takes hold of the violence and suffering of the human collective. The sovereign uses their individual

¹⁰⁶ Lennon (1970) 'Working Class Hero' *John Lennon/Plastic Ono Band*.

¹⁰⁷ Wenner (2000), pp 137-138.

¹⁰⁸ Lennon (1970) 'Working Class Hero' *John Lennon/Plastic Ono Band*.

(subjective) values to determine an order for the multitude. Meeting opposition and adversity, these creative acts: the newly made values of the ubermensch, Lennon's personally truthful music, and the imposition of the sovereign order, all exhibit the exercise of will. The sovereign's function is to assert their will over the population so that human interactions will be stabilised.

It has been explained why a sovereign is needed, how a sovereign is created, and what a sovereign does. This line of examination has culminated in the figure of the unconstrained sovereign, free to decide how to achieve peace. The following section will show how the sovereign's decision creates meaning for legal subjects. In Hobbes' view, the absence of a sovereign in the state of nature means the absence of law, and thus, the absence of any understanding of meaningful concepts such as justice and injustice that constrain people's behaviour in their dealings with each other.¹⁰⁹ The idea of justice does not inhere in the individual, argues Hobbes.¹¹⁰ Justice is a mere product of people relating to each other within society.¹¹¹ The meanings created by the sovereign constitute society. Lennon also suggested that the meaning of his actions carried over into everyday life, saying '*...you're reacting, we're acting. Somebody else has to tell us what the reaction is.*'¹¹² Lennon originates meaning, which others receive and internalise. The decision that creates this meaning, as well as the act of imposing this meaning, will now be examined.

II – Carl Schmitt on the Sovereign Decision

Carl Schmitt was influenced by the conflicts of two World Wars. His jurisprudence includes a focus on the way a sovereign creates meaning that orders

¹⁰⁹ Hobbes (2008), p 84.

¹¹⁰ Hobbes (2008), p 84.

¹¹¹ Hobbes (2008), p 84.

¹¹² Wenner (2000), p 73.

and protects the lives of its citizens. To Schmitt, the decision to suspend law is the essence of sovereignty.¹¹³ The decision to suspend the law requires a conclusive determination as to whether there is a danger to the state and its people.¹¹⁴ As it is impossible to pre-emptively define criteria for assessing whether a given situation constitutes a danger, the law itself cannot describe what situations justify an exception.¹¹⁵ If a specific danger to the state and its people was pre-empted, then it would not call for an exception as it would be capable of being dealt with by law.¹¹⁶ The impossibility of predicting danger necessitates the bestowal upon the sovereign of unlimited discretion to decide what constitutes danger and unlimited scope to decide what is necessary to subdue this danger.¹¹⁷

Here, the comparison with Lennon exposes that sovereign action begins at the limits of conventionality. The sovereign arrives when the law cannot resolve conflict. Lennon identifies the harms of war and announces how they are to be subdued. He makes known that others are incapable of dealing with the threat of war, criticising conventional forms of protest. The prescribed ways of voicing dissatisfaction are expected, their familiarity depriving them of impact. According to Lennon, ‘Marching was fine and dandy for the Thirties. Today you need different methods – it’s sell, sell, sell. If you want to sell peace, you’ve got to sell it like soap.’¹¹⁸ Lennon promoted peacefulness through the media by taking out billboard advertisements,¹¹⁹ writing and recording the song ‘Give Peace a Chance’,¹²⁰ participating in a concert for peace in Toronto, and sending back his MBE award in objection to the Vietnam

¹¹³ Schmitt (2005), p 5.

¹¹⁴ Schmitt (2005), p 6.

¹¹⁵ Schmitt (2005), p 6.

¹¹⁶ Schmitt (2005), p 5.

¹¹⁷ Schmitt (2005), pp 6-7.

¹¹⁸ Norman (2008), p 596.

¹¹⁹ Du Noyer (2006), p 59.

¹²⁰ Du Noyer (2006), p 138; Lennon (1969) *Give Peace a Chance*.

war.¹²¹ Lennon also took issue with what he called ‘intellectual’ attempts to secure peace. During one of his peace events, he said ‘...if the least we can do is give somebody a laugh, we’re willing to be the world’s clowns because we think it’s a bit serious at the moment and a bit intellectual.’¹²² In arguing with a writer who doubted the efficacy of his methods, Lennon rhetorically asked ‘Do you want nice, middle-class gestures for peace? And intellectual manifestos written by a lot of half-witted intellectuals? And nobody reads them. That’s the trouble with the peace movement.’¹²³ Lennon discounts others’ efforts at obtaining peace, implying his own authority to deal with the matter (Lennon suggests that ‘the world could go far if they listened’ to him¹²⁴), just as the sovereign has the right to decide on the exception. In deeming conventional means ineffective, Lennon is making a pronouncement similar to declaring a state of exception. Lennon’s bed-in demonstrations of 1969 have the quality of the state of exception. Lennon called the bed-in a ‘seven-day press conference in bed’.¹²⁵ During a bed-in, Lennon and Ono would stay in a hotel bed for up to a week and use the resultant news media attention to proliferate their opinion on how to counter violence. The bed-in is performative of a state of exception because it is outside the usual order of things, a method of securing peace that was universally unconventional. Lennon’s media-savvy ‘holy foolery’¹²⁶ differentiated him from other progressive campaigners. Others with anti-establishment views disagreed with Lennon’s approach, including writer Gloria Emerson, who lamented ‘...you’ve made yourself ridiculous’ and said ‘My dear boy, you’re living in a never-

¹²¹ Du Noyer (2006), p 156.

¹²² Solt (2006) *Imagine: John Lennon*, Chapter 14.

¹²³ Solt (2006) *Imagine: John Lennon*, Chapter 19.

¹²⁴ U2 (1980) ‘The Ocean’ *Boy*.

¹²⁵ Solt (2006) *Imagine: John Lennon*, Chapter 16.

¹²⁶ MacDonald (2003b), p 100.

never land. You don't think you've saved a single life?'¹²⁷ On his first album, released in the year following the bed-ins, Lennon chronicled his unwillingness to promote the methods that other counter-cultural activists used to counter violence. In 'I Found Out',¹²⁸ Lennon laments the constant pressure from these activists to support their causes, singing 'The freaks on the phone won't leave me alone.'¹²⁹ Lennon disassociates himself from these people, warning 'Don't give me that brother, brother.'¹³⁰ At the same time he antagonised the conservative 'establishment'. Du Noyer states that '...John's enemies... included Richard Nixon, J. Edgar Hoover and Elvis Presley.'¹³¹ During a bed-in interview Lennon said that '...even if you can beat the establishment at their own game, I don't believe in that game. I think the only way to do it is Ghandi's way, and that's nonviolent...'¹³² The actions Lennon speaks of do not occur within the 'game'. The sovereign is not inhibited by the parameters of the law. They are capable of addressing a threat that the system cannot. There is a possible interpretation of Lennon's drive to act unhindered as merely a desire for liberal freedom, and his lingering outside of convention ('Imagine no...') as an abstraction like Rawls' original position. 'Power to the People'¹³³ sounds more like a tenant of liberalism than it does a claim to supreme authority. However, Lennon must be considered sovereign-like rather than liberal because liberal freedom is created and upheld by legal structures, while Lennon avoids being guided by any framework. MacDonald observes that:

'Nothing else on Abbey Road matches the Zeitgeist-catching impact of Lennon's cover-breaking announcement, after two verses of faintly

¹²⁷ Solt (2006) *Imagine: John Lennon*, Chapter 19.

¹²⁸ Lennon (1970) 'I Found Out' *John Lennon/Plastic Ono Band*.

¹²⁹ Du Noyer (2006), p 29.

¹³⁰ Lennon (1970) 'I Found Out' *John Lennon/Plastic Ono Band*.

¹³¹ Du Noyer (2006), p 57.

¹³² Solt (2006) *Imagine: John Lennon*, Chapter 16.

¹³³ Lennon (1971) *Power to the People*.

menacing semi-nonsense: 'One thing I can tell you is you got to be free'. The freedom invoked here differs from previous revolutionary freedom in being a liberation from all forms and all norms, including left-wing ones.'¹³⁴

Liberalism creates freedom for the legal subject. For sovereignty, freedom is not an end but a means to impose order. In his blank white suit of 1969, Lennon has no affiliation to the norms and their usual forms, only to his own mission.

Schmitt regards as likely disagreement amongst a people as to what is best for their society (and thus what should be considered the normal state of affairs and what should be considered harmful).¹³⁵ Indeed, the civil clash in England backgrounds Hobbes' account of sovereignty's foundations. In Lennon's time, clashes within societies were occurring between traditional sources of authority and younger people. Of the United States of America, Lennon biographer Norman said that the 'generation gap had turned into a blazing abyss', with the Vietnam War in particular being a source of contention.¹³⁶ Partridge, in her book on Lennon, described the country as 'torn by racial strife and exhausted by an expensive, bloody, and demoralising war.'¹³⁷ Significant divisions in society necessitate the sovereign decision to end such disputes.¹³⁸ The sovereign's role is to stop people fighting with each other. If there is disagreement as to whether or not the society is as it should be, the sovereign must impose their definition of normality and exception onto the society leaving no room for disagreement. This is achieved by subduing those with

¹³⁴ MacDonald (2003a), pp 107-108.

¹³⁵ Schmitt (2005), p 8.

¹³⁶ Norman (2008), p 681.

¹³⁷ Partridge (2005), p 172.

¹³⁸ Schmitt maintains that liberalism defers making decisions: Bielefeldt (1998), p 24. According to Dyzenhaus (1998), p 2, it is Schmitt's view that, conversely, a decisive '...leader will create a normal situation out of the chaos of pluralism by making a genuinely political, sovereign decision.'

contrasting interpretations of the situation.¹³⁹ The sovereign defines normality and instils peace in one.¹⁴⁰ The sovereign decision creates meaning for the people by setting out the understandings on which their society operates.¹⁴¹ The decision sets out who is friend and who is enemy (a threat to the state).¹⁴² Lennon exhorting ‘power to the people’ may not be incongruous with analogy to sovereignty. Schmitt believes that sovereignty can be democratic.¹⁴³ It may seem that democracy would require submission to a constitution and thus be anathema to sovereignty.¹⁴⁴ However, power to declare the exception and begin with a fresh constitution (rather than acting under an existing document) may be assumed citing the needs of the public:¹⁴⁵ ‘power to the people’. The sovereign represents the people, making real what they want for their society. This requires, though, unanimity, a homogeneity of population.¹⁴⁶ When the multitude are divided, agreement may be impossible and thus not a solution to dispute. Just as Lennon left behind the four-way personal compromise and the artistic standstill of the Beatles to create solo albums, individuality is sovereignty’s solution. Sovereignty promotes an individual subjectivity to supremacy. The definitive views of the individual and their capability for decisive action allow for resolution of the deadlock. Uniformity is produced when the sovereign imposes an order to which people must conform. The imposition of the individual on the people is the function of the sovereign decision, as a comparison with Lennon demonstrates:

¹³⁹ <http://plato.stanford.edu/entries/schmitt/>

¹⁴⁰ Dyzenhaus (1994), p 16; Dyzenhaus (1998), p 2.

¹⁴¹ Schmitt believes that sovereignty justifies existence by creating a meaning for which people can offer their lives: Dyzenhaus (1994), pp 15-16.

¹⁴² George Schwab’s introduction to Schmitt (2005), pp xviii; xxiv, Bielefeldt (1998), p 25.

¹⁴³ Dyzenhaus (1994), p 14.

¹⁴⁴ It may appear that democracy requires a constitution because, according to Schmitt, liberalism (and its constitutional restraints) has strongly associated itself with democracy: Dyzenhaus (1994), p 3.

¹⁴⁴ McCormick (1998), p 177, p 180.

¹⁴⁵ McCormick (1998), p 177, p 180.

¹⁴⁶ Bielefeldt (1998), p 23, Dyzenhaus (1994), p 1.

‘I’m opening a door for John Lennon, not for music or for the Beatles or for a movement or anything. I’m presenting myself to as broad a scope as I can.’¹⁴⁷

‘I mean to sell as many albums as I can, as many records as I possibly can because I’m an artist who wants everybody to love me and everybody to buy my stuff.’¹⁴⁸

It is Lennon’s goal to be noticed, regardless of the meaning of his work. In the same way, the content of the sovereign’s definition of normality is not as important as the fact that a decision, any decision, on what must be conformed to, has been made. The sovereign is an individual that unites the masses. Resolution of conflict is arrived at not by devising an order that is agreeable to all, but by providing a meaning that all are to obey. Sovereignty is a scheme of peace, not of freedom. The sovereign forces their order on those in opposition to it. Lennon foresees the assimilation of those presently in opposition to the society he envisions: ‘Whatever you’re thinking Mrs. Grundy of Birmingham on Toast, you know, you don’t stand a chance. a) You’re not going to be there when we’re running it, and b) you’re going to like it when you get less frightened of it.’¹⁴⁹

The sovereign is identified by noting who, in fact, brings about the state of exception. It was suggested in the previous section that, consistent with Nietzsche, the sovereign wills order onto the people. Schmitt’s work provides further evidence for this. The sovereign’s position is, as Nonet would have it, verified by its efficacy. It must be noted, however, that this efficacy depends on the sovereign being in synch with the beliefs of others:

¹⁴⁷ Wenner (2000), p 95.

¹⁴⁸ Wenner (2000), p 96.

¹⁴⁹ *John Lennon – Man of the Decade (December 1969)*
<http://www.youtube.com/watch?v=g9pH4TJQ3zM>

‘A sovereign’s view on this issue [of the exception] can be expected to be responsive to social attitudes. If it were not, a sovereign could hardly possess the factual capability to suspend the law and to act successfully against the perceived emergency.’¹⁵⁰

A brief reference to Giorgio Agamben ahead of time: Agamben supplies a point complementary to the above quote, maintaining that the sovereign’s word is law because what the sovereign requires of the people is a mere description of what is already possible in the state of exception.¹⁵¹ Lennon echoes this view in stating that musicians have the dual role of leading the people while also mirroring situation in which they exist. Lennon said ‘I think poets and musicians and artists or whatever they are, of the age, not only do they sort of lead the age on but they also reflect that age’.¹⁵² Although Lennon is not an actual sovereign with power to suspend the law, he channels a star power that makes this comparison possible. Not all musicians, in fact, possibly no other musician could sustain the analogy. Unlike the ‘half-witted’ writers whose manifestos ‘nobody reads’, Lennon was a significant figure:

‘America’s larger stage revealed for the first time what extra-ordinary power John’s name possessed to transcend even the new spiky frontiers of race, gender and political allegiance, and – more crucially here than anywhere – to guarantee maximum media attention for any cause he supported.’¹⁵³

Lennon noted the attentiveness that people had to his ideas, saying ‘...for some reasons known only to themselves, people do print what I say. And I’m saying

¹⁵⁰ <http://plato.stanford.edu/entries/schmitt/>

¹⁵¹ Agamben (1998), p 184.

¹⁵² Solt (2006) *Imagine: John Lennon*, Chapter 1.

¹⁵³ Norman (2008), p 686.

“Peace”.¹⁵⁴ ‘Give Peace a Chance’¹⁵⁵ was chanted by close to half a million people protesting against the Vietnam War in front of the White house.¹⁵⁶ Although others rejected Lennon’s ideas, with one newspaper article claiming ‘He [Lennon] doesn’t make a ha’penny’s worth of difference to attitudes in Biafra or Vietnam,’¹⁵⁷ that Compulsively performative of his times, Lennon engaged with innovations and issues such as hippiedom, Maoism, and feminism, highlights that the sovereign channels power from the attitudes of others. In singing of and speaking to these issues that Lennon evokes a situation that can be likened to the state of exception. The limitations of fixed meaning are dissolved:

‘In Come Together, the personal preamble to Julia [‘Half of what I say is meaningless,’¹⁵⁸] is propelled into the public sphere and elevated to the level of (anti-) ideology: a call to unchain the imagination and, by setting language free, loosen the rigidities of political and social entrenchment.’¹⁵⁹

Throughout 1969 and 1970 especially, Lennon was occupied with this sweeping away of that which hindered him. Targeted for ‘suspension’ were the expectations of Lennon’s audience, which Lennon dismissed as ‘myth’¹⁶⁰, as well as an inventory, presented in the song ‘God’¹⁶¹ from *Plastic Ono Band*,¹⁶² that included magic, I-Ching, Bible, Tarot, Hitler, Jesus, Kennedy, Buddha, mantra, Gita, Yoga, kings, Elvis, and Zimmerman [Bob Dylan]. After reciting this list, Lennon concludes ‘I just believe in me. Yoko and me. That’s reality.’ Lennon is the ‘reality’ of the

¹⁵⁴ Norman (2008), p 596.

¹⁵⁵ Lennon (1969) *Give Peace a Chance*.

¹⁵⁶ Du Noyer (2006), p 22.

¹⁵⁷ Solt, Andrew (2006) *Imagine: John Lennon*, Chapter 19.

¹⁵⁸ The Beatles (1968) ‘Julia’ *The Beatles*.

¹⁵⁹ MacDonald (2003b), p 108.

¹⁶⁰ Wenner (2000), p 11.

¹⁶¹ Lennon (1970) ‘God’ *John Lennon/Plastic Ono Band*.

¹⁶² Lennon (1970) *John Lennon/Plastic Ono Band*.

world as he sees it once he has abandoned convention, the ‘myths’ he was operating behind merely obscuring his agency. The sovereign possesses the true power of the law, through sometimes occluded by the everyday operation of the legal system. The world described in the title song from Lennon’s following album, 1971’s *Imagine*,¹⁶³ is a description of suspension (‘imagine no...’) that allows for the resolution of conflict (‘nothing to kill and die for,’) and the unification of the people (‘the world will be as one,’).¹⁶⁴ On his third album, *Some Time in New York City*,¹⁶⁵ released in 1972, Lennon attempted to utilise the freedom strived for in his first two albums by dealing with more radical political topics, such as the oppression of women and African Americans, and the conflict in Northern Ireland, amongst others.¹⁶⁶ Considering its subject matter to be of the highest importance, Lennon deliberately tried to create an album that would be listened to by even more people than his previous works.¹⁶⁷ The album was unsuccessful, however, charting at number 48 in the United States.¹⁶⁸ With *Some Time in New York City*¹⁶⁹ largely ignored, Lennon’s music (1973’s considerably less political *Mind Games*¹⁷⁰) and public dialogue reverted to a tone closer to that of 1969 – 1971. Lennon and Ono announced the imaginary country of ‘Nutopia’ during a press conference to discuss their immigration problems with the United States.¹⁷¹ Lennon described Nutopia as a place that has ‘...no land, no boundaries, no passports, only people. Nutopia has no laws other than cosmic.’¹⁷² This reads as a reaffirmation, an extension of Lennon’s

¹⁶³ Lennon (1971) *Imagine*.

¹⁶⁴ Lennon (1971) ‘Imagine’ *Imagine*.

¹⁶⁵ Lennon (1972) *Some Time in New York City*.

¹⁶⁶ Du Noyer (2006), p 57.

¹⁶⁷ Du Noyer (2006), p 57.

¹⁶⁸ Norman (2008), p 699.

¹⁶⁹ Lennon (1972) *Some Time in New York City*.

¹⁷⁰ Lennon (1973) *Mind Games*.

¹⁷¹ Partridge (2005), p 174.

¹⁷² *Nutopia Announcement* <http://www.youtube.com/watch?v=XX8gfDJRBDs>

‘state of exception’. Using the work of Giorgio Agamben, the continuing state of exception and its consequences will be discussed presently.

III – Giorgio Agamben on the Continuing Exception

In the late sixties and early seventies, Lennon engaged in what appeared to be a finite quest to secure personal calm and social peace. Du Noyer comments that ‘...so much of *John Lennon/Plastic Ono Band*¹⁷³... represents a temporary clearing of the mental decks more than a definitive statement’.¹⁷⁴ As suggested at the end of the previous section, though, there is a sense of perpetuity to what first seemed to be a passing mindset. The way in which Lennon prolongs his use of unbounded, extraordinary measures suggests the need to consider the extension of the state of exception. In this situation, according to Giorgio Agamben, the exception and the norm merge, creating an indeterminate space.¹⁷⁵ Agamben’s work on the exception is conducted in the field of biopolitics, which concerns the regulation of human bodies.¹⁷⁶ The suspension of law involves the transition from ‘bios’ or politically structured life, towards ‘zoe’ or bare life, which is pure physical existence.¹⁷⁷ Lennon expressed approval for the blues, saying that it was ‘...*real*. It’s not perverted or thought – it’s not a concept.’¹⁷⁸ No ‘concept’, no limiting structure, only direct expression of pure existence. It is normative structures, such as the conventions that inform people’s expectations of musical performance and personal behaviour, that Lennon sought to shed in order to freely address the issues that preoccupied him. The

¹⁷³ Lennon (1970) *John Lennon/Plastic Ono Band*.

¹⁷⁴ Du Noyer (2006), p 29.

¹⁷⁵ Agamben (1998), p 20; p 22.

¹⁷⁶ Agamben (1998), p 3.

¹⁷⁷ Agamben (1998), p 1; p 3.

¹⁷⁸ Wenner (2000), p 78.

format of the Beatles was one such structure that separated Lennon from this more immediate existence:

‘... I no longer believe in myth, and Beatles is another myth. I don’t believe in it. The dream’s over. I’m not talking about the Beatles is over, I’m talking about the generation thing. The dream’s over, and I have personally got to get down to so-called reality.’¹⁷⁹

This ‘reality’ was illustrated on the *Plastic Ono Band*¹⁸⁰ album, which was influenced by Lennon’s course of primal scream therapy. Primal scream eschewed structured forms of communication in favour of intense, immediate, and inarticulate expressions such as cries, screams, and ‘howls’.¹⁸¹ The lyrics of *Plastic Ono Band* shifted away from the kind Lennon wrote while a member of the Beatles. While songs such as ‘Help!’¹⁸² and ‘A Day in the Life’¹⁸³ ‘...cloaked their message in poetic imagery or punning wordplay...’ *Plastic Ono Band*’s¹⁸⁴ songs are extremely candid.¹⁸⁵ Harrowingly personal, the words are accompanied by harsh, grating screams. The music, too, is ‘bare’. Recorded using the slim set-up of a three-piece band, the instrumentation is direct and unembellished. Lennon’s stripped-down and abrasive aesthetic viscerally evokes a world devoid of the comforting social overlay that distances people from pain. Lennon’s authorship of this environment demonstrates that bare life is created by the sovereign. Agamben posits that ‘the production of bare life is the originary activity of sovereignty.’¹⁸⁶ The sovereign is

¹⁷⁹ Wenner (2000), p 11.

¹⁸⁰ Lennon (1970) *John Lennon/Plastic Ono Band*.

¹⁸¹ Lennon on howling http://www.youtube.com/watch?v=7naja0jDL_Q

¹⁸² The Beatles (1965) ‘Help!’ *Help!*

¹⁸³ Beatles (1967) ‘A Day in the Life’ *Sgt. Pepper’s Lonely Hearts Club Band*.

¹⁸⁴ Lennon (1970) *John Lennon/Plastic Ono Band*.

¹⁸⁵ Norman (2008), p 649.

¹⁸⁶ Agamben (1998), p 83.

the only entity that can strip away political meanings and create a new order. However, it is possible for meaningless bare life to become the order.

Indefinitely continuing the exception makes bare life and political life indistinguishable. The measures that are allowed by the state of exception can be overlaid onto the law.¹⁸⁷ The state of exception becomes more than the withdrawal of law. Law and fact become intermingled and can no longer be distinguished.¹⁸⁸ They cannot be told apart because the state of exception is not a fact (something that exists without law), as it is brought about through a legal act (the suspension of law), but is not a right (a legal creation), as law is suspended.¹⁸⁹ Agamben calls this situation ‘the camp’,¹⁹⁰ which occurs when the ‘...exception begins to become the rule...’¹⁹¹ This indistinctiveness comes about through a series of transitions. Bare life is first excluded from politics. It then becomes the subject of political regulation before being indistinguishable from politics.¹⁹² To illustrate the lack of distinction between the exception and the rule, Agamben uses *homo sacer* (sacred man), an obscure figure of Roman law.¹⁹³ *Homo sacer* cannot be sacrificed, although killing this man is not a crime.¹⁹⁴ If belonging to the gods, then killing *homo sacer* would be a sacrilegious act, but it is not. If sentenced to death, then *homo sacer* should be executed by the state, but he is not.¹⁹⁵ *Homo sacer* is part of the worlds of both men and gods without being subject to their laws.¹⁹⁶ The sovereign is the inversion of the *homo sacer*.¹⁹⁷ To the *homo sacer*, everyone else is sovereign, and to the sovereign,

¹⁸⁷ Agamben (1998), p 168.

¹⁸⁸ Agamben (1998), p 170.

¹⁸⁹ Agamben (1998), p 9.

¹⁹⁰ Agamben (1998), p 168.

¹⁹¹ Agamben (1998), p 169.

¹⁹² Agamben (1998), p 9.

¹⁹³ Agamben (1998), p 8.

¹⁹⁴ Agamben (1998), p 71.

¹⁹⁵ Agamben (1998), p 73.

¹⁹⁶ Agamben (1998), p 83.

¹⁹⁷ Agamben (1998), p 84.

everyone is *homines sacri*.¹⁹⁸ As a solo artist, Lennon was able to recruit subordinate players to do his bidding. ‘A typical life in the day of John Lennon’ George Harrison wryly commented when observing the relative insignificance, compared to Lennon, of the people that Lennon had at his command.¹⁹⁹ These musicians are interchangeable with others. They are relatively insignificant. They require from Lennon no compromise such as he would have to make recording as an equal part of a group. In bare life, people can be used in whatever way the sovereign requires to bring about their order. The sovereign is important because they are the site of the decision. It is their agenda that is carried out.

The intermingling of law and fact results in the merging of legality and illegality and creates an environment in which the law is deprived of its content and becomes the same as physical life.²⁰⁰ Biopolitics works to such an extent here that citizens become *homines sacri*, and nothing inflicted upon the people is considered a crime.²⁰¹ In 1974, the year after Lennon reasserted a kind of state of exception through *Nutopia*, he encapsulated the lack of distinction between legality and illegality with the single ‘Whatever Gets You thru the Night’.²⁰² The phrase from which the song draws its title suggesting that anything is permissible. Lennon acknowledged the harsh conditions of an environment free of convention. Speaking of the *Plastic Ono Band*²⁰³ album, Lennon said that ‘It’s so miserable in a way and heavy, but it’s *reality*. I’m not going to veer away from it for anything.’²⁰⁴ In ‘God’²⁰⁵ from that album, Lennon sings of people having to fend for themselves:

¹⁹⁸ Agamben (1998), p 84.

¹⁹⁹ Solt (2000) *Gimme Some Truth: The Making of John Lennon’s “Imagine” Album*, Chapter 6.

²⁰⁰ Agamben (1998), p 53.

²⁰¹ Agamben (1998), p 170.

²⁰² Lennon (1974) ‘Whatever Gets You thru the Night’ *Walls and Bridges*.

²⁰³ Lennon (1970) *John Lennon/Plastic Ono Band*.

²⁰⁴ Wenner (2000), p 117.

²⁰⁵ Lennon (1970) ‘God’ *John Lennon/Plastic Ono Band*.

‘...and so dear friends, you’ll just have to carry on. The dream is over.’ The lack of any normative boundaries in the state of exception means that anything can be inflicted upon *homines sacri*.²⁰⁶

However, Lennon also often presented the lack of normative structure as freeing for him. On a talk show interview with David Frost in 1969, Lennon explained an avant garde performance from that same year where he and Ono improvised noises on stage. Lennon said ‘It’s just us expressing ourselves without any words or format. You know, not formalising the sound we make to make words to make music or beat. We’re just expressing ourselves like a child does.’²⁰⁷ In the state of exception, the sovereign is free to act as they wish.

If the sovereign was solely within the law, then when the law was suspended the sovereign would disappear. The sovereign must remain to bring about order. However, is not true to claim that the sovereign is only outside of the law, as their subjectivity permeates its meaning. The sovereign is simultaneously outside as well as part of the legal system,²⁰⁸ or ‘Within You Without You’,²⁰⁹ in the words of George Harrison. The sovereign must remain outside in order to bestow authority upon the system, but is amongst law in deciding whether the legal order must withdraw from an exceptional situation.²¹⁰ Lennon operates external to the order he presides over. In ‘Isolation’²¹¹ from *Plastic Ono Band*,²¹² Lennon portrays the separation between himself and everyday people, singing ‘The world is just a little town, everybody trying to put us down, isolation,’ and ‘We’re afraid of everyone,

²⁰⁶ Agamben (1998), p 183.

²⁰⁷ ‘John Lennon on The David Frost Show’ (1969) *part 1*
<http://www.youtube.com/watch?v=g2jKFZVIQv0>

²⁰⁸ Agamben (1998), p 15.

²⁰⁹ The Beatles (1967) ‘Within You Without You’ *Sgt. Pepper’s Lonely Hearts Club Band*.

²¹⁰ Agamben (1998), p 15.

²¹¹ Lennon (1970) ‘Isolation’ *John Lennon/Plastic Ono Band*.

²¹² Lennon (1970) *John Lennon/Plastic Ono Band*.

afraid of the sun, isolation.’ Lennon is separate from the public; his life is not that of the normal person’s. He has distinguished himself from the norm and, in doing so, made his life a matter of broader significance. As symbolised by the cover of *Unfinished Music No. 1: Two Virgins*,²¹³ on which Lennon appears naked (literally bare),²¹⁴ bare and political life meet in the actual person of the sovereign:²¹⁵

‘Here the traditional distinction between the sovereign’s political body and his physical body... disappears, and the two bodies are drastically contracted into one. The Fuhrer has, so to speak, a whole body that is neither private nor public and whose life is in itself, supremely political.’²¹⁶

Agamben observes that, unlike a chancellor, whose position is created under the constitution of Germany, the Fuhrer spontaneously generates law, making the Fuhrer’s body of importance to the system.²¹⁷ Lennon conflates bios and zoe in the same way:

‘Uncompromising as ever, he threw himself into this trap with total commitment, not only refusing to draw a line between his public and private life but going out of his way to personalise everything that happened in his vicinity....’²¹⁸

Lennon intermingles public and private in multiple ways, including through his art. Lennon’s avant-garde films, often static shots of his face or body parts, also evidence the way in which any document of his existence, no matter how

²¹³ Lennon and Ono (1968) *Unfinished Music No. 1: Two Virgins*.

²¹⁴ Lennon and Ono (1968) *Unfinished Music No. 1: Two Virgins*.

²¹⁵ Agamben (1998), p 184.

²¹⁶ Agamben (1998), p 184.

²¹⁷ Agamben (1998), p 184.

²¹⁸ MacDonald (2003b), pp 100-101.

commonplace, was considered art.²¹⁹ His songs are often deeply personal (many of *Plastic Ono Band*'s²²⁰ songs detail Lennon's childhood traumas) but are always released for public consumption. The subject matter of Lennon's music ranges from wholly public concerns such as the social injustices detailed in *Some Time in New York City*,²²¹ to disclosure on personal topics such as marriage in *Mind Games*.²²² Sometimes Lennon's song writing would oscillate between these two alternatives within a single album. On *Imagine*,²²³ Lennon's concerns veer from the emancipation of the world in the title track to personally attacking his former band mate Paul McCartney in the song 'How Do You Sleep?'.²²⁴ Lennon spoke favourably of his compositions 'Girl'²²⁵ and 'A Day in the Life',²²⁶ calling them 'real',²²⁷ claiming reality to be their virtue. He highlighted that it is the combination of the exceptional (highly accomplished song writing) and the mundane (the quotidian narrative of 'A Day in the Life'²²⁸) that defines his work. Also in his personal development Lennon makes his life a matter for public consumption. When undertaking primal scream therapy, Lennon expressed the desire to advertise in newspapers to attract others to what he thought was a necessary treatment.²²⁹ During the *Some Time in New York City*²³⁰ period, Lennon promoted the counter-cultural figures who had deepened his understanding of radical leftist politics.²³¹ The most important instance of Lennon conflating bios and zoe, however, is the bed-in, replete

²¹⁹ Partridge (2005), p 144: '...they [Lennon and Ono] made avant-garde films: *Smile*, *Two Virgins*, *Rape*, and *Self Portrait*, a slow-motion film of John's penis in various degrees of erection.'

²²⁰ Lennon (1970) *John Lennon/Plastic Ono Band*.

²²¹ Lennon (1972) *Some Time in New York City*.

²²² Norman (2008), p 711.

²²³ Lennon (1971) *Imagine*.

²²⁴ Du Noyer (2006), p 51; Lennon (1971) 'How Do You Sleep?'

²²⁵ The Beatles (1965) 'Girl' *Rubber Soul*.

²²⁶ Beatles (1967) 'A Day in the Life' *Sgt. Pepper's Lonely Hearts Club Band*.

²²⁷ Wenner (2000), p 99; p 115.

²²⁸ Beatles (1967) 'A Day in the Life' *Sgt. Pepper's Lonely Hearts Club Band*.

²²⁹ Wenner (2000), p 3.

²³⁰ Lennon (1972) *Some Time in New York City*.

²³¹ Norman (2008), p 687.

with its beards, beds, and bags. In this event, Lennon mostly vividly transformed the norm into the exception and his body into a site of significance. Lennon made all of his existence into something demanding attention by putting across purely physical activities such as resting in bed as political demonstrations. Lennon stated that all everyday activities had political significance: ‘Do everything for peace. Piss for peace or smile for peace or go to school for peace or don’t go to school for peace. Whatever you do just do it for peace.’²³² The most basic physical considerations, such as bathing²³³ or the inexorable growth of unattended facial hair²³⁴ become a way of contending with issues of violence. Biological existence becomes a politically significant gesture. Lennon has made his life into the state of exception, and the state of exception becomes his normal state of affairs.

When a state of exception becomes the norm, then it cannot be labelled as exceptional. Equally, the norm also becomes exceptional. The two are alloyed, so that, as in Lennon’s life, the boring elements of life become art, and extreme (such as a staggering amount of attention from the rest of the world) becomes constant and expected. Lennon does everyday things for peace. He discusses the state of the world while in his pyjamas and media events report the simple fact of his being. The very act of living becomes a response to the problem of violence. Everyday life and demonstrating political change become the same, but, it must be emphasised, only when these usually unremarkable activities are performed by Lennon himself. Lennon has made his individual body, not bodies generally, as he suggests in his ‘Whatever you do...’ directive, the site of political significance. The sovereign does not hold a political office, they inhabit a political state of being. In demanding

²³² *I Met the Walrus* <http://www.youtube.com/watch?v=jmR0V6s3NKk&feature=watch-now-button&wide=1>

²³³ Footage from 1969 of Lennon bathing is present in Solt (2006) *Imagine: John Lennon*.

²³⁴ Lennon’s comments on press reaction to his substantial beard: <http://www.youtube.com/watch?v=vhkzFDBCbXI>

attention for his existence in this way, Lennon has focused attention in matters of peace and violence on his body. Lennon often asserted his existence as bare life. For example, Du Noyer interprets the songs 'Isolation'²³⁵ as Lennon emphasising his human vulnerabilities in spite of his reputation.²³⁶ Lennon asserts his humanity, his ordinariness as a flawed human being, but, like the mix of bios and zoe, this is always paired with the remarkableness of his life as a rock star and, particularly, with his engagement in matters of violence and peace. It is likely that Lennon was not conscious of the combination. During the recording of *Imagine*,²³⁷ for example, a young man stalked Lennon, living in the gardens of Lennon's estate.²³⁸ Lennon decided to confront this young man. Ono explained that this was because 'John always felt responsible for these people because they were the result of his songs.'²³⁹ When talking with the man, Lennon emphasised the commonness of his life, saying 'Don't confuse the songs with your own life. I mean, they might have relevance to your life, you know, but a lot of things do. So we met, I'm just a guy, man, who writes songs.'²⁴⁰ What Lennon misses is that while he is 'just a guy', that 'just', and all the insignificance that the word implies, is something he has made a site of significance. However, it is also possible that, on some level, Lennon in fact was aware of the conflation of his two lives. Schmitt argues that the sovereign is characterised by the decision to institute the state of exception. If this is their defining activity, then the sovereign exists as sovereign when they are making a decision and exercising their power in the state of exception. This indicates that the continuing state of exception is an environment in which the sovereign can

²³⁵ Lennon (1970) 'Isolation' *John Lennon/Plastic Ono Band*.

²³⁶ Du Noyer (2006), p 30.

²³⁷ Lennon (1971) *Imagine*.

²³⁸ Solt (2006) *Imagine: John Lennon*, Chapter 7.

²³⁹ Solt (2006) *Imagine: John Lennon*, Chapter 7.

²⁴⁰ Solt (2006) *Imagine: John Lennon*, Chapter 7.

constantly substantiate their being by wielding their powers. Because the sovereign is free in the state of exception, it is the very environment in which they are able to prolong the exercise of sovereignty. An unrestrained power is free to perpetuate itself. Perhaps, in keeping with Barrett's contention, mentioned in chapter 2, that the Nietzschean *ubermensch*, exercising his power, is not the 'complete and whole man',²⁴¹ Lennon realised that living through power does not imbue contentment. The *ubermensch*'s project of transcendence may separate a person from certain nourishing human qualities. Lennon's sovereign-like quest and its requirement of self-propagating authority, might have done the same. After his activist period, Lennon became despondent. He separated from Ono and went to Los Angeles, drinking and fornicating in what has become known as the 'lost weekend'.²⁴² Lennon later reflected of his activism that 'It evolved that somehow we ended up being responsible to produce peace. I mean, even in our own heads it got that way.'²⁴³ Lennon decided to stop attracting attention, abandoning responsibility for peace and disowning the accompanying need to perpetuate authority. From 1970 to 1975, Lennon had been trapped in the life of a rock star, releasing an album every year. After this, he became more private. Lennon stopped recording music, performing, and staging mass media projects. Returning to New York City, Lennon became a house husband and was able to enjoy domesticity without political connotations. His days were ordinary, routine, and relaxed. Lennon's departure from the world of music was so thorough that he ceased contact with old rock star friends.²⁴⁴ Lennon committed himself to caring for his son Sean while Yoko managed her and Lennon's

²⁴¹ Barrett (1962), p 192.

²⁴² Partridge (2005), p177; Solt (2006) *Imagine: John Lennon*, Chapter 22; Norman (2008), p 728; p 731.

²⁴³ Wenner (2000), p 73.

²⁴⁴ Norman (2008), p 770.

finances,²⁴⁵ as mentioned in 'Cleanup Time',²⁴⁶ a song from his later release, *Double Fantasy*.²⁴⁷ 'The Queen is in the counting house, counting out the money. The King is in the kitchen, making bread and honey.' Lennon became involved in the domestic repetitions of home life, finding this challenging, but also engrossing and rewarding.²⁴⁸ 'Cleanup Time's'²⁴⁹ 'bread and honey' alludes to a phase in which he even made lunchtime meals for his family and employees.²⁵⁰

Withdrawing from the music industry and the news media did not mean that Lennon became secluded. Conversely, raising a child prompted Lennon's reengagement with conventional life after the detachment of his time as a celebrity.²⁵¹ He swam with his son at a YMCA, walked through central park, and ate in a local coffee shop.²⁵² 'Isolation'²⁵³ no longer. Lennon reconnected with people from a position of equality rather than authority. In doing so he became more serene. He absorbed himself in passive activities, gazing at the world around him²⁵⁴ and entertaining idle thoughts, as well as enjoying books and television.²⁵⁵ In this atmosphere of placidity, Lennon created his final album, *Double Fantasy*,²⁵⁶ which included material by Ono. Its subject matter was Lennon's family and domestic life, and included songs expressing love and gratitude for his son ('Beautiful Boy (Darling Boy)'²⁵⁷) and wife ('Woman'²⁵⁸), and the calm of his time spent idly

²⁴⁵ Partridge (2005), p 187.

²⁴⁶ Lennon and Ono (1980) 'Cleanup Time' *Double Fantasy*.

²⁴⁷ Lennon and Ono (1980) *Double Fantasy*.

²⁴⁸ Norman (2008), p 764.

²⁴⁹ Lennon and Ono (1980) 'Cleanup Time' *Double Fantasy*.

²⁵⁰ Norman (2008), p 769.

²⁵¹ Norman (2008), p 767.

²⁵² Norman (2008), p 767.

²⁵³ Lennon (1970) 'Isolation' *John Lennon/Plastic Ono Band*.

²⁵⁴ Norman (2008), p 794.

²⁵⁵ Partridge (2005), p 184.

²⁵⁶ Lennon and Ono (1980) *Double Fantasy*.

²⁵⁷ Lennon and Ono (1980) 'Beautiful Boy (Darling Boy)' *Double Fantasy*.

²⁵⁸ Lennon and Ono (1980) 'Woman' *Double Fantasy*.

(‘Watching the Wheels’²⁵⁹).²⁶⁰ The tone of the album was not contentious, like Lennon’s earlier work, and Lennon himself appeared ‘calmer and mellower, as if deep inside him a storm had finally blown out.’²⁶¹ The album is about peace (‘no rats aboard the magic ship of perfect harmony’, according to ‘Cleanup Time’²⁶²), but it is a personal peace rather than a worldwide Nutopia. Lennon gained the individual freedom he sought not by being above everyone, but by living more like a subject than a sovereign. He returned from his time away to record *Double Fantasy*.²⁶³ Weeks after its release in 1980, Lennon was shot outside his apartment in the Dakota building.²⁶⁴

Lennon’s assailant, Mark David Chapman, was angry at Lennon for what Chapman believed to be disloyalty to the ideas that Lennon had expressed in his songs.²⁶⁵ Lennon’s wealth, for example, was interpreted as a contravention of ‘Imagine’s’²⁶⁶ entreaty to ‘imagine no possessions’.²⁶⁷ Lennon was utterly underserving of such violence. However, it was because he mixed his being with his politics, because he exemplified the intersection as that of bios, and zoe, that his body seemed relevant to his ideals for people like Chapman. While not creating a reason to shoot him, Lennon made his body the site of these conflicts, these disputes over meaning. In making the pure fact of his existence ‘vital’ (in every sense) to societal issues, Lennon was indistinguishable from his ideas. His body became something more significant than usual. The sovereign is unique. Sovereigns impose their subjectivity upon the legal system. It is their very singularity, their embodiment

²⁵⁹ Lennon and Ono (1980) ‘Watching the Wheels’ *Double Fantasy*.

²⁶⁰ Norman (2008), p 794.

²⁶¹ Norman (2008), p 796; p 798.

²⁶² Lennon and Ono (1980) ‘Cleanup Time’ *Double Fantasy*.

²⁶³ Lennon and Ono (1980) *Double Fantasy*.

²⁶⁴ Du Noyer (2006), p 139.

²⁶⁵ Norman (2008), p 804.

²⁶⁶ Lennon (1971) ‘Imagine’ *Imagine*.

²⁶⁷ Norman (2008), p 804.

that is the essence of how sovereignty functions. The singular allows for decisiveness and embodiment creates the possibility of spontaneously generating opinion upon which decisions can be made. In being sovereign, a person's uniqueness is raised up and applied to an entire system. The sovereign defines the meaning of law by making who they are relevant to others. By imposing their order, the sovereign imprints themselves onto law that others must follow. They connect meaning with violence and peace.

Agamben demonstrates that the transformation a person undertakes when becoming sovereign, with its collapse of *bios* and *zoe* into one, results in a creature that fits neither within the usual definition of the person nor within the legal order. Like the *ubermensch*, this sovereign entity is beyond 'man'. Criticisms of the *ubermensch* are relevant, therefore, in understanding sovereignty. First, the sovereign imposes order upon the people to furnish them with a richer way of life. This redemptive intervention is suggestive of the paired possibilities for Zarathustra's mission: delivering salvation and enforcing subjugation. With sovereignty, these possibilities are likely to eventuate together. While Schmitt may argue that 'sovereignty saves' because it depends on endorsement by the people, Agamben exposes the troubling acts of violence that constitute the body of the sovereign.

Agamben's work points towards the second Zarathustrian critique; that the *ubermensch* risks worsening the personal and social problems they attempt to relieve. The sovereign is meant to limit violence, but violence is endemic in the continuing state of exception. Sovereignty may escalate rather than pacify. Lennon discovered this paradox, realising that rock stardom and sovereign-like pontificating did not soothe the irritation in his soul. In departing from sovereignty, Lennon also enacts the critique that the *ubermensch* may be unable to relate to people in society after

their transformation. Such difficulties prompted Lennon to abdicate his 'sovereign' duties and return to an 'everyday' humanity. In chapter 2, it was suggested that the *ubermensch* was driven by a feeling of imperfection. When Lennon relinquished his insecurities about coexistence his grand mission became unimportant and he himself could escape the kinds of behaviour that fed into his fear that people were unable to get along. Lennon could be seen as ultimately escaping Zarathustra's melancholy, and suggests that law may also need to work on avoiding making its own nightmares come true.

Subject to no other, the sovereign correlates to the Nietzschean *ubermensch*'s place outside of the 'herd'. Lennon's belief in the 'establishment' as constricting and devitalising, as evident in 'Working Class Hero',²⁶⁸ finds kinship with the deadening effects of society as argued for by Nietzsche. Zarathustra stresses the need for one to create personal values. This task is echoed in Lennon's surreal outlook and the sovereign's decision on the exception, which defines the system, suffusing it with the sovereign's unique sensibility. Residing outside of the legal order, the sovereign evidences the individual creativity and unconstrained will of the *ubermensch*. Also like the *ubermensch*, the sovereign is outside of the herd but not independent of it. The exceptional individual interacts with the masses so as to save them. Zarathustra and Hobbes' sovereign both diagnose maladies in man that require intervention from a being with superior (will)power. Just as acts of creativity are founded upon will, the legal system is seen as deriving its efficacy from the exercise of sovereign power. Like Nietzsche, Lennon proclaims 'I don't believe in God.'²⁶⁹ Nietzsche's focus on the material realm affirms the role of power, of force, in sovereignty. Sovereignty acts on human bodies in order to create legal validity. Partially similar to Nietzsche's

²⁶⁸ Lennon (1970) 'Working Class Hero' *John Lennon/Plastic Ono Band*.

²⁶⁹ Lennon (1970) 'God' *John Lennon/Plastic Ono Band*.

anti-metaphysical stance, Hobbes writes that ‘...we are not to renounce our senses, and experience...’²⁷⁰ Law is to be a matter of the senses (fear of the sovereign) and the physical (sovereign force).

Sovereignty Fields Forever?

Sovereignty is a system based around an individual,²⁷¹ the sovereign, who is responsible for the security of the population. As the supreme power, a sovereign is able to choose what the normal state of affairs is to be, and subdue internal conflict by eradicating anything inconsistent with this definition of normality. To effect the imposition of order, the sovereign inaugurates the state of exception; a setting in which normality is irrelevant and the sovereign may take extraordinary measures. This environment sees the amalgamation of political and bare life, the nexus of which is located in the sovereign as a consequence of sovereignty’s focus on this individual entity. While meant to secure peace, violence is a possibility of the environment that such individual action is conducive to. In the following chapter, David Bowie critiques the rock star as a salvific figure, drawing attention to the dangers of such a concentrated locus of power.

²⁷⁰ Hobbes (1962), p 271.

²⁷¹ Although sovereignty itself can survive beyond a *particular* individual: ‘the King is dead, long live the King.’

‘You go back, Jack, do it again. Wheel turnin’ ‘round and ‘round.’

- Steely Dan.¹

¹ Steely Dan (1972) ‘Do It Again’ *Can’t Buy a Thrill*.

Chapter Five

The Rise and Fall of Ziggy Stardust and Natural Law

In 1974, John Lennon met² and worked with fellow English rock star David Bowie. The two recorded a cover of Lennon's 'Across the Universe'³ and wrote 'Fame',⁴ with both songs appearing on Bowie's *Young Americans* album.⁵ While Bowie called Lennon his 'greatest mentor',⁶ the two approached their vocation in contrasting ways. Where Lennon was rock star id and earnest crusading, Bowie was urbane and self-conscious, busy putting the 'art' into artifice.⁷ These dissimilar music-making methods express different understandings of human nature.⁸ To Lennon, humanity had an inescapable dark core that he alternately indulged (his 'rock star id') and attempted to constrain (his 'earnest crusading'). Opposite to this, Bowie embodied the view that people could do good when free to define themselves as they wished. Sonically, lyrically, and through a series of characters he sang about and acted out both on- and (increasingly) offstage, Bowie dramatized and problematized the outlook of rock stars such as Lennon, challenging the conception of humanity as a destructive force in need of restraints. Accordingly, issues discussed

² David Bowie 'Commencement Speech, Berklee, May 8, 1999'
<http://www.berklee.edu/commencement/past#.UFfo3411Q7s>

³ The Beatles (1970) 'Across the Universe' *Let It Be*.

⁴ Bowie (1975) 'Fame' *Young Americans*.

⁵ Also, on *Young Americans*' (1975) title track, Bowie sings 'I read the news today, oh boy,' quoting from Lennon's 'A Day in the Life'.

⁶ David Bowie 'Commencement Speech, Berklee, May 8, 1999'
<http://www.berklee.edu/commencement/past#.UFfo3411Q7s>

⁷ In the above commencement speech, Bowie commends Lennon for the pioneering sonic and musical experimentation he was involved in during the Beatles, saying 'I guess he defined for me, at any rate, how one could twist and turn the fabric of pop and imbue it with elements from other artforms, often producing something extremely beautiful, very powerful and imbued with strangeness.' However, it is arguable that Lennon had mostly abandoned this attitude by the late 1960s, settling into traditional rock 'n' roll as his default style.

⁸ That sovereignty is founded on a conception of nature is evident in its use of the 'state of nature' rhetorical device.

in the previous chapter of this thesis are prominent in a lot of Bowie's music, as is evident in the 1970 song 'Saviour Machine':⁹

'President Joe once had a dream. The world held his hand, gave their pledge, so he told them his scheme for a saviour machine. They called it the prayer, its answer was law. Its logic stopped war, gave them food. How they adored 'til it cried in its boredom. Please don't believe in me, please disagree with me. Life is too easy, a plague seems quite feasible now or maybe a war or I may kill you all.'¹⁰

The lyrics for 'Saviour Machine'¹¹ neatly correspond to the basics of sovereignty: the sovereign is installed to secure peace ('Its logic stopped war'), the sovereign's pronouncements are absolute ('its answer was law'), and the sovereign holds the threat of violence over its people ('I may kill you all').¹² Yet despite the attention he pays to sovereign-like matters, Bowie himself is not analogous to this area of jurisprudence. He provides a commentary¹³ on (sovereign-like) saviours¹⁴ and offers a warning: 'Your minds are too green, I despise all I've seen. You can't stake your lives on a saviour machine.'¹⁵ Sovereignty offers salvation, motivated by its view of humans as petty and treacherous creatures that can only be redeemed through the intervention of a dominant individual. 'Saviour Machine'¹⁶ radiates Bowie's scorn for reliance upon this kind of 'Big Brother'.¹⁷ An order that merely aims to curtail people's flaws is one that mistakenly undervalues humanity: ignoring the

⁹ Bowie (1970) 'Saviour Machine' *The Man Who Sold the World*.

¹⁰ Bowie (1970) 'Saviour Machine' *The Man Who Sold the World*.

¹¹ Bowie (1970) 'Saviour Machine' *The Man Who Sold the World*.

¹² Bowie (1970) 'Saviour Machine' *The Man Who Sold the World*.

¹³ 'Bowie sounds like a *commentator* [my emphasis], as if the whole album was a genre exercise.': <http://www.allmusic.com/album/young-americans-mw0000098919>

¹⁴ In addition to 'Saviour Machine', see 'Big Brother' (1974) on *Diamond Dogs*, which describes a sovereign-like saviour figure: 'Someone to claim us, someone to follow. Someone to shame us, some brave Apollo,' and entreats 'Please saviour, save your shores.'

¹⁵ Bowie (1970) 'Saviour Machine' *The Man Who Sold the World*.

¹⁶ Bowie (1970) 'Saviour Machine' *The Man Who Sold the World*.

¹⁷ Bowie (1974) 'Big Brother' *Diamond Dogs*.

richness of human life, denigrating the worthiness of human activity, and underestimating human potential, it unnecessarily constrains its subjects, diminishing them until they conform to its model of a small-minded, base organism. Heralding a more potent way of life, Bowie's work indicates that people are in fact capable of greater deeds. Sovereignty places importance on ensuring order and appoints a ruler to accomplish this task. The substance of this order is of little interest to sovereign thought. Conversely, in presenting enchanted worlds and evolved characters as an antidote to all that is drab and pointless, Bowie appears to have something particular to tell his audience about how human beings can thrive. Bowie's jurisprudential equivalent is natural law, which holds that a legal system should include certain content that guides people in their lives.

At present, the foremost exponent of natural law is John Finnis.¹⁸ In this chapter, Finnis' work *Natural Law and Natural Rights*¹⁹ (henceforth *NLNR*) will be examined via Bowie. Associating the two seems outrageous. In most respects, Finnis and Bowie are extremely dissimilar. Finnis is conservative, while the gender-bending Bowie has often challenged convention. Finnis' theory, which holds that law should help secure the intangible qualities that make human activity worthwhile, shows a concern with fundamentals. Bowie, the shape-shifting musical appropriator, seems to deal in surfaces. Nonetheless, the two are united by their both disputing prevalent meanings of nature. Bowie, 'larger than (everyday) life', disdains the undersized interpretations of the human that corral people into dull existences. Finnis begins by arguing that the many²⁰ who dismiss natural law have been (mis)led into doing so by an incomplete understanding of the human experience. In response to this

¹⁸ Blake (2011), p 101 writes of '...the new natural law theory, of which John Finnis is the foremost champion...'

¹⁹ Finnis (1980).

²⁰ Finnis (1980), p 33 calls this erroneous impression '...the most popular image of natural law...'

widespread misapprehension, Finnis resolves to make known a more expansive description of human nature and reveal natural law's irreplaceable ability to steer humanity towards worthwhile endeavours.

Using Bowie to 'glam up' *NLNR* can help expose the implications of Finnis' revival of the natural law tradition. Finnis' attempt to explain the scope of nature and the purpose of law echoes a recurring narrative in Bowie's work. In this narrative, society is unsound; it is populated by those who cannot perceive how to make use of their lives. Amidst this confusion, a superior being, referred to by a variety of names including the 'homo superior',²¹ and the 'starman',²² arrives to teach the people how to identify and pursue meaningful projects. The saviours that Bowie portrays are almost always unsuccessful; brought down by their flaws. On the 1972 album *The Rise and Fall of Ziggy Stardust and the Spiders from Mars*,²³ Bowie tells the story of the titular Ziggy, a Martian who comes to Earth to redeem its population. However, Ziggy is corrupted by his own hubris. In a prescient echo of Lennon's tragic demise, Ziggy is destroyed when he attracts the resentment of his followers, who wish to 'crush his sweet hands'.²⁴ A while after portraying Ziggy, Bowie was temporarily taken over by his 'Thin White Duke' character; a stern, would-be fascist ruler who personified the rock star (sovereign-like) saviour mentality that Bowie had tried to warn against. Bowie's slide from didacticism into authoritarianism resembles Finnis' argument in *NLNR*. Finnis advocates the restoration of nature to a place of jurisprudential importance, arguing that it can infuse life with richness through an oft-ignored process of introspection. The consequence of looking within, though, is in fact the evaporation of nature. Formerly a source of independent meaning, nature

²¹ Bowie (1971) 'Oh! You Pretty Things' *Hunky Dory*.

²² Bowie (1972) 'Starman' *The Rise and Fall of Ziggy Stardust and the Spiders from Mars*.

²³ Bowie (1972) *The Rise and Fall of Ziggy Stardust and the Spiders from Mars*.

²⁴ Bowie (1972) 'Ziggy Stardust' *The Rise and Fall of Ziggy Stardust and the Spiders from Mars*.

is emptied of its content, replaced by the internal world of its beholder. With ‘nature’ then used as a platform for the imposition of an individual’s subjectivity, Finnis’ attempt to depart from the sovereign order is unsuccessful.

The three sections of this chapter plot this ‘rise and fall’ of Finnis’ natural law revival. In the first section, Finnis’ theory of nature is explained as enabling access to universal and timeless values (called ‘goods’ by Finnis) that provide indisputable direction to human activities. The objectivity of these goods is questioned, however, in the second section, where it is suggested that the theory’s claims to definitive moral authority are not supported by the reasoning it provides. The third section contains an examination of the repercussions of this unsubstantiated authority for the legal system that would result from Finnis’ interpretation of natural law.

I – ‘The Expanding Man’²⁵ and the Rediscovery of Nature

This section outlines Finnis’ view that, in recent jurisprudence, humanity has been limited by a narrow self-image and describes Finnis’ project to widen understanding of human nature, thereby revealing its full potential. First, Bowie’s criticism of the mundane is aligned with Finnis’ identification of positivism’s hampering effects. Second, Bowie’s tactic of alloying rock music with ideas sourced from outside its conventions addresses Finnis’ use of the pre-modern to rectify contemporary ignorance. Third, the theory of practical reasoning, retrieved by Finnis from outside of the usual understandings of nature in order to augment them, is described along with Bowie’s self-definitional creativity. Fourth, and finally, Finnis’ use of practical reasoning’s underpinnings as proof of the meaningfulness of human

²⁵ Steely Dan (1977) ‘Deacon Blues’ *Aja*.

activity is explicated through Bowie's starman characters' message as to life's worthiness. Proceeding now, some detail is provided of Bowie's starman characters, after which the disparaging view of human nature and Finnis' response to it are proffered.

Inhabiting characters of his own creation, Bowie acts out a critique of rock stars' tendency to view the populace as wretched. Bowie warns 'Oh, look out, you rock 'n' rollers,' on 'Changes'²⁶ and sings disparagingly on the effects of celebrity on 'Fame':²⁷ 'Fame makes a man take things over. Fame lets him loose, hard to swallow.' According to Buckley, the targets of *Ziggy Stardust* are the ideology of rock music and the popular musicians who offer themselves as the saviours (arguably, Lennon could be counted as one such star) of their audiences.²⁸ The Ziggy Stardust character evokes Marc Bolan, an ostentatious, colourful rock musician; Jimi Hendrix, who, like Ziggy, played guitar left-handed and made reference to voodoo;²⁹ the self-destructive Iggy Pop³⁰ as well as the outré Legendary Stardust Cowboy;³¹ both inspirations for Ziggy's name; and Vince Taylor,³² a musician of the 1950s and 1960s who quit rock 'n' roll after having an onstage religious experience. The limitations and pettiness ascribed to the people and fixated upon by these saviour figures contribute to their downfalls. For example, in the 1976 film *The Man Who Fell to Earth*,³³ Bowie plays Newton, an alien that arrives on Earth to obtain water to save his planet, but who fails his mission because of immobilising addictions to everyday distractions such as television, sex, and alcohol.³⁴ Furthermore, Ziggy's

²⁶ Bowie (1971) 'Changes' *Hunky Dory*.

²⁷ Bowie (1975) 'Fame' *Young Americans*.

²⁸ Buckley (2005), p 129.

²⁹ Buckley (2005), p 124.

³⁰ Trynka (2011), p 151.

³¹ <http://www.youtube.com/watch?v=exo3z-iIbgo&feature=related>

³² Trynka (2011), p 152.

³³ Roeg (1976) *The Man Who Fell to Earth*.

³⁴ Buckley (2005), pp 228-229.

demise, an event Bowie depicts opaquely, seems to involve the animosity of Ziggy's fans, the everyday people.

Bowie's examination of the rock star is consistent with rock music's self-reflective strain. Since its beginnings, there have been rock songs about rock songs, such as Chuck Berry's 'Roll Over Beethoven'³⁵ and 'Rock and Roll Music',³⁶ AC/DC's 'It's a Long Way to the Top (If You Wanna Rock 'n' Roll)',³⁷ and 'Rock 'n' Roll Singer',³⁸ and Van Halen's 'Runnin' With the Devil',³⁹ which tells of the rock star life, 'I'm the One',⁴⁰ which addresses the audience of a rock gig, and 'Jamie's Cryin''⁴¹ which is told from the perspective of a fan. The Who's 1969 album *Tommy*⁴² is an antecedent of Bowie's *Ziggy Stardust*⁴³ record. Like the *Ziggy Stardust*⁴⁴ album, *Tommy*⁴⁵ is a collection of songs that constitute a narrative, and also like *Ziggy*,⁴⁶ tells the story of a saviour who becomes megalomaniacal, inspiring disciples to turn on him. This inventory of songs and albums demonstrates that rock 'n' roll provides a resource for thinking about itself. Likewise, expansive natural law theories claim that values can be discovered by those who reflect on their lives.⁴⁷ That these values can be used to shape laws that will enable rather than restrict.

The self-limiting view of humanity that Finnis intends to correct claims that natural law is incapable of establishing objective reasons for the worthiness of particular endeavours and so cannot intelligibly guide human behaviour. This

³⁵ Berry (1956) *Roll Over Beethoven*.

³⁶ Berry (1957) *Rock and Roll Music*.

³⁷ AC/DC (1975) 'It's a Long Way to the Top (If You Wanna Rock 'n' Roll)' *T.N.T.*

³⁸ AC/DC (1975) 'Rock 'n' Roll Singer' *T.N.T.*

³⁹ Van Halen (1978) 'Runnin' with the Devil' *Van Halen*.

⁴⁰ Van Halen (1978) 'I'm the One' *Van Halen*.

⁴¹ Van Halen (1978) 'Jamie's Crying' *Van Halen*.

⁴² The Who (1969) *Tommy*.

⁴³ Bowie (1972) *The Rise and Fall of Ziggy Stardust and the Spiders from Mars*.

⁴⁴ Bowie (1972) *The Rise and Fall of Ziggy Stardust and the Spiders from Mars*.

⁴⁵ The Who (1969) *Tommy*.

⁴⁶ Bowie (1972) *The Rise and Fall of Ziggy Stardust and the Spiders from Mars*.

⁴⁷ George (2008), p 172 writes that 'Theories of natural law are *reflective* [my emphasis] critical accounts...'

argument is exemplified by David Hume,⁴⁸ to whose writing is attributed the ‘is-ought problem’, a term often understood as calling attention to the illogicality of leaping from the description of nature to making normative propositions.⁴⁹ Hume is dismissive of the idea, supposedly present in the work of thinkers including Aquinas,⁵⁰ that it is possible to discover binding, guiding abstractions.⁵¹ There is no connection between moral beliefs and that which is apparent in the physical world.⁵² Observations about biological reality cannot be used to found directives as to how people should act.

This Humean understanding of human nature lessens the possibilities of life, taking only base biological facts into consideration when constructing a portrait of people’s behaviour. The legal system informed by this mindset constructs the human being as a selfish, aggressive animal. As humans are skilled at the eradication of their own kind, law is created to keep violence in check and preserve the species. As in Hobbes, an order inevitably emerges from nature. As highlighted by Austin, this order is maintained by an authority that is based on human responsiveness to pain.⁵³ Only the simplest facts of humanity’s physical existence are the foundational precepts of this emaciated construction of life and law. With Bowie, as with Finnis’ project, there is a sense that humanity is squandering its potential. Bowie’s fantasy worlds are a critique of a debased interpretation of existence: the everyday, with its drab environments, its myopic perceptions, and its restrictive customs.

Calling the biological view ‘restrictive’ implies the existence of an ampler notion of humanity. The missing elements of this more comprehensive definition of

⁴⁸ Evident in recent natural law theories is ‘The attempt of legal and political philosophy to recover from the havoc caused by Hobbes and Hume...’: Murphy (1995), p 399.

⁴⁹ MacIntyre (1959), p 451-452; Hudson (1965), p 246.

⁵⁰ Lavine, (1984), p 152.

⁵¹ Hume (2010), p 257.

⁵² Hume (2010), p 257; Lavine (1984), p 152.

⁵³ Austin (1998), p 11.

being must therefore be located. To replenish human nature, Finnis has recourse to materials that lie outside of the modern understanding of humanity. As will be more fully detailed below, Finnis returns to pre-Modern incarnations of natural law to obtain a mechanism that will bypass the is-ought problem (as well as a related critique, identified by Hume, that reason does not influence behaviour). Bowie, too, goes outside of the orthodox mindset that underestimates humanity. His songs are often populated by casts of characters who are estranged from mainstream culture. One such character is the narrator of 'All the Madmen',⁵⁴ who claims that he would 'rather stay here with all the madmen than perish with the sad men roaming free.' Exemplifying the outsider role in the extreme are the characters Bowie inhabits, including Ziggy Stardust, the extra-terrestrial who involves himself in the affairs of humanity. Often, scholars have observed that Bowie's exotic appearance and the otherworldly subject matter of his music are of particular appeal to those who wish to stand outside the circumstances of their lives,⁵⁵ for example:

'Bowie's meta-message was escape⁵⁶ – from class, from sex, from personality, from obvious commitment – into a fantasy past (Isherwood's Berlin peopled by a ghostly cast of doomed bohemians) or a science fiction future. When the contemporary 'crisis' [of society in 1970s England] was addressed, it was done so obliquely, represented in transmogrified form as a dead world of humanoids, ambiguously relished and reviled.'⁵⁷

⁵⁴ Bowie (1970) 'All the Madmen' *The Man Who Sold the World*.

⁵⁵ Buckley (2005), p 173, MacDonald, (2003a), p140, Stevenson (2006), p 112, Trynka (2011), p 190.

⁵⁶ Bowie's escapism could possibly be analogised to Rawls' original position and the self-definition of the liberal individual. However, given Bowie's fairly specific prescriptions as to the good life, it is argued that natural law themes are more strongly visible.

⁵⁷ Hebdige (1979), p 61.

‘...his [Bowie’s] entire aesthetic was predicated upon a deliberate avoidance of the ‘real’ world and the prosaic language in which that world was habitually described, experienced and reproduced.’⁵⁸

Bowie evolves away from these humdrum realities. The quotidian must be escaped because, like sovereignty’s low opinion of humanity, its expectations confine people to meagre roles.

Once on the outside of these strictures, new ideas can be obtained and used to reshape and expand the conventional. Bowie adds the unexpected to rock to enliven the musical form. Finnis brings to natural law material that is outside of its (depleted) present state to try and rehabilitate the theory. Finnis’ work has been described as ‘an ambitious and attractive reformulation and restatement’ of natural law.⁵⁹ Developing his theory from the work of Thomas Aquinas⁶⁰ (whose work was, in turn, based on Aristotle’s), Finnis attempts to reconstitute human nature by transporting a Pre-Modern theory of law into the future. Bowie creates music through the process of introducing, to the straightforward, ingredients acquired from further afield. Looking back on his career, Bowie explained:

‘...I went on a crusade, I suppose, to change the kind of information that rock music contained.’⁶¹ ‘...what I found that I was good at doing, and what I really enjoyed the most, was the game of “what if?” [For example,] What if you combined Brecht-Weill musical drama with rhythm and blues?’⁶²

⁵⁸ Hebdige (1979), p 61.

⁵⁹ Garet (1995), pp 605-606.

⁶⁰ Lamont (2002), p 365.

⁶¹ David Bowie ‘Commencement Speech, Berklee, May 8, 1999’
<http://www.berklee.edu/commencement/past#.UFfo341IQ7s>

⁶² David Bowie ‘Commencement Speech, Berklee, May 8, 1999’
<http://www.berklee.edu/commencement/past#.UFfo341IQ7s>

Bowie adulterates rock, adding to it, *inter alia*, art-theory, mime, cabaret, and avant-garde sounds. Finnis adds to law's understanding of human nature by (re)introducing practical reasoning. The Humean-style understanding of human nature denies that law can help people determine how they should act. While Finnis concedes the impossibility of moving from describing the natural world to forcing certain types of behaviour, he points out that natural law, correctly formulated, is capable, rather, of inspiring people to act.⁶³ As will now be explained, Hume's mistake is to condemn an incomplete version of natural law theory, one that contains only speculative reasoning, the process of observing and commenting upon nature's outwardly apparent qualities.

Finnis examines two interpretations of Hume's attack on natural law. The first of these regards Hume as an exponent of the 'is-ought' distinction.⁶⁴ While it is not certain whether the idea should be attributed to Hume, Finnis states that, regardless of its origins, 'is-ought' presents a valid criticism.⁶⁵ Despite accepting that facts cannot spawn normativity, Finnis makes clear that Hume is incorrect to claim that, in consequence, reason is incapable of discerning good and bad.⁶⁶ A closer reading of Hume reveals another, more coherent and convincing interpretation. Instead of posing the 'is-ought' problematic, this second interpretation sees Hume as arguing '...that rational perception of the moral qualities of actions could not of itself provide a motivating guide to action.'⁶⁷ Hume opposes the contention that reason defines a universal morality, in accordance with which people have an obligation to act.⁶⁸ Finnis observes that, for example, Clarke's writings (which Hume assailed)⁶⁹

⁶³ Finnis (1980), pp 46-47, Westerman (1997), p 248.

⁶⁴ Finnis (1980), p 37.

⁶⁵ Finnis (1980), p 37.

⁶⁶ Finnis (1980), p 37.

⁶⁷ Finnis (1980), p 37. See also Yalden-Thompson (1978), p 90.

⁶⁸ Finnis (1980), p 38.

did not convince as to why a person ought to act virtuously due to the absence of any explanation of a person's incentives for doing so.⁷⁰ Clarke's argument '...fails to consider whether acting fittingly and reasonably is an aspect of (or way of realizing) the agent's well-being or is in any other way worth while or desirable.'⁷¹ This critique of Clarke, adduced by Finnis rather than Hume, is attentive to the 'adequate point' of adhering to particular standards of conduct, a matter fundamental to Finnis' (forthcoming) response to Hume's criticism.⁷² Hume himself, in addressing Clarke, is occupied with showing that awareness of a guide, such as reason, does not inevitably make it compulsory to act in accordance with that guide.⁷³ Accordingly:

'...the gap which Hume says cannot be bridged is *not* the gap between the factual and the normative, but the gap between *any truth* (even a 'normative truth', a true proposition about what is good or bad, right or wrong) and motivating conclusions about what ought to be done.'⁷⁴

Finnis' complaint with this mission of Hume's is that it does not attend to the reasons that a person may have to act in keeping with a normative proposition: what Finnis describes as 'the logical difference between obligation and influence'.⁷⁵ This is not to say that Hume's work is without merit. Hume rightly draws attention to Clarke's misguided reliance upon speculative reason in the matter of action, to which it was irrelevant.⁷⁶ Clarke searched for reasons for action in the notion of congruence with the natural world while overlooking the concept of the good, which is expert at

⁶⁹ Finnis examines these writers in order to explain and dismiss modern 'misconceptions' of natural law, setting the stage for a reiteration of classic natural law (as understood by Finnis).

⁷⁰ Finnis (1980), pp 40-41.

⁷¹ Finnis (1980), pp 40-41.

⁷² Finnis (1980), p 41.

⁷³ Finnis (1980), p 41.

⁷⁴ Finnis (1980), pp 41-42.

⁷⁵ Finnis (1980), p 42.

⁷⁶ Finnis (1980), p 42.

justifying conduct.⁷⁷ However, while Hume was justified in presenting this critique, his own approach evidences the mean, biological view of human nature where people have to be somehow forced into acting a particular way. Hume is ignorant of the resources natural law has for explaining why people act.⁷⁸ In this way, he is not unlike the natural law advocates he criticises, who themselves misunderstood the full scope of the theory.⁷⁹ Their work is a deteriorated incarnation of something more comprehensive. Hume is correct in stating that surveillance of perceptible externalities cannot provide compelling guidance in human affairs.⁸⁰ However, the version of natural law Hume criticises has unjustifiably discarded natural law's second component, another type of reasoning.⁸¹ Aristotle and Aquinas stipulated not one, but a pair of ways to reason: speculative and practical. Speculative reason (focused on by Clarke and Hume) produces all-encompassing theories about the enduring mechanics of the natural world.⁸² Practical reason is suited to interpreting the significances of actions, and addresses how the good is to be achieved.⁸³ In addition to the speculative gaze, which describes the world,⁸⁴ complete incarnations of natural law are also able to address the motivations and justifications that humans have for taking action. Aquinas' expression of natural law is therefore exempt from Hume's criticism.⁸⁵ The theory contravenes neither of the interpretations of Hume's complaint that Finnis presents. The 'is-ought' prohibition is not breached: Finnis denies that traditional natural law theorists intended to or did actually 'derive ethical

⁷⁷ Finnis (1980), pp 42; 45.

⁷⁸ Finnis (1980), p 42.

⁷⁹ For example, Finnis (1980), pp 40-41.

⁸⁰ Finnis (1980), pp 47-48.

⁸¹ Finnis (1980), p 42.

⁸² Westerman (1997), p 248, Taylor, (1955), p 97.

⁸³ Westerman (1997), p 248, Taylor, (1955), p 97.

⁸⁴ As Finnis (1980), p 42 describes it, the speculative approach is a type of reasoning '...in which the fundamental category is 'what is the case'...'.

⁸⁵ Finnis (1980), pp 46-47.

norms from facts'.⁸⁶ In actuality, the quarantining of the factual from the normative is precisely echoed in the structure of Aristotle and Aquinas' two types of reason.⁸⁷ Nor does Aquinas's theory incur the criticism suggested by the second interpretation of Hume, as it does not propose that speculative observations provide sufficient impetus for action.⁸⁸ In Finnis' understanding of Aquinas, 'the first principles of natural law, which specify the basic forms of good and evil' do not emerge from 'speculative principles', 'facts', or 'metaphysical propositions'.⁸⁹ Hume's criticism, meanwhile, wrongly conflates obligation with 'impulse or influence'.⁹⁰ While reason does not impose itself as an obligation, it does inspire to action the person who comprehends the benefits that follow from it.⁹¹ Hume was looking for reason that would force people to act, but ignored the reasons that make people want to act.

Hume's model of human nature fails to include value. Sovereignty understands people from the outside, conceptualising human nature in terms of biological impulses (such as acquisitiveness and aggression) and accordingly imposes physical limitations. Practical reasoning is not achieved by looking to one's surroundings, but by turning inwards.⁹² People are situated as internal observers of human nature with full experience of the meaning that saturates human existence. Practical reason does not construct human nature using the scientific accounts ('psychological, anthropological, or metaphysical', as Finnis writes).⁹³ Instead, it realises that people are self-aware, and offers a more nuanced understanding of human nature. Resonant with Bowie's critical portrayal of the regressive, feral

⁸⁶ Finnis (1980), p 33.

⁸⁷ Finnis (1980), p 36.

⁸⁸ Finnis (1980), p 47.

⁸⁹ Finnis (1980), pp 33-34.

⁹⁰ Finnis (1980), p 47.

⁹¹ Finnis (1980), p 47.

⁹² Finnis (1980), p 36, Hinton (2003), p 69: '...Finnis insists that all that is needed in order for a human being to understand the natural law is an experience of the natural law's operation from the *inside* [my emphasis].'

⁹³ Finnis (1980), p 36.

‘Diamond Dogs’,⁹⁴ humans do more than respond to stimuli; they are not thoughtless creatures. Finnis goes beyond scientific rationality, where meaning is drawn only from observation. Humans are not mere observers. People do not understand everything from a distance but are involved in the world; active participants in being. Humanity is eminently qualified to understand how people should act because humans are cognisant of the values that afford significance to these actions. Hume is wrong to search for some external pressure that will ensure conformity to reason when people are impelled from the inside by their understanding of what actions tease out life’s satisfactions.

Accordingly, Finnis proposes a legal system that encourages ‘human flourishing’,⁹⁵ also called the good life.⁹⁶ ‘Flourishing’ is also an apt term for the colourful, exotic style Hebdige describes Bowie asserting against the ‘prosaic’.⁹⁷ Even though it is contrasted to the dullness of the ordinary, flourishing is not solely the privilege of the elite. As with the spatial imaginings of the other legal philosophers under consideration in this thesis, Finnis establishes a setting for his theory, and, as his theory is focused towards the good, his setting is community, which coalesces from shared understandings and goals. It is the communal environment that enables humans to flourish by realising the good.⁹⁸ Law can help organise a society, turning its subjects into a community.⁹⁹ In order to do this, law needs the influence required to make people adhere to its designs for society.¹⁰⁰ This influence is fuelled by validity of origin and effectiveness of implementation.¹⁰¹

⁹⁴ Bowie (1974) ‘Diamond Dogs’ *Diamond Dogs*.

⁹⁵ Finnis (1980), p 23.

⁹⁶ Simmonds (2002), p 142.

⁹⁷ Hebdige (1979), p 61.

⁹⁸ Finnis (1980), p 147; p 161.

⁹⁹ Finnis (1980), p 149.

¹⁰⁰ Finnis (1980), p 260.

¹⁰¹ Finnis (1980), p 276.

Nonetheless, this positivist-style acknowledgement is lacking as a portrayal of law, as law is more fully defined by its indispensable role in bringing about the common good¹⁰² for its community.¹⁰³ According to the standard textbook narrative of the split between natural law and positivism, natural law became a difficult proposition in the 17th century due to the emergence of disagreement upon what counted as the good life.¹⁰⁴ Some politics attempted to separate law, which offered individual freedoms to realise personal interpretations of the good, from ethics, which promoted a more universal definition of the ideals that people should strive for.¹⁰⁵ Finnis aims to reunite jurisprudence with ethical concerns (or ideas of the good).¹⁰⁶ Therefore, his society is communal. Community is formed by common aspirations, predicated on shared values, rather than the group of detached, self-serving individuals that make up the liberal society.¹⁰⁷ In ‘Five Years’,¹⁰⁸ the opening track of the *Ziggy Stardust*¹⁰⁹ album, Earth is approaching destruction. Bowie sings ‘News had just come over: we had five years left to cry in. News guy wept and told us earth was really dying.’ The cause of the planet’s demise is not specified. It is uncertain as to whether Bowie refers to planetary destruction or social collapse. Regardless, the scenario Bowie goes on to describe suggests a dysfunctional society. The narrator of the song surveys those around him, the ‘fat-skinny’ and ‘tall-short people’, ‘all the nobody people,’ and ‘all the somebody people,’ and admits that ‘I never thought I’d need so

¹⁰² Finnis (1980), p 154 describes the common good as ‘...the factor or set of factors... which, as considerations in someone’s practical reasoning, would make sense of or give reason for his collaboration with others...’

¹⁰³ Finnis (1980), p 263: ‘...the authority of rules derives from their opportunity to foster the common good...’; Westerman (1997), p 234.

¹⁰⁴ Simmonds (2002), p 142.

¹⁰⁵ Simmonds (2002), p 143.

¹⁰⁶ Finnis (1980), p 3: ‘...a theorist cannot give a theoretical description and analysis of social facts, unless he also participates in the work of evaluation, of understanding what is really *good for human persons* [my emphasis]...’; Westerman, (1997), p 236.

¹⁰⁷ Westerman (1997), p 235, George (2008), p 173.

¹⁰⁸ Bowie (1972) ‘Five Years’ *The Rise and Fall of Ziggy Stardust and the Spiders from Mars*.

¹⁰⁹ Bowie (1972) *The Rise and Fall of Ziggy Stardust and the Spiders from Mars*.

many people.’ This desire for togetherness resonates with Finnis’ advocacy of the communal. However, it appears that the population of ‘Five Years’¹¹⁰ are alone, alienated from community, and in despair. Some of the people around the narrator act violently towards each other, such as a girl who ‘went off her head, hit some tiny children.’ Others appear catatonic, such as the ‘soldier with a broken arm’ who ‘fixed his stare to the wheel of a Cadillac,’ or are sickened by each other’s actions, such as when ‘a cop knelt and kissed the feet of a priest and a queer threw up at the sight of that.’ There is further violence and injustice in ‘Life on Mars?’¹¹¹ from *Hunky Dory*,¹¹² in which the narrator writes a film that involves ‘Cavemen fighting in the dance halls’ and a ‘law man beating up the wrong guy.’ The hopelessness, uncertainty and aggression in these scenes express a misdirected, impoverished state of life, akin to the society that is without community and thus impedes human flourishing.

Amidst this destitute humanity, the starman Ziggy appears. Ziggy tells the populace ‘not to blow it ‘cause he knows it’s all worthwhile.’¹¹³ Bowie reiterates this sentiment in ‘Win’, singing ‘I say it’s hip to be alive’.¹¹⁴ As Bowie suggests in that song (‘All you’ve got to do is win’),¹¹⁵ positive outcomes are possible in life. The worthiness of human existence is evident Finnis’ central proposition¹¹⁶ that there are a set of ‘basic goods’.¹¹⁷ These goods confirm and encompass life’s purpose and significance. Law’s role is to direct people towards the goods.¹¹⁸ Making a distinction between morality and ethics clarifies the role of the good. Ethics speak of

¹¹⁰ Bowie (1972) ‘Five Years’ *The Rise and Fall of Ziggy Stardust and the Spiders from Mars*.

¹¹¹ Bowie (1971) ‘Life on Mars?’ *Hunky Dory*

¹¹² Bowie (1971) *Hunky Dory*.

¹¹³ Bowie (1972) ‘Starman’ *The Rise and Fall of Ziggy Stardust and the Spiders from Mars*.

¹¹⁴ Bowie (1975) ‘Win’ *Young Americans*.

¹¹⁵ Bowie (1975) ‘Win’ *Young Americans*.

¹¹⁶ Westerman (1997), p 235.

¹¹⁷ Finnis (1980), p 86.

¹¹⁸ Finnis (1980), p 3; p 23.

what people should strive for, whereas morality permits and proscribes particular actions.¹¹⁹ Bringing about the good is different from moral correctness.¹²⁰ Activities that foster the good allow one to access the richness of life. Practical reason has two main parts which together comprise the basis of Finnis' theory.¹²¹ The first of these parts is the 'basic goods' that angle humans towards flourishing.¹²² The second is nine 'requirements of practical reasonableness' that state how the goods are employed in decision-making.¹²³ Finnis sets out to explain how the goods should influence people's choice of actions.

Hume's understanding of reason, more in sympathy with liberalism and its individual freedoms, limits itself to instructing people as to how to achieve their objectives.¹²⁴ This version argues that reason is unable to guide the selection of goals.¹²⁵ Such a standpoint conflicts with the Aristotelian definition of practical reasoning argued for by Finnis.¹²⁶ Desire, or natural impulse,¹²⁷ by itself is not reasonable. To be reasonable, desire must focus on something objectively worthwhile.¹²⁸ Simmonds writes that, in Finnis' view, '...a desire is unintelligible unless it is related to some objectively good characteristics of the thing desired.'¹²⁹ Therefore: 'An account of practical reason must start, not from desires, but from goods; and, being good independently of desire, such goods will be objective

¹¹⁹ Dal Pont (2001), p 3.

¹²⁰ Finnis (1980), p 101.

¹²¹ Finnis (1980), p 3, Duncanson (1989), pp 240-241.

¹²² Finnis (1980), p 23; p 81, Duncanson (1989), pp 240-241.

¹²³ Finnis (1980), p 23; p 10, Westerman (1997), pp 237-238.

¹²⁴ Finnis (1980), p 37. McCormick (1981), p 100, Simmonds (2002), p 114.

¹²⁵ Finnis (1980), p 37. McCormick (1981), p 100, Simmonds (2002), p 114.

¹²⁶ Finnis (1980), p 47, Simmonds (2002), p 114.

¹²⁷ Westerman (1997), p 251.

¹²⁸ Finnis (1980), pp 69-70, Westerman (1997), p 241.

¹²⁹ Simmonds (2002), p 116. See also George (1999), p 17; p 21. For example, on the good of knowledge, Finnis (1980), p 62 writes: '...to say that such knowledge is a value is simply to say that reference to the pursuit of knowledge *makes intelligible* [my emphasis] ...any particular instance of the human activity...'

goods.’¹³⁰ The goods answer the ‘...questions about the point of human existence.’¹³¹ It is the ‘point of human existence’ that the despairing people in Bowie’s narrative cannot make out. In ‘Oh! You Pretty Things’,¹³² Bowie contemplates ‘...a world to come where the books were found by the golden ones. Written in pain, written in awe by a puzzled man who questioned what we were here for.’¹³³ Implied in the contrast with bewildered humanity is the flourishing of the ‘golden ones’, who do not suffer from a lack of direction as did the ‘puzzled man’. Finnis’ basic goods promise direction, but in order to secure their guidance, one must be able to perceive the goods. The goods are identified by answering the puzzled man’s question as to the purpose of humanity.

The starman’s life of fulfilment is available to humanity. The possibility of improving the human condition is glimpsed at in the Nietzschean evolution hailed in in ‘Oh! You Pretty Things’:¹³⁴ ‘Look out at your children. See their faces in golden rays. Don’t kid yourself they belong to you. They’re the start of the coming race.’ These youngsters have the potential to flourish. They are involved in a movement away from the previous generation’s trivial way of life. Finnis, too, holds that people have the capacity to improve their circumstances. Human beings are able to discover the principles by which they should live. As hitherto discussed, humans are always exposed to value. Unlike nature, which obliges measurement and speculation, people already inhabit the outlook required to discern what is good for the human, and because this humanity is common to all, it is possible to agree on what is objectively good. Applying, as they do, to everyone, and existing in constancy, the goods are reliably accessible by those who know what to search for. At this point, Westerman’s

¹³⁰ Simmonds (2002), p 116.

¹³¹ Finnis (1980), p 371.

¹³² Bowie (1971) ‘Oh! You Pretty Things’ *Hunky Dory*.

¹³³ Bowie (1971) ‘Oh! You Pretty Things’ *Hunky Dory*.

¹³⁴ Bowie (1971) ‘Oh! You Pretty Things’ *Hunky Dory*.

definition of natural law is helpful to begin profiling these goods so that they can be identified. According to Westerman, natural law theories display four essential beliefs, which are that:

- ‘a) there are universal and eternally valid criteria and principles on the basis of which positive law can be justified and/or criticised;
- b) these criteria and principles are grounded in nature, either physical nature, or more specifically, human nature;
- c) human beings can discover those principles by the use of reason;
- d) for positive law to be morally obligatory, it should be justified in terms of these principles and criteria.’¹³⁵

Finnis’ natural law conceives of law in terms of the values (called ‘criteria and principles’ above) that make human life worthwhile. As stated in part a) of Westerman’s definition, these values are ‘universal and eternally valid’.¹³⁶ In other words, natural law’s values are objective: ‘universal’ in that they are outside the specifics of any society, and ‘eternally valid’ because they are outside of time. This objectivity is applied to law; it is used to appraise the law’s authority, as is established in part d) of the above definition. Legal systems are deemed successful to the extent that they facilitate the values that give meaning to human actions. Part b) locates the values that reveal (via law) this meaning, and part c) demonstrates confidence in humans’ ability to discern these values.

Bowie’s escapism aligns with universality and timelessness, the two elements of natural law’s objectivity. The resemblance to universality lies in Bowie’s freedom from the specifics of identity. The androgyny of Ziggy Stardust demonstrates

¹³⁵ Westerman (1997), p 12.

¹³⁶ Westerman (1997), p 12.

Bowie's playfulness with, for example, gender and sexual orientation.¹³⁷ Buckley describes Bowie's claim to bisexuality around this time as a contravention of the era's social norms and a transformation into 'the personification of something other.'¹³⁸ Bowie's otherness is a release from the specifics that prevent access to the universal. Nor is Bowie within a single time. He achieves timelessness by flitting between 'fantasy' pasts and 'science fiction' futures. Positioned outside space and time, Bowie can view the world in the way that natural law, according to Westerman's definition, founds or criticises legal systems from an objective vantage.

Success in identifying and accepting the goods is dependent on understanding that the goods require no foundation.¹³⁹ They cannot be traced back to any earlier propositions.¹⁴⁰ Nor are they made worthy by their usefulness towards any end.¹⁴¹ They are self-sufficient.¹⁴² Finnis' assertion of the independence of the basic goods is reminiscent of the motivation that drives Bowie's creativity. Apolitical and averse to the ordinary,¹⁴³ Bowie does not seek to justify his work based on its social or material impact. His overridingly artistic endeavours, aimed at 'producing something extremely beautiful, very powerful and imbued with strangeness,'¹⁴⁴ emphasise that what Bowie does is to be appreciated for its inherent qualities. Bowie's work speaks to Finnis' goods as the description of an experience of satisfaction that cannot be understood in terms of its usefulness to any exterior purpose. It is this quality of goods as an experience common to all people that directs the goods' identification. Those seeking to discover the goods must turn inward, reflecting on their

¹³⁷ See also the character described in Bowie (1974) 'Rebel Rebel' *Diamond Dogs*: 'Got your mother in a whirl. She's not sure if you're a boy or a girl.'

¹³⁸ Buckley (2005), p 108.

¹³⁹ Finnis (1980), p 69, Simmonds (2002), p 117, Westerman (1997), p 242.

¹⁴⁰ Finnis (1980), p 69, Simmonds (2002), p 117.

¹⁴¹ Finnis (1980), p 65, George (1999), p 17, Westerman (1997), p 240.

¹⁴² Finnis (1980), p 69, Simmonds (2002), p 117, Westerman (1997), p 240.

¹⁴³ Hebdige (1979), p 61.

¹⁴⁴ David Bowie 'Commencement Speech, Berklee, May 8, 1999'
<http://www.berklee.edu/commencement/past#.UFfo341IQ7s>

experiences. The goods are identified through self-examination.¹⁴⁵ Scrutinising one's rationales reveals that deeds are motivated not by desire but by appreciation of the goods.¹⁴⁶ The basic goods must be examined in detail as they significantly influence human experience.¹⁴⁷ The sufficiency of Finnis' goods as an account of human enterprise is vital to his opinion on how law should shape these activities.¹⁴⁸ The goods frame human experience rather than being a product of it. They are a starting point for human understanding of the world, and so proof cannot be adduced to support claims of their existence as any need for proof only occurs after the goods have influenced the human mindset. According to Finnis, the only feasible evidence for the goods is the goods themselves: they are self-evident.¹⁴⁹ Importantly, self-evidence means that the goods, despite their consistency with nature, cannot be detected in nature.¹⁵⁰ Instead, they are recognised in one's self.

However, the self-evidence of the goods does not make them immediately perceptible and not all are aware of, or agree upon, the goods.¹⁵¹ For example, on the good of knowledge, Finnis writes:

‘This is not to say that everyone actually does recognize the value of knowledge, or that there are no pre-conditions for recognizing this value. The principle that truth is worth pursuing is not somehow innate, inscribed on the mind at birth. On the contrary, the value of truth becomes obvious only to one who has experienced the urge to question...’¹⁵²

¹⁴⁵ Finnis (1980), p 61.

¹⁴⁶ Finnis (1980), p 61.

¹⁴⁷ Westerman (1997), p 237.

¹⁴⁸ Westerman (1997), pp 238-239.

¹⁴⁹ Finnis (1980), pp 64-65, Westerman (1997), p 241.

¹⁵⁰ Westerman (1997), p 256.

¹⁵¹ Finnis (1980), p 65.

¹⁵² Finnis (1980), p 65.

The goods' merit is not necessarily forthcoming.¹⁵³ Rather, the self-evident quality of the goods describes their independence from abstract justification.¹⁵⁴ Of the truth of the goods, Finnis writes that: 'It cannot be demonstrated, but equally it needs no demonstration.'¹⁵⁵ Instead, the search for truth must shift inwards. Furthermore, Finnis describes the goods as 'pre-moral'.¹⁵⁶ There is nothing that can be used to evaluate the goods because they comprise the standards with which judgements can be made. The goods precede argument as all possible arguments for the goods are dependent on the goods themselves.¹⁵⁷ Any concept that is derivative cannot be a good.¹⁵⁸ While there can be no external evidence for the goods, whether or not they exist is not a matter of personal preference.¹⁵⁹ The goods are meant to educate people how to behave, and so are not susceptible to change based on people's beliefs.¹⁶⁰ Being objective, the goods are valid even if they go unnoticed by, or do not meet with acceptance from, most people.¹⁶¹ Furthermore, practical reasoning is not something that must be adopted in order to recognise the goods.¹⁶² It is already underway when people decide how to act and discuss their choices.¹⁶³ Practical reasoning needs only to be scrutinised to show the influence of the goods in this process.¹⁶⁴ Self-evidence is only apparent to the perceptive.¹⁶⁵ It is by heeding

¹⁵³ Hinton (2003), p 71.

¹⁵⁴ Westerman (1997), p 242.

¹⁵⁵ Finnis (1980), p 65.

¹⁵⁶ Finnis (1980), p 34.

¹⁵⁷ Finnis (1980), p 67; 69.

¹⁵⁸ Finnis (1980), p 69.

¹⁵⁹ Finnis p 69 'They are objective; their validation is not a matter of convention, *nor is it relative to anybody's individual purposes* [my emphasis].' Also, Finnis (1980), p 72.

¹⁶⁰ An individual's perceptions do not impact upon the goods. For example, Finnis (1980), p 72, with the good of knowledge: 'It matters not that I may be feeling incurious myself.' 'It constitutes a critique of my passing likes and dislikes. ...again and again it will come to mind... catching me out in my inconsistency.'

¹⁶¹ Westerman (1997), p 242.

¹⁶² Finnis (1989), p 68.

¹⁶³ Finnis p 61.

¹⁶⁴ Finnis p 61

¹⁶⁵ Finnis, pp 68-69, Westerman (1997), p 242.

the ‘urge to question’¹⁶⁶ that the goods can be appreciated. Bowie’s puzzled man was at least taking the right approach in questioning his life. Answering the question requires a process of reason, which is primarily an intellectual exercise.¹⁶⁷ Ziggy is ‘a cerebral outsider debarred from strong feeling,’¹⁶⁸ and Bowie’s music is powered by his intellect. From the warped rock ‘n’ roll pastiche of his early 1970s albums, to later excursions into various musical styles, it is evident that Bowie is consciously controlling his musical output. Bowie’s intellectualism is most starkly evident in the Thin White Duke, an extreme superman persona that Bowie created some time after the Ziggy Stardust era. The Thin White Duke was bereft of emotion,¹⁶⁹ described in the song *Station to Station*¹⁷⁰ as coldly ‘throwing darts in lovers’ eyes’. Bowie explained the *Station to Station*¹⁷¹ album as being ‘devoid of spirit, very steely. Even the love songs are detached... It’s very much like me, or very much like I want to be.’¹⁷² Reflection shows the way to the better life; it displays the goods that constitute meaningful living.

According to Finnis, there are seven goods, within which any worthwhile human activity can be categorised; life, knowledge, play, aesthetic experience, sociability, practical reasonableness, and religion.¹⁷³ Through these multiple goods, Finnis presents a conception of humanity that has multiple components.¹⁷⁴ Ziggy’s existence can be conceptualised in a similar manner. Buckley calls Ziggy a

¹⁶⁶ Finnis (1980), p 65.

¹⁶⁷ Kerruish (1983), p 226, Finnis (1980), p 69: ‘Self-evident principles such as those I have been discussing are not validated by feelings.’

¹⁶⁸ Buckley (2005), p 142.

¹⁶⁹ Buckley (2005), p 225.

¹⁷⁰ Bowie (1976) ‘Station to Station’ *Station to Station*.

¹⁷¹ Bowie (1976) *Station to Station*.

¹⁷² Buckley (2005), p 241.

¹⁷³ Finnis (1980), pp 86-90.

¹⁷⁴ George (2008), p 172: ‘Theorists of natural law understand human fulfilment-the human good-as variegated.’

‘composite rocker’¹⁷⁵ his identity assembled from elements of various real world musicians. The modular construction of identity is a theme of Bowie’s work. On the album *The Man Who Sold the World*,¹⁷⁶ he expresses the concern that the parts making up his mental framework might separate from each other and lead to a psychological breakdown.¹⁷⁷ In constructing Ziggy, Bowie was able to select the components that defined his fictional rock star. In Finnis’ theory people are similarly free to build their lives on their choice of goods.¹⁷⁸ While choice of goods is left to the discretion of the individual, the law is charged with ensuring that the goods are realised. However, the direction provided by the law is meant not to constrain, but to facilitate the realisation of human potential.

In aspiring to free people from sovereignty and its condescending intrusions, Finnis’ theory makes a gesture of liberation that can be associated with the *ubermensch* thematic, particularly Zarathustra’s mission to inspire self-determination. The preceding chapters have seen these same Nietzschean ideas applied to conflicting accounts of law. Identifying thematic similarities among theories that oppose each other may seem forced. However, not only does this strategy follow Nietzsche’s (self-)contradictory character, it also highlights the Nietzschean process of value creation in jurisprudence. In Zarathustra’s metamorphoses, the values that have come before are discarded, allowing new ones to be forged. Likewise, the successive (re)interpretations of law proffered by the legal scholars under examination in this thesis all begin with the rejection of other theories. This contrary process of creating new values is necessary. As Bowie will later demonstrate, the destination that one escapes to is also a site of fresh

¹⁷⁵ Buckley (2005), p 110.

¹⁷⁶ Bowie (1970) *The Man Who Sold the World*.

¹⁷⁷ Buckley (2005), p 85.

¹⁷⁸ Westerman (1997), pp 237-238.

incarceration. Change secures freedom, but this freedom must be renewed. Zarathustra promotes continuous transformation because of its invigorating properties. The vitality of legal understanding relies upon such change.

Zarathustra, Bowie, and Finnis contend that life is poorly served by clinging to comfort. Zarathustra looks out upon a society that begs to be saved from the dissipating indulgences of the last men. Bowie dreams up extravagant beings as a challenge to everything safe. Finnis' theory appears to try and deliver people from a complacent life ensconced in the comfort of the sovereign's protection. Zarathustra's argument that being told what to do dilutes one's vitality is Finnis' implicit argument against positivism. A rebellion is required. In chapter 2 it was remarked that courage was needed to break from the herd and become an *ubermensch*. The outrageous Bowie has courage in abundance, flaunting dress codes and gender roles. Finnis, too, evidences a kind of gall in contesting the well-established dominance of positivism. With this daring attitude, Zarathustra, Bowie, and Finnis disrupt complacency. Zarathustra impatiently calls to account the people in the marketplace; Bowie broadcasts into the suburbs as a flamboyant starman; and Finnis expounds flourishing. Value is reintroduced to the colourless world. Finnis' goods show that existence has purpose and can provide satisfaction. The goods are an affirmation, the Zarathustrian child's 'yea' to life. Practical reason concerns the internal experience of humankind. It is distinct from the external, measurable world. Despite effectively disavowing Nietzsche,¹⁷⁹ Finnis' deployment of the internal experience in his writing shadows Nietzsche's break from scientific rationality, where meaning is drawn only from observation. It is possible for humans to enjoy a richness of experience, and it is

¹⁷⁹ Finnis (2000), p 1597.

towards this joy that the law is to guide its subjects, as will be explained in the following section.

II – The Goods and Law

Finnis offers an enticing world where people exist cooperatively, guided by reason to lead fulfilling lives. Community provides fertile circumstances for abundant and varied evocations of the good.¹⁸⁰ In Finnis' theory, law alone is capable of providing the elements that comprise this setting.¹⁸¹ As Hobbes demonstrated in the previous chapter, through its imposition of order, law ensures the consistency in the populace's behaviour that must be relied upon to make feasible any human project, such as, in the case of Finnis, attempts at realising the good.¹⁸² Therefore, law is the sole means of attaining certain human goods and 'requirements of practical reasonableness that only those institutions can satisfy.'¹⁸³ Not only does law provide an environment for the cultivation of the goods, but it also tries to ensure that the goods are realised by shaping the behaviour of its subjects. As per Aquinas' theory, the 'fallen' character of humanity¹⁸⁴ means an ever-present possibility that people will choose wrong courses of action. Law is needed as a guide.¹⁸⁵ Finnis carries this disposition towards humanity into his theory, where law points people towards a particular notion of how life should be lived.¹⁸⁶ Bowie and the saviours he performs as also appear to be driven to intervene in (and potentially impose on) humankind to share the 'answer' to the purpose of existence. Even though Finnis' theory requires

¹⁸⁰ Finnis (1980), p 147, MacCormick (1981), pp 104-105.

¹⁸¹ MacCormick (1981), pp 104-105. Finnis (1980), p 268 on some of the contributions of a legal system: '...law brings definition, specificity, clarity, and thus predictability into human interactions.' See also Batnitzky (1995), Aiyar (1999).

¹⁸² MacCormick (1981), p 104.

¹⁸³ Finnis (1980), p 3.

¹⁸⁴ Jun (2009), p 348.

¹⁸⁵ Jun (2009), p 348. See also Aquinas (2006), p 846.

¹⁸⁶ Finnis (1980), p 262.

law's close involvement in people's lives, it does not yield precise instructions for a correct legal system.¹⁸⁷ Instead, Finnis offers a way of thinking about how to act that can be called 'natural law-as-style'.¹⁸⁸ Practical reasoning countenances multiple possibilities for the organisation of community, necessitating legal institutions that impose definitive arrangements, thus bringing about the environment needed to pursue the good.¹⁸⁹

However, although Finnis avoids the 'is-ought' criticism, his theory suffers in other areas.¹⁹⁰ For one, the objectivity of the basic goods has been questioned.¹⁹¹ Tan notes that the connection Finnis makes between reflection upon practical reasoning and the goods that such contemplation is supposed to reveal is 'too arbitrary, too glib.'¹⁹² Finnis does not detail the intellectual process that leads to discovery of the requirements of practical reasonableness.¹⁹³ Even if there are objective basic goods, an objective outlook would be required to be able to perceive them, and Finnis does not show that his reflective process is suitable for this task.¹⁹⁴ His theory proceeds from unjustified assumptions.¹⁹⁵ Finnis compounds this theoretical inadequacy by ascribing the quality of self-evidence to the goods to maintain that they are the inevitable outcome of the reflective process. Imbuing the goods with self-evidence demands acceptance of the goods from those who have not been given all of the information required to discover and verify the goods' existence.¹⁹⁶ Self-evidence is

¹⁸⁷ Westerman (1997), p 237.

¹⁸⁸ Westerman (1997), p 237.

¹⁸⁹ Simmonds (2002), p 135.

¹⁹⁰ Westerman (1997), p 256.

¹⁹¹ Duncanson (1989), p 239.

¹⁹² Tan (2000), p 637. Also, Shearmur (1990), p 126: '...insofar as his [Finnis'] points are intended to be inter-subjectively acceptable, his method often falls short of what is required. In particular, he does not seem to consider whether our moral experience may be subject to different and competing interpretations...'

¹⁹³ Tan (2000), p 637.

¹⁹⁴ Shearmur (1990), p 127.

¹⁹⁵ Duncanson (1989), p 239.

¹⁹⁶ Tan (2000), p 637.

a rhetorical technique used in the attempt to elicit reliance on unsubstantiated claims.¹⁹⁷ However, Finnis' goods are too abstract to be self-evident.¹⁹⁸ Duncanson argues that knowledge arises out of communal perspectives rather than being objective and timeless, as Finnis claims.¹⁹⁹ Those propounding an idea need to acknowledge their partiality and provide reasons why others should agree with them, tasks that Finnis' style is not equipped to perform.²⁰⁰ As Westerman explains:

‘It is... not certain whether the reformulation of natural law theory as a theory of practical reasonableness is better suited to cope with the various traditional dilemmas of natural law theory. ... The foundation in nature might not have been adequate, but the alternative candidate which is proposed, self-evidence, is even less convincing as a foundation. In order to turn ‘self-evidence’ into more than a debate-stopper or disguise for this lack of foundation, a theory would be required in which it is argued that man has immediate access to those self-evident forms of human flourishing. ... Such a theory is absent.’²⁰¹

A truly universal and timeless foundation to Finnis' theory is absent. While the initial impression may be that Finnis is only reiterating natural law by way of explanations that can be understood and capitulated to by a contemporary audience, the theory undergoes substantive metamorphosis in its journey to the present. Finnis reinvents natural law without using the divine as a starting point,²⁰² perhaps to make the theory attractive in a more secular age. Consequently, Finnis must be sceptical of truths about humanity that can be read from one's surroundings, as his theory cannot

¹⁹⁷ Tan (2000), p 637. In contrast to the occluded workings of Finnis' reflective process, Rawls' *A Theory of Justice* puts its mechanisms, such as the 'veil of ignorance', the 'original position', and 'reflective equilibrium', on display, inviting their evaluation.

¹⁹⁸ Duncanson (1989), p 248.

¹⁹⁹ Duncanson (1989), p 245.

²⁰⁰ Duncanson (1989), p 245.

²⁰¹ Westerman (1997), p 256.

²⁰² Finnis (1980), p 49, Westerman (1997), p 237.

assume that the natural world is encoded with God's plan.²⁰³ Understanding of how to live dwells solely in the human. The world of nature is surplus to the discovery of this insight, a straggler that follows after the attainment of knowledge.²⁰⁴ According to Finnis, this scepticism of the world is compatible with Aquinas, who supposedly teaches that values precede nature.²⁰⁵ Really, Finnis inverts the sequence of Aquinas' reasoning.²⁰⁶ Finnis' practical reasoning launches from a pre-existing and definite understanding of what is good, while Aquinas takes as raw material the impulses of nature and, through practical reasoning, converts them into goods.²⁰⁷ In 'Changes',²⁰⁸ Bowie sings of his restlessness; 'Every time I thought I'd got it made it seemed the taste was not so sweet,' conveying his need to repeatedly move on from the ideas he inhabits. Bowie's repeated transforming, affected by the situations in which he finds himself, highlights natural law's own need to always move on, and its responsiveness to the times, as evident in Finnis' attempt to parse Aquinas for a new generation. Finnis presents his theory as objective; universal, timeless. It is, in fact, one in a long line of (ch-ch-ch-ch-)changes²⁰⁹ made to natural law.

In addition to the disconnect between reflection and self-evidence, the basic goods and the substance of law are estranged from each other in Finnis' theory. There is nothing about the basic goods that demands their use as a foundation for the moral decision-making of practical reasoning.²¹⁰ The goods exist before morality, and alone cannot be used to identify what course of action should be taken.²¹¹ Practical reasonableness must be used to extrapolate morality from the 'pre-moral'

²⁰³ Westerman (1997), p 251.

²⁰⁴ Westerman (1997), p 248.

²⁰⁵ Finnis (1980), p 52.

²⁰⁶ Finnis reasserts this interpretation of Aquinas in Finnis (2005), pp 129-130.

²⁰⁷ Westerman (1997), p 252.

²⁰⁸ Bowie (1971) 'Changes' *Hunky Dory*.

²⁰⁹ Bowie (1971) 'Changes' *Hunky Dory*.

²¹⁰ Westerman (1997), p 256.

²¹¹ Westerman (1997), p 237.

goods.²¹² It is particularly difficult to utilise the goods in determining a course of action, as nothing precedes the goods, so there is no standard by which they can be prioritised.²¹³ Without the quality of moral obligation, the goods do not adequately serve natural law. Furthermore, Finnis does not specify how practical reasonableness finds implementation in a legal framework.²¹⁴ The generality of the goods creates considerable difficulties directing people towards particular forms of activity. For example, Finnis has stated that the law should deter same-sex sexual activity because it does nothing to realise the common good.²¹⁵ Garet argues that, starting from Finnis' goods, the opposite conclusion can be reached.²¹⁶ Finnis' contention that same-sex relationships do not foster the common good is incorrect because it is based on a predetermination as to what goods the activity must realise.²¹⁷ Same-sex relationships may not cultivate the good of 'life', but sexual behaviour could be described as play or sociability, or could even be a good in itself.²¹⁸ Furthermore, some of Finnis' goods might be described in terms of each other, with Davies querying 'How do we know that knowledge is not a form of sociability? Or derivative of religion?'²¹⁹ Kerruish argues that even if Finnis' goods are accepted as an accurate categorisation of human flourishing, they provide nothing that specifies how practical reasoning is to be conducted.²²⁰ The generalities of the basic goods must be translated into specifics, but the act of doing so will return them to subjectivity as each person outlines their individual understanding of what the goods

²¹² Westerman (1997), p 238.

²¹³ Westerman (1997), p 244.

²¹⁴ Tan (2000), p 638.

²¹⁵ Finnis (1994), pp 1049, 1066-1067, Garet (1995), p 607; p 628.

²¹⁶ Garet (1995), pp 628-629, 641-642.

²¹⁷ Garet (1995), pp 641-642.

²¹⁸ Davies (2008), p 92. Furthermore, Finnis' claim that same-sex relationships cannot fulfil the good of 'marriage' (adduced after *NLNR*: see Finnis (1994) for this argument) is deeply problematic: Perry (1995), Crowe (2011), p 13.

²¹⁹ Davies (2008), p 92.

²²⁰ Kerruish (1983), p 227.

contain.²²¹ Here, Nietzsche can be called upon to critique Finnis. Finnis claims that his goods are objective. Nietzsche's philosophy, however, asserts that objectivity is impossible and that values are a product of the will. Finnis' goods are not universal, timeless values, but are fabricated.

Bowie's characters are camp.²²² Fabricated, flamboyant, and apolitical,²²³ these fictional figures vividly highlight the artificiality and ambiguity of Finnis' basic goods, which can be applied or withheld in any way, reminiscent of the performance element of Bowie's work, the 'faker' that 'others may see' him as.²²⁴ Bowie learned through early musical efforts that 'authenticity and the natural form of expression wasn't going to be my [Bowie's] forte.'²²⁵ Bowie disavowed any personal investment in rock 'n' roll music soon after he stopped working primarily in that style: 'I mean it when I say I didn't like all those albums – *Aladdin Sane*, *Pin Ups*, *Diamond Dogs*, *David Live*. It wasn't a matter of liking them, it was 'Did they work or not?' Yes, they worked. They kept the trip going.'²²⁶ Finnis' goods are also an attempt to 'keep the trip going', to extend natural law's relevance, to maintain its popularity. But by keeping natural law alive through artificial means, he paradoxically deprives the theory of a substantive and convincing account of human nature.

'Who made who?' AC/DC once chanted. This question applies to Bowie as well as Finnis' basic goods: Do Bowie's characters point out valid ideas, or is Bowie using them as an excuse to indulge in the life of the rock star saviour? Is the nature

²²¹ Kerruish (1983), p 227.

²²² Hebdige (1979), p 60.

²²³ Sontag 'Notes on "Camp"' <http://www9.georgetown.edu/faculty/irvinem/theory/sontag-notesoncamp-1964.html>

²²⁴ Bowie (1971) 'Changes' *Hunky Dory*.

²²⁵ David Bowie 'Commencement Speech, Berklee, May 8, 1999'

<http://www.berklee.edu/commencement/past#.UFfo3411Q7s>

²²⁶ Buckley (2005), p 230.

postulated by Finnis truly objective and characteristic of all humans, or has Finnis created it to suit his own opinions? Bowie may be regarded as adopting particular ideas and musical forms in order to ‘make a point’, with the awareness that Bowie functions as a sort of actor framing the audience’s understanding of his performance and making known that he is enacting a critique of that which he embodies. Creating a transparently artificial and composite character in Ziggy, for example, enables Bowie to confront rock stardom’s claims to authenticity:

‘...rock ideology had a hegemonic position: almost everyone agreed unconsciously with its central tenets while never quite recognising that it was an ideology in the first place. So singers and performers, sometimes unwittingly, followed standards of excellence and decorum, which, until Bowie, had never been fundamentally challenged before.’²²⁷

Ziggy can be seen as a tool for the edification of the audience. ‘The music is the mask the message wears – music is the Pierrot and I, the performer am the message,’ Bowie announced.²²⁸ This quote sits at the nexus of the two understandings of Bowie’s ‘acting’. In saying that ‘music is the mask the message wears’, Bowie could mean that his songs were the form he chose to present his ideas. Conversely, declaring the performer to be ‘the message’ might be taken as a proclamation that Bowie is acting as a vessel for his appetites. Arguably, the Thin White Duke, a character who made expressions of sympathy towards fascism, that Bowie presented himself as during a period of significant drug use, enabled such indulgences. Early on, Bowie recognised that these appetites might take him over. An outtake from 1971 titled *Shadow Man*²²⁹ includes the line ‘the shadowman is really you’ and communicates Bowie’s anxiety that another, less accountable, self

²²⁷ Buckley (2005), p 104.

²²⁸ Buckley (2005), p 99.

²²⁹ Bowie (2002) ‘Shadow Man’, *Slow Burn*.

may replace him.²³⁰ Bowie retired Ziggy Stardust, later commenting: ‘Now [playing Ziggy] we started hitting real problems, because I enjoyed the character so much, and it was so much easier for me to live within the character.’ Just as Ziggy ended up ‘making love with his ego’,²³¹ ‘I [Bowie] wasn’t getting rid of him [Bowie’s fictional creation] at all; in fact, I was joining forces with him.’²³² Equally, there are alternative interpretations of Finnis’ conception of human nature. It may be that this nature defines Finnis as it does all people, and is something that humanity will benefit from knowing more about. Otherwise, it may be an invention of Finnis’ alone, a way of portraying things as he wants them to be. These interpretations are intertwined. For example:

‘Just where the Thin White Duke ended and Bowie began is a moot point. If one agrees with Bowie’s own analysis in interviews, then these invented personae governed the real-life David Jones and made him act in accordance with their character. But how much of this is a smokescreen to cover up, or excuse, huge lapses in taste, half-baked intellectualising and coke-driven madness?’²³³

An understanding of the duality of Bowie’s acting emphasises a dilemma in Finnis’ theory. On one side, exemplified by Ziggy Stardust, Bowie uses his characters to educate, on the other, as seen in the Thin White Duke, Bowie is occupied and animated by the very thing he critiques, having effectively become that thing. So it is with Finnis, who, as will be further detailed in the following section, began by trying to save people from overdetermination²³⁴ only to prescribe a system that imposes an arbitrary, rather than universal, vision of human nature that is

²³⁰ Buckley (2005), p 119.

²³¹ Bowie (1972) ‘Ziggy Stardust’ *The Rise and Fall of Ziggy Stardust and the Spiders from Mars*.

²³² Buckley (2005), p 140.

²³³ Buckley (2005), p 226.

²³⁴ Althusser (2005), p 101.

inadequately connected to law. Presently, it will be argued that Finnis then resorts to methods of justification that see his theory become a legal system wielding the kind of authority that more expansive conceptions of human nature are intended to critique.

III – Authority and the Disappearance of Nature

Finnis does not explain the thinking required to discern the basic goods, or support their claim to objectivity, instead arguing self-evidence. Finnis ascribes wisdom to those who accept the basic goods, while denigrating the ‘sceptic’ who remains unconvinced of the goods, portraying the latter as ‘slightly dim and villainous’, according to Douzinas and Gearey, who find this rhetorical strategy for securing acquiescence towards the basic goods to be comparable to the threatening command of positivism.²³⁵ This, along with other features of Finnis’ theory, shows his version of human nature to be one that, without justifying itself, demands obedience. Natural law is not simply a product of abstract speculation, and has been deployed towards an assortment of ends.²³⁶ For example, Finnis’ theoretical influence, Aquinas ‘– partly – used it to assert the authority of the Catholic Church...’²³⁷ Natural law has been imposed by the powerful in times past, and this forcefulness is repeated in Finnis version of the theory. Finnis’ theory shares Aquinas’ view of humanity’s potential for good and ill.²³⁸ The existence of the goods is not dependent on recognition, as imperfect human subjectivity is not entirely trustworthy. Some humans will err. Finnis’ goods are objective, detached, because

²³⁵ Douzinas and Gearey (2005), p 69. Also, Shearmur (1990), p 127: ‘It is striking that Finnis often seems to treat all theorists who hold views different from his own as people who are either denying the obvious or who fall prey to various fallacies.’

²³⁶ Westerman (1997), p 9.

²³⁷ Westerman (1997), p 9.

²³⁸ Westerman (1997), p 251.

his theory proceeds from secular beginnings,²³⁹ so they cannot be sourced in God, while humans are too flawed to originate the goods for themselves. Consequent upon the shortcomings of human nature, practical reasoning must be founded upon the basic goods.²⁴⁰ There are inconsistencies in this argument. Human nature is flawed and is unsuitable as a foundation for practical reasoning, hence the process of moral deliberation commencing with basic objective goods.²⁴¹ The goods depend on practical reasonableness for implementation, however, practical reasonableness is compromised because it has had no role in identifying the basic goods and only appears once judgements have been made.²⁴² Belief in humanity's fallen nature here fuels a legal system that uses authority to make sure that legal subjects adhere to structures necessary for life to be lived in keeping with the good. Bowie (in his Thin White Duke phase) illustrates the extreme end of the continuum on which justification of authority lies. The belief that humanity requires law to guide its actions is echoed in Bowie's mid-1970s statements that a fascist government was necessary to steer humanity towards fully utilising its abilities. For Bowie, the rock star is related to the fascist regime in that both have a theatrical, mediated relationship with others.²⁴³ During his time as the Thin White Duke, a mentally troubled and heavily inebriated Bowie extensively researched Nazism and expressed approval for fascist leaders' use of performance and multimedia to control entire nations.²⁴⁴ During a 1993 interview, Bowie said of this period that 'Goebbels intrigued me more than any of the other Nazis because of the way he used the media.

²³⁹ Westerman (1997), p 237.

²⁴⁰ Westerman (1997), p 251.

²⁴¹ Westerman (1997), p 252.

²⁴² Westerman (1997), pp 252-253.

²⁴³ An association also made in Parker and Scarfe (1982) *The Wall*.

²⁴⁴ Buckley (2005), pp 250-251.

He was an extraordinary guy.’²⁴⁵ In an interview conducted while inhabiting the Thin White Duke, Bowie commented ‘[Hitler] was no politician. He was a media artist himself. He used politics and theatrics and created this thing that governed and controlled the show for those twelve years.’²⁴⁶ The world will never see his like again. He staged a country.’²⁴⁷ Earlier, Bowie critiqued fascism in the dystopic *Diamond Dogs*²⁴⁸, an album influenced by George Orwell’s *1984*.²⁴⁹ Now, he embraces it. The starman’s mission shifts from using art to enlighten to using art as control.²⁵⁰ Accordingly, Bowie wanted to rule over England as dictator,²⁵¹ believing that this was the only way to reform what he called the ‘disgusting’ condition of contemporary morality.²⁵² Associating Finnis with Bowie in no way implicates Finnis in fascism. The Thin White Duke is presented, however, as an outermost example of how ever-increasing severity is a consequence of attempts to externalise a personally compelling design for life.

A demand for authority is present in Finnis’ theory. Because of the objective quality of the basic goods, Finnis’ theory can be used to justify the authority of the legal order without any acceptance of the goods’ validity by the people subject to the law. Those who cannot perceive and accept the goods have simply failed to make sense out of life, just as those entrenched in the kind of dreary life that Bowie offers an escape from, do not see the possibilities for how they might flourish. Bowie’s mid-1970s belief in the need for fascist government may indeed have arisen from a

²⁴⁵ Buckley (2005), pp 232-233.

²⁴⁶ Buckley (2005), p 250.

²⁴⁷ Buckley (2005), pp 250-251.

²⁴⁸ Bowie (1974) *Diamond Dogs*.

²⁴⁹ Trynka (2011), p 401.

²⁵⁰ In ‘Fascinating Fascism’

<http://www.history.ucsb.edu/faculty/marcuse/classes/33d/33dTexts/SontagFascinFascism75.htm>,

Sontag writes that ‘[‘Fascist aesthetics’] ...flow from (and justify) a preoccupation with situations of control, submissive behaviour...’

²⁵¹ Buckley (2005), p 250.

²⁵² Buckley (2005), p 250.

belief in the ignorance of the masses. As stated above, Finnis implies that the sceptic's inability to acknowledge or be satisfied by self-evidence is a consequence of ignorance or treachery.²⁵³ In keeping with Finnis' disparaging portrayal of the sceptic, in 'Life on Mars?',²⁵⁴ Bowie describes the people as 'the mice in their million hordes': possibly a scurrying, oblivious mass in need of reform. Beginning early in his musical output, in songs such as 'Cygnets Committee',²⁵⁵ and 'The Supermen',²⁵⁶ a lot of Bowie's songs have depicted the public arrival or surreptitious existence of saviour beings able to control humanity.²⁵⁷ These beings are a combination of Bowie's reading of Nietzsche and his exposure to Gnostic ideas such as 'the masters', entities dwelling in secret mountains headquarters who preside over humanity.²⁵⁸ The masters are mentioned in 'Station to Station',²⁵⁹ where Bowie urges the listener to 'Drink to the men who protect you and I.'²⁶⁰ The starman's control over the human race is presented as a natural consequence of the deficiencies of most normal people. In 'Oh! You Pretty Things',²⁶¹ it is said that 'we're finished' and 'Let me make it plain, gotta make way for the homo superior.' Using self-evidence instead of legitimate moral justification, Finnis' theory proposes a legal system that compels obedience through authority.²⁶² Finnis uses the notion of the common good to try and convince of this theory.²⁶³ It is a moral good to ensure the stability of the legal system.²⁶⁴ Therefore, the proposition that 'an unjust law is no law' is a

²⁵³ MacDonald (2003a), p 144.

²⁵⁴ Bowie (1971) 'Life on Mars?' *Hunky Dory*.

²⁵⁵ Bowie (1969) 'Cygnets Committee' *David Bowie*.

²⁵⁶ Bowie (1970) 'The Supermen' *The Man Who Sold the World*.

²⁵⁷ MacDonald (2003a), p 142.

²⁵⁸ MacDonald (2003a), p 143.

²⁵⁹ Bowie (1976) 'Station to Station' *Station to Station*.

²⁶⁰ MacDonald (2003a), p 143.

²⁶¹ Bowie (1971) 'Oh! You Pretty Things' *Hunky Dory*.

²⁶² Finnis (1980), p 276.

²⁶³ Tan (2000), p 638.

²⁶⁴ Davies (2008), p 94.

‘subordinate theorem’ to Finnis.²⁶⁵ Upholding the law’s stability may require a person to obey a law that they think to be unreasonable.²⁶⁶ On the question of whether a person should disobey a law, Finnis says there is ‘little that is not highly contingent upon social, political, and cultural variables.’²⁶⁷ His opinion on this matter is at odds with the supposed universality of the goods that are to guide law. Having failed to provide reasons to accept laws that are lacking in content that will be universally agreed to, Finnis replaces justification for the law with the dictates of authority.

This authoritarianism highlights nature’s fate in *NLNR*. The lack of any properly objective and universal standard to Finnis’ theory indicates that nature has been done away with. This is Bowie’s crucial contribution to analysing Finnis’ work. When observing Bowie, it is immediately apparent that he flouts nature. As evident in his unorthodox cross-breedings (such as man-dog hybrid Bowie of the *Diamond Dogs*²⁶⁸ cover), Bowie is unconcerned with following any existing template for life. His projects defy such structures (or strictures). Bowie is the one in control; the artist directing and (re)arranging existence. Acting in this way, Bowie extinguishes nature. Bringing Bowie to bear on Finnis shows that, while Finnis means to re-establish natural law, *NLNR* effectually brings about nature’s demise.

Bowie denies rigid expectations about life. Hebdige alludes to this, interpreting Bowie’s visual presentation as a defiance of ‘...the notoriously pedestrian stereotypes conventionally available to working-class men and women.’²⁶⁹ As evident in the androgyny he often adopted, Bowie is not in thrall to conservative definitions of what is natural. He escapes these limits by changing his form.

²⁶⁵ Finnis (1980), p 351.

²⁶⁶ Finnis (1980), p 352.

²⁶⁷ Finnis (1980), p 362.

²⁶⁸ Bowie (1974) *Diamond Dogs*.

²⁶⁹ Hebdige (1979), p 60.

Comparably, Finnis escapes the fixed, narrow role that is the biological description of the human. Evident in these transformations are acts of will. Bowie sculpts his identity to match a design. Finnis, too, imposes a definition onto life. Human flourishing is shaped as Finnis wishes it to be rather than being dictated by life. These acts of will are driven by personal visions. Bowie is the inventor of the mixtures that are concocted to create each new self. He is able to effect transformations by thinking of his being as made up of (malleable) culture, rather than (inflexible) nature. Natural law seems to be unchanging. However, comparison with Bowie demonstrates that, in Finnis' work, nature is made of nothing but the changeable stuff of culture. Finnis substitutes the biological construction of being for one that begins in mental space. His turning away from any external limit means looking within for inspiration. With Bowie, humanity has the potential to become whatever people can imagine. In *NLNR*, Finnis' interior life founds the shaping of existence. The discerning of how humans are to thrive takes place in the self. The goods are not objective, but subjective. With the definition of flourishing under human control, the idea of 'nature' meets its end.

Nature is cast out of Finnis' theory. According to Veatch, '[Finnis] ...perceives no reason why he should not simply disclaim all attempts to establish a basis for moral laws in nature...' ²⁷⁰ Looking within to discover how to thrive, nature is ignored. It vaporises, wraithlike, sliding out of focus and into irrelevance. Nature is portrayed as unhelpful, extraneous. ²⁷¹ Finnis writes that:

'They ['the first principles of natural law'] are not inferred from speculative principles. They are not inferred from facts. They are not inferred from metaphysical propositions about human nature, or about

²⁷⁰ Veatch (1981b), p 253.

²⁷¹ Westerman (1997), p 251.

the nature of good and evil, or about ‘the function of a human being’; nor are they inferred from a teleological conception of nature or *any other conception of nature* [my emphasis].²⁷²

Because nature cannot be used to mount an argument about human life, Finnis is candid about its banishment. He appears to find nature regrettable, calling ‘natural law’ an ‘unhappy term’ for the theory.²⁷³ Finnis’ tenders his ‘de-natured’ theory as beneficial.²⁷⁴ Nonetheless, it has considerable flaws. This nominally ‘natural law’ theory misses the opportunity to put nature to use, first of all in its derivation of the goods. Making practical reasoning the centre of natural law means a claim that the goods precede reason.²⁷⁵ Surprisingly, rearranging natural law’s priorities in this way shrivels practical reasoning.²⁷⁶ With the goods already established, the important function practical reasoning performed in previous versions of natural law is no longer required.²⁷⁷ Previously, natural desires had to be assessed and deemed objectively good (or not, as the case may be). Exiling nature leaves practical reasoning without anything of such overriding significance to interpret.²⁷⁸ Nor is nature enlisted to weigh the goods so that a course of action can be decided upon.²⁷⁹ Paradoxically, given that Finnis’ theory is supposedly practical, the eviction of nature makes it more difficult to accomplish this task. The absence of a theorised nature results in an all-around less practical jurisprudence. ‘Nature’, to the extent that it remains in *NLNR*, arrives late.²⁸⁰ It appears after the event to validate what Finnis has written, but does not comprise any part of the argument. The

²⁷² Finnis (1980), pp 33-34.

²⁷³ Finnis (1980), p 374.

²⁷⁴ Veatch (1981a), p 256.

²⁷⁵ Westerman (1997), pp 251-252.

²⁷⁶ Westerman (1997), p 253.

²⁷⁷ Westerman (1997), p 253.

²⁷⁸ Westerman (1997), p 253.

²⁷⁹ Westerman (1997), p 247.

²⁸⁰ Westerman (1997), p 249.

theory is ‘decorated’²⁸¹ in ‘nature’, like one of Bowie’s costumes, but its attempt at a perspicuous retelling of human life does not ‘grow’ out of the natural world.

Finnis’ dismissal of nature has earned intense reproach.²⁸² For example, Veatch asks, in relation to Finnis, ‘...how can the enterprise of a natural-law ethics be anything other than a search for some basis for morals and ethics in nature itself, and thus in the facts of nature?’²⁸³ This censure indicates another unexpected similarity between Finnis and Bowie: both are controversial. Turning natural law inside out, Finnis flies in the face of convention, his drastic inversion as startling as Bowie’s flamboyant mutations. Both attract opposition in their attempts to rehabilitate frameworks of human endeavour. Even though he critiques the rock star, Bowie is a rock star, and could not avoid all the pitfalls of that occupation. Finnis starts anew with natural law, seeking to remake the tradition to the exclusion of its imperfections, but he is unsuccessful in this attempt, reinforcing problems that have persisted throughout successive iterations of the theory.²⁸⁴

Bowie’s descent from Ziggy to the Thin White Duke throws into relief that Finnis’ theory ends up becoming the thing it critiques. Bowie (not wanting to be confined to a single musical genre nor any archetypal identity) and Finnis (rejecting a portrait of the human drawn up from the outside) shed the skin of the rigidly prearranged life. However, both then discontinue their emancipatory efforts: Bowie with his dictatorial stylings, and Finnis with his imposition of a particular vision of the good. The problematic revealed here is that the overbearingness in the essence of natural law. Natural law is a search for guidance. Finnis discards speculative reason because it is not a trustworthy guide. His introspective turn sources the guidelines for

²⁸¹ Westerman (1997), p 249.

²⁸² Westerman (1997), p 249.

²⁸³ Veatch (1981b), p 251.

²⁸⁴ Westerman (1997), p 6.

flourishing in utter subjectivity. As with 'Fame',²⁸⁵ where 'What you like is in the limo,' the good is now defined by idiosyncratic desires. Flourishing no longer takes on a diversity of forms, but is used to dress up autocracy. There is only a single, officially mandated way to flourish. There is revealed to be an 'I' at the centre of this flourishing; a literally self-centred theory, as it is centred around practical reasoning, like Narcissus, a reflection upon the self. Nature is barred from giving perspective, as the new natural law maintains there is nothing to see 'out there'. Finnis looks inwards, mistakes his unique vision for universal truth, and then tries to impose it, wanting other people to flourish similarly to him.

Nature's expulsion is obvious in the lack of explanation for the basic goods. There is no communicable explanation of the goods, nothing that can survive outside of the subjectivity in which the goods originated. In contrast to the observable and consistent standard provided by speculative reasoning, the basic goods are indeterminate. Looking inwards reveals goods that are unique to the person that discovers them, producing a conception of nature that does not necessarily correspond to the external world. The goods are never confirmed by checking that they relate to the forms life actually takes. Inevitably, therefore, people will be seen by the observer of the goods as divergent and in need of pressure to act in keeping with the prescribed manner of flourishing. Ultimately, Finnis' theory does not deliver a more expansive conception of humanity, but a narrowing of nature, tapering from a shared humanity down to the subjectivity of a single person. Finnis universalises his view, using it to regulate the environment and channel human life through a particular conception of flourishing. This is an inviting world, promising a people not in conflict, but united, achieving at a higher level. However, harmony and enhanced

²⁸⁵ Bowie (1975) 'Fame' *Young Americans*.

performance are accomplished not by appealing to some common radiance, but through the imposition of an order.²⁸⁶ With that, natural law becomes legal positivism: according to Finnis, law can be defined as:

‘...rules made, in accordance with regulative legal rules, by a determinate and effective authority (itself identified and, standardly, constituted as an institution by legal rules) for a ‘complete’ community, and buttressed by sanctions...’²⁸⁷

The validity of Finnis’ system comes from the same exercise of ‘sanctions’ that natural law supposedly holds to account. Nature’s ejection from natural law makes room for the subjectivity. That subjectivity is imposed through will here makes Finnis’ theory noticeably similar to sovereignty, the jurisprudence that it was framed in opposition to at the beginning of this chapter.

Finnis’ is a theory that upholds the law’s power structures. According to Duncanson: ‘the ideas out of which it [Finnis’ theory] is constructed are merely variants of those in which the politics of the status quo are expressed.’²⁸⁸ For Finnis’ theory, this means the (eternal?) recurrence of sovereign power, his theory returning law to that same arrangement. For Bowie, the figure of Lennon and his ‘saviour behaviour’ continues to loom. The reason for these repetitions is the continuing reliance on the saviour. Even as Bowie proclaims the danger of the rock ‘n’ roll messiah, he is trying to save the people from saviours. As in Steely Dan’s ‘Do It Again’,²⁸⁹ where the wheel keeps ‘turnin’ ‘round and ‘round’, mistakes are repeated, problems from the past brought forward. In this case, the problem is an addiction to

²⁸⁶ Finnis (1980), p 232 states that in ‘co-ordinating action’, ‘There must be either unanimity, or authority. There are no other possibilities.’ Finnis proceeds to rule out unanimity on p 233.

²⁸⁷ Finnis (1980), p 276.

²⁸⁸ Duncanson (1989), pp 239-240.

²⁸⁹ Steely Dan (1972) ‘Do It Again’ *Can’t Buy a Thrill*.

saviours that cannot be shaken off. The song 'Star'²⁹⁰ from the *Ziggy Stardust* album²⁹¹ demonstrates the association between rock stardom, the flourishing life, and authority: 'I could make it all worthwhile as a rock 'n' roll star. Bevan tried to change the nation. Sonny wants to turn the world, well, he can tell you that he tried. I could make a transformation as a rock 'n' roll star'. It may be that the worthwhile life of the rock star is here being represented as a life of personal fulfilment alone, being contrasted with the ability to 'change the nation'. However, knowing what counts as the worthwhile life and leadership are linked, and both are possibilities of the enterprise of rock stardom as depicted by Bowie generally. Ziggy came to Earth to show its people that life is 'all worthwhile'. This mission turned into an authoritative one, with Ziggy becoming a saviour. In the words of 'Ziggy Stardust',²⁹² Ziggy '...made it too far, became the special man'. He became a 'leper messiah'; overbearing, unwanted, cast out or possibly destroyed, a 'rock 'n' roll suicide'.²⁹³ Bowie repeats this fall to some degree in becoming the Thin White Duke. Wanting to free the people from a constrained existence and empower them to flourish, he eventually advocates the consolidation of power in a dominating entity. Bowie's 'broken record' repeat of the rise and fall of a powerful, controlling individual reinforces the possibility of a transition from notions of how human life can be lived to the self-justification of pure legal power. Whereas sovereignty wishes order for its own sake, natural law is initially motivated by having something particular to assert about how life should be. However, in making claims to authority based on unsubstantiated declarations of life's proper mode, Finnis' natural law theory results in a legal system where the law constrains, rather than enables its subjects.

²⁹⁰ Bowie (1972) 'Star' *The Rise and Fall of Ziggy Stardust and the Spiders from Mars*.

²⁹¹ Bowie (1972) *The Rise and Fall of Ziggy Stardust and the Spiders from Mars*.

²⁹² Bowie (1972) 'Ziggy Stardust' *The Rise and Fall of Ziggy Stardust and the Spiders from Mars*.

²⁹³ Bowie (1972) 'Rock 'n' Roll Suicide' *The Rise and Fall of Ziggy Stardust and the Spiders from Mars*.

Furthermore, Westerman observes that: ‘....Finnis’s theory of natural law exhorts us to be more uncritically law-abiding than any legal positivist has ever dared to suggest.’²⁹⁴ It is not only that the re-establishment of limits results from Bowie and Finnis’ attempts to encourage flourishing, but that these limits are more constraining than those which they saw as oppressive to humanity. Bowie outdoes Lennon’s claims to authority, and Finnis is more imposing than the legal positivists. Bowie and Finnis do not erase the targets of their critique; they eclipse them.

Bowie repeatedly sloughs off his identity, changing it for a new one. The motivation for these recreations is visible in Bowie’s core message; that humanity can grow into something better. Bowie escapes from the stasis that keeps him from being a superman. Breaking out of limitations has its consequences. Bowie sings in in ‘1984’²⁹⁵ that ‘The changing isn’t free.’ It is always a case of ‘out of the frying pan and into the fire’, for the only sanctuary possible from one fixed self is yet another rigid form. Like the compounding dissatisfaction Zarathustra experiences as he scales to ever greater heights, Bowie’s recreations become more severe (as evident in the Thin White Duke); each time, greater reassurance is required that, with a leap into the strange, freedom has been achieved. Finnis’ reinvention is from one type of reasoning to another. Desirous of a ‘sure-fire’ way to flourish, Finnis discards the speculative, believing that it does not provide sufficient guidance. He replaces it with a practical experience that is, for him, personally compelling, but being ‘in love with a strict machine’²⁹⁶ has harsh implications for the external world. Finnis tries to free people from a burdensome conception of human nature, and, Thin White Duke-like, gives rise to a sterner force.

²⁹⁴ Westerman (1997), p 283. For example, Finnis (1980), p 24 writes that ‘...the principles of natural law explain the obligatory force (in the fullest sense of ‘obligation’) of positive laws, even when those laws cannot be deduced from those principles.’

²⁹⁵ Bowie (1974) ‘1984’ *Diamond Dogs*.

²⁹⁶ Goldfrapp (2003) ‘Strict Machine’ *Black Cherry*.

Repeating a dilemma in the attempt to remedy it marks once more the presence of the ubermensch thematic in this analysis of jurisprudence and rock music. In fact, Bowie was directly influenced by Nietzschean philosophy.²⁹⁷ A small sample of his music that refers to or is reminiscent of the work of Nietzsche: from *The Man Who Sold the World*,²⁹⁸ 'All the Madmen',²⁹⁹ which quotes from *Zarathustra*, 'Man is an obstacle',³⁰⁰ and 'The Supermen',³⁰¹ from *Hunky Dory*,³⁰² 'homo sapiens have outgrown their use,' and 'I'm not a prophet or a Stone Age man. Just a mortal with the potential of a superman.'³⁰³ A Nietzschean theme prominent in Bowie's work is that of transformation. Zarathustra's message is that man has the potential to grow and develop. A similar view motivates Finnis' theory, which aims to direct humanity towards 'flourishing', a fulfilment of its capabilities. There are differences between Nietzsche and Finnis, including Finnis' positing of metaphysical 'goods' and Nietzsche's claim of God's demise, incongruous with the Thomism of Finnis' intellectual pedigree. Finnis would deny any similarities between his work and Nietzsche's. However, Finnis and Nietzsche share the drive to realise some greater potential in humanity. Nietzsche helpfully accentuates that the confidence in humanity's capabilities often stimulates a desire to intervene in human life in order to realise this promise. Zarathustra is aware of the difficulty in convincing people to reach beyond their current state without using force in an attempt to break through the people's ignorance. Guiding the people through force would replicate the state of subservience from which they must be freed. It is this Zarathustrian dilemma that Bowie exposes in Finnis. *NLNR* begins with confidence in people's ability to flourish

²⁹⁷ Buckley (2005), p 233.

²⁹⁸ Bowie (1970) *The Man Who Sold the World*.

²⁹⁹ Bowie (1970) 'All the Madmen' *The Man Who Sold the World*.

³⁰⁰ Bowie (1970) 'After All' *The Man Who Sold the World*.

³⁰¹ Bowie (1970) 'The Supermen' *The Man Who Sold the World*.

³⁰² Bowie (1971) *Hunky Dory*.

³⁰³ Bowie (1971) 'Quicksand' *Hunky Dory*.

but sees this expression of esteem as a debt to be repaid. Faith in humanity mutates into a dark inversion of itself. People are expected to live up to a particular idea of their potential, and, in a twist, they cannot be trusted to realise (meaning both recognise and fulfil) their own worthiness. It transpires that the goods are authority imposed by will. In his dictatorial phase, Bowie's conviction that people are meant for greater things was temporarily warped into a belief that only obedience could coax out human achievement. Bowie cast off this approach, however, demonstrating the law's need to advance beyond the use of saviours. Buckley states that:

‘Bowie was living proof that our personalities are constantly in flux, constantly being made and remade, not fixed in stone by age, class or gender. ... There's no final version of Bowie. For every teenager who considered him or herself unfinished, who was not quite happy with his or her lot, who didn't like the way society worked but couldn't articulate that sense of disquiet, Bowie was the perfect foil.’³⁰⁴

At the time of its emergence, natural law, too, was artificial, ambiguous, always changing, and critical of society: ‘...its [natural law's] ‘discovery’ is not so much a revelation or unveiling as an invention, a creation.’³⁰⁵ ‘Unlike ‘objective statements’, natural right was neither static, nor certain...’³⁰⁶ Bowie shows that law's instruments of critique must not forget these transformative qualities.

Life after Mars

Ultimately, Bowie was able to rise again where Ziggy could not. He avoided getting stuck in the saviour groove, abandoning his Thin White Duke character and disavowing fascism, saying ‘It is not my position for the kind of artist I am, who tries

³⁰⁴ Buckley (2005), p 285.

³⁰⁵ Douzinas and Gearey (2005), p 81.

³⁰⁶ Douzinas and Gearey (2005), p 81.

to capture the rate of change, to adopt any given policy or stance politically because my job is an observer of what is happening.³⁰⁷ Bowie stepped away from the role he had played along with all its unfeeling authoritarianism. Giving up on ‘coke-driven’³⁰⁸ pontificating, Bowie moved on (interestingly, going to Berlin to do so³⁰⁹) to happier and more humanly-connected work, collaborating fruitfully with Brian Eno on a series of albums.³¹⁰ In moving beyond the saviour figure, Bowie suggests the need for jurisprudence to do the same. This reorientation may be exemplified by Madonna, whose work will be discussed in the following chapter.

³⁰⁷ Buckley (2005), p 253.

³⁰⁸ Buckley (2005), p 226.

³⁰⁹ MacDonald (2003a), p 146.

³¹⁰ MacDonald (2003a), p 146.

‘She’s not a bad girl, she’s just ambitious.’

– Jeff Beck, Nile Rodgers.¹

¹ Beck (1985) ‘Ambitious’ *Flash*.

Chapter Six

Confessions on a Dance Law: Madonna and Rights

Experiencing Bowie in live performance had a transformative, inspiring effect on Madonna.² In her work, Madonna followed on from Bowie in contesting society's mores, and it would eventually become obvious that she also shared his aptitude for reinvention. Madonna's success and longevity, as well as the strong responses elicited by her work, have prompted an abundance of academic appraisals of the singer.³ Cultural studies has examined how Madonna's constantly changing appearance and her appropriation of cultures from outside of the mainstream show up issues of identity, and, using commodity analyses, scholars have detailed how Madonna has perpetuated commercial success through control over her image.⁴ Madonna's overtly performative identity, as well as her power over its definition and propagation, prominently exhibit the construction of the self and the self's relation to others. Arrived at by Finnis' introspective practical reasoning, the self was the end point of the previous chapter. Now to be examined is rights theory, which offers jurisprudential insight into how the self comes about and exists in the world. Rights determine which attributes of a person are subject to legal protection, drawing outlines of selfhood in the law and safeguarding the integrity of individuals.

This chapter does not focus on the theory of any particular jurisprude, but examines the general concept of rights. In what follows, contrasting views on rights-based thinking are described in reference to Madonna, an artist whose music elicits

² 'Madonna accepts for David Bowie Rock and Roll Hall of Fame Inductions 1996' <http://www.youtube.com/watch?v=kcm90o9Plk>

³ For example, see *The Madonna Connection*. Schwichtenberg (1993a).

⁴ For example, Pisters (2004) and Tetzlaff (1993).

both controversy and significant popular attention. It is argued that these same qualities are to be found in rights, which remain widely appealing in spite of critiques that have highlighted their negative consequences.⁵ Embodying these contradictions, Madonna (by way of analogy) both praises and problematises rights discourse. This jurisprudential analysis of Madonna is conducted mainly in reference to Madonna's album *Confessions on a Dance Floor*⁶ (henceforth '*Confessions*') and a video recording of the accompanying live performance titled *The Confessions Tour*.⁷ A selection of songs from Madonna's previous albums will also be discussed. Cultural studies scholarship of Madonna will be referred to in order to explain Madonna's relationship to subcultural groups engaged in the struggle for political recognition, an activity that often involves the pursuit of rights. In comparing her work to rights, Madonna becomes representative of a type of jurisprudence that runs counter to the sovereign-saviours of previous chapters. Rather than imposing an order that is the product of a supreme entity, rights are intended to create a space for empowerment; they help create identity and maintain its integrity. The mission to redeem the world at large is replaced by a focus on the self.

While ultimately surveying multiple perspectives on rights, this chapter begins by establishing a liberal notion of rights, such as is addressed by the theories that are subsequently introduced. Exemplifying liberal rights is the work of Ronald Dworkin. Madonna meets Dworkin in the 'Me decade'.⁸ Dworkin's *Taking Rights Seriously*⁹ was published in 1977, the year Madonna arrived in New York City to begin her career as a musician. The self was a theme in the rock and pop music of the period that commenced around this time, with evocations of self-'improvement', for

⁵ Mirza (1999), p 117.

⁶ Madonna (2005) *Confessions on a Dance Floor*.

⁷ Madonna (2005) *Confessions on a Dance Floor*; Akerland (2007).

⁸ Wolfe (1976).

⁹ Dworkin (1977).

example, Buckley describing the 1980s as ‘...an era in which Madonna jogged on stage, turning the pop spectacle into a reconstruction of a work-out in the gym...’¹⁰ and ruthlessness, including the ironic commentary of the Rolling Stones’ ‘Winning Ugly’:¹¹ ‘I wanna be top, forever on the up and damn the competition.’ This emphasis on the self is present in the confession and the dance floor. They are the means by which Madonna describes and creates herself in a way that is similar to the rights-bearing subject. Madonna’s stage show, with its mix of costuming, expository video displays, and complimentary dancers, conveys a sense that Madonna is exposing her inner world to the audience. ‘I like to be the art. I am the art. Je suis l’art,’ Madonna retorts when complimented on the artistry of her stage design.¹² In associating her being with art, Madonna highlights that the self is an act of creation communicated to others. At the time of The Confessions Tour, Madonna announced her ambition to turn the world into a giant dance floor,¹³ and during The Confessions Tour performance, Madonna declares that she wants to ‘see the whole world jumping.’¹⁴ Her dance floor world, as discussed below, compares to the world of rights-bearing individuals pursuing the definition of identity to which legal recognition contributes.

Madonna’s assertion of identity may have unintended results. In an era where musicians are expected to distinguish themselves from the masses, the scintillation of the confession may attract new groups of collaborators and admirers and relegate the rebel performer to an enforcer of collectivity. Madonna throws light on the way that individuality and collectivity feed into each other during rights discourse. Suggestive

¹⁰ Buckley (2005), p 377.

¹¹ Rolling Stones (1986) ‘Winning Ugly’ *Dirty Work*.

¹² Akerland (2007), Chapter 1.

¹³ Madonna expresses this sentiment in the press release announcing the confessions tour. It can be found at the Madonna.com news page, entry for April 3, 2006.

<http://madonna.com/news/index.php?mode=list&page=21>

¹⁴ Akerland (2007), Chapter 13.

of the interplay between the individual and the collective in rights discourse is the disco ball, which appears on the album art and promotional material for *Confessions* and is a central prop in The Confessions Tour concert. The disco ball reflects smaller points of light upon the dance floor world, just as Madonna's audience revolves around her, and as rights necessitate continually distinguishing one's self from the other. This chapter is divided into four sections that correlate to aspects of the debate surrounding rights. In the first section, Madonna's pursuit of self-creation through freedom from collectivity is aligned with liberal rights, which are represented by Ronald Dworkin's anti-utilitarian theory. Through her music, Madonna celebrates the acts that allow her to distinguish herself, highlighting the friction between the individual and the collective that occurs when rights are used to mediate societal interaction. The second section outlines the negative consequences of rights. According to critical legal scholars, rights give form to the desires of powerful elites. This critique relates to the way in which Madonna transforms her audience into a collective of witnesses for her acts of self-creation. The continuing attraction of rights to the disadvantaged is addressed in the third section, where it is explained that Madonna inspires her collectivised audience to emulate her behaviour. The fourth section considers the paradoxical state in which rights currently exist, where they are viewed as both potentially detrimental as well as indispensable. Inspiring her audience to follow her, Madonna becomes reabsorbed into the collectivity and is forced to reinvent herself in order to become unique once more. These acts of renewal only increase her attractiveness as a figure worthy of emulation. Through repeating strategies of personal definition in order to reinvent herself, Madonna enacts the victories and problems that arise from advancing the self through rights, as well as the difficulties of establishing individuality in any other way. Before

reinvention can be discussed, however, the use of rights as a tool of invention must be established.

I – The Liberal Theory of Rights

*Taking Rights Seriously*¹⁵ provides an example of how the liberal self is established relation to the many. Dworkin's conception of rights is framed in opposition to a two-part theory that denies rights to individuals. One part of this theory is utilitarianism, which advances the view that the good of the collective should be pursued over the wellbeing of the individual.¹⁶ The other part is legal positivism, which holds that the law needs no moral content to be valid, and, consequently, that legal acknowledgement of rights is not essential.¹⁷ Utilitarianism is equivalent to the collectivity that Madonna challenges. Just as Madonna seeks freedom from the sameness of the crowd through music and performance, rights protect individuals against majority preferences as to how people should behave.¹⁸ According to Dworkin, policies aimed towards securing the good of the majority are to be avoided because they do not accord people the equal concern and respect to which they are entitled.¹⁹ 'Express yourself, respect yourself,' Madonna says in 'Express Yourself',²⁰ echoing Dworkin's 'equal concern and respect', highlighting the connection between respect and personal articulation, and connecting Dworkin's phrase to rights. Rights allow for the creation of the self by guarding the individual's freedom to pursue their personal objectives. Likewise, the creation of a unique self requires Madonna to pursue goals that she has elected, rather than living as others

¹⁵ Dworkin (1977).

¹⁶ Dworkin (1977), p vii.

¹⁷ Dworkin (1977), p vii.

¹⁸ Dworkin (1977), p 205.

¹⁹ Dworkin (1977), p xii.

²⁰ Madonna (1989) 'Express Yourself' *Like a Prayer*.

do.²¹ Madonna deliberately cultivates a unique identity. According to Schwichtenberg, Madonna draws attention to the way in which identity is changeable and thus under the control of the individual. For example, Madonna highlights the malleable nature of gender identity through the same-sex couplings in the video for 'Justify My Love'²² and by appearing in men's clothing in the video for Express Yourself.²³ Hawkins, too, argues that Madonna depicts gender as performance, saying that '...Madonna's musical expression is a confession of calculated constructedness.'²⁴ Mandziuk uses words such as 'self-determination', 'self-expression', and 'control' to describe Madonna's commitment to individuality.²⁵ Pisters includes 'self-respect' and 'control' as two of Madonna's 'core thematics',²⁶ and Clifton says that Madonna changes her vocal style to achieve 'paramount and deliberate' changes of the self.²⁷ Madonna's behaviour demonstrates that rights afford autonomy, the freedom to invent oneself rather than being defined by the identity of the majority.

Madonna has often justified her behaviour on the basis of individual choice. For example, in her appearance on the television program *Nightline*²⁸ Madonna was accused of making videos that degraded women, such as the video for 'Express Yourself',²⁹ where at one point Madonna appears with a chain around her neck. Madonna defended the video on the basis that she had chosen to present herself in such a way and that to disallow the video would be to unduly censor her self-

²¹ Mandziuk (1993), p 167.

²² Mondino (1990) *Madonna, Justify My Love*.

²³ Schwichtenberg (1993c), p 141; Fincher (1989) *Madonna, Express Yourself*.

²⁴ Hawkins (2004), p 12.

²⁵ Mandziuk (1993), p 167.

²⁶ Pisters (2004), p 22.

²⁷ Clifton (2004), p 55.

²⁸ 'Madonna – Nightline Interview 1990': <http://www.youtube.com/watch?v=-Nh9Mv6WTA8>

²⁹ Fincher (1989) *Madonna, Express Yourself*.

expression.³⁰ Here, Madonna argues that her ‘right’ to performance should protect her against majority opinion as to how she should conduct herself. Suggestive of Madonna’s aversion to the majority is the cacophonous ‘Sorry (Remix)’,³¹ a song that plays at a point during The Confessions Tour concert while Madonna is offstage.³² Looping pre-recorded footage of Madonna saying ‘Don’t talk, don’t speak,’ appears on the stage screens, intercut with unflatteringly edited footage of politicians and leaders, the representatives of collective will. On stage, a male and a female enact a fight; elucidating the violence implied by the video imagery on display. Conversely, the world of the dance floor is a space of equality in which individuality is uninhibited.

This environment is described in ‘Vogue’³³ with the line ‘It doesn’t matter if you’re black or white, if you’re a boy or a girl.... it’s called the dance floor...’ The equality of the dance floor reinforces Dworkin’s equal concern and respect, and it is this consideration towards individuals that Dworkin advocates as how the work of the judiciary is to be understood, as his opposition to the amorality of positivism demonstrates. Positivists such as H.L.A. Hart place morality outside of the law’s boundaries. Hart’s concept of law has the legal system as a structure built out of rules.³⁴ If these rules are insufficient to decide a case, then a judge is permitted access to extra-legal considerations such as moral principles.³⁵ Dworkin, conversely, imbues the law with morality by identifying the legal system as a source of principles.³⁶ Use of these principles to prioritise one or the other of a case’s opposing

³⁰ Mandziuk (1993), p 171.

³¹ Madonna (2007) ‘Sorry (Remix)’ *The Confessions Tour*.

³² Akerland (2007), Chapter 11.

³³ Madonna (1990) ‘Vogue’ *I’m Breathless*.

³⁴ Dworkin (1977), 81.

³⁵ Dworkin (1977), p 81: ‘When a particular lawsuit cannot be brought under a clear rule of law...then the judge has, according to that theory [positivism], a ‘discretion’ to decide the case either way.’

³⁶ Dworkin (1977), p 22.

parties results in a theory that describes legal decisions as being made in terms of rights. Dworkin writes that ‘...even when no settled rule disposes of the case, one party may nevertheless have a right to win,’³⁷ and that, under this system:

‘...the supposed tension between judicial originality and institutional history is dissolved: judges must make fresh judgements about the rights of the parties who come before them, but these political rights reflect, rather than oppose, political decisions of the past.’³⁸

Madonna ‘pushes boundaries’ in regards to social normativity.³⁹ In matters of race and sexuality she operates on contested terrain. Dworkin’s theory of rights is animated on the terrain of contest: the courtroom. Madonna provokes controversy that is precipitated by the clash of the identities and beliefs of individuals, similar to the disagreement over personal entitlements within legal adversarial confrontation. Like Madonna’s enactment of social issues, rights are involved in matters of conflict. Dworkin’s rights-based approach justifies and explains judicial decision making by accounting for the operation of those ‘hard cases’ where existing legal rules provide no clear solution to the dispute at hand.⁴⁰ To say that judges in these situations look outside of the legal system for principles and make new law is to depict judges as legislators,⁴¹ and legislators deal, amongst other things, in policy.⁴² Policy entertains goals that benefit the collective rather than upholding the rights of individuals.⁴³ ‘Know your rights!’:⁴⁴ Dworkin offers two reasons as to why cases should instead be decided on the basis of rights using legal principles. First, judges have no way of

³⁷ Dworkin (1977), p 81.

³⁸ Dworkin (1977), p 87.

³⁹ Schwichtenberg (1993b), p 5.

⁴⁰ Dworkin (1977), p 81.

⁴¹ Dworkin (1977), p 82.

⁴² Dworkin (1977), p 82.

⁴³ Dworkin (1977), p 82.

⁴⁴ The Clash (1982) ‘Know Your Rights’ *Combat Rock*.

obtaining data that would allow them to determine what policy would be of greater benefit to the community.⁴⁵ Using rights to decide cases only requires consideration of the more practically comprehensible issue of the wellbeing of the individual parties to the case.⁴⁶ Also occurring on the register of the specific, of the individual and immediate, is romantic love, such as is detailed in Madonna's 'Future Lovers'.⁴⁷ Madonna repeats the line 'In the evidence of its brilliance.' Love and individuality are the only 'evidence' that are admissible; the only data that can be made sense out of and used as a basis for action. Those who act on love 'shine for eternity in a world that's free.' Madonna's future lovers thrive by living in the register of the individual and Dworkin's judges are able to decide cases by focusing on the parties that are directly before them.

The second reason to conceptualise legal decisions as a matter of rights is that, rather than effectively making law by introducing moral principles from outside the legal system (as per Hart's account of law), using rights to decide cases ensures that legal obligations are known ahead of time.⁴⁸ Madonna says 'Better the devil that you know, your love for me will grow,' in 'Like it or Not'.⁴⁹ This statement parallels the awareness of one's standpoint that is enabled by knowable rights.⁵⁰ 'Get Together's'⁵¹ proclamation that 'If it's bitter at the start, then it's sweeter in the end,' echoes the happy end of Dworkin's court cases, which conclude with the uncovering of a 'right answer' and the affirmation of the consistency and correctness of the legal system.⁵² Rights enable the right answer to be found,⁵³ and provides a full

⁴⁵ Dworkin (1977), pp 84-85.

⁴⁶ Dworkin (1977), p 85.

⁴⁷ Madonna (2005) 'Future Lovers' *Confessions on a Dance Floor*.

⁴⁸ Dworkin (1977), pp 84-85.

⁴⁹ Madonna (2005) 'Like It or Not' *Confessions on a Dance Floor*.

⁵⁰ Dworkin (1977), p 86.

⁵¹ Madonna (2005) 'Get Together' *Confessions on a Dance Floor*.

⁵² Dworkin (1977), p 279.

⁵³ Dworkin (1977), p 81.

explanation of the judicial function. Judges do not exercise complete discretion when the law offers no clear solution.⁵⁴ Instead, judges uncover pre-existing rights that may have gone unnoticed but which are structured by the institutional history of the law.⁵⁵

Although policies are often based upon vague rights, such generalisations can always be diminished in favour of more specific goals because abstract rights lack any weight that allows them to be ranked against competing interests.⁵⁶ Therefore, rights can be identified as those entitlements enjoyed by individuals that cannot be infringed upon even if doing so would benefit society as a whole.⁵⁷ Mandziuk emphasises that Madonna is steadfast in the pursuit of her interests.⁵⁸ She resists interference from others in the same way that rights withstand the interventions attempted by other interests. 'Express Yourself'⁵⁹ denigrates that which is not resilient: 'You don't need diamond rings or eighteen carat gold. Fancy cars that go very fast, you know they never last, no no.' Rights are validated by their strength, their worthiness borne out of subjection to the forces they are supposed to weather. Madonna too advocates exposing things to external pressures to determine their authenticity. On 'Into the Groove',⁶⁰ the dance floor is a proving ground: 'Get into the groove boy, you've got to prove your love for me,' and in 'Express Yourself',⁶¹ Madonna advises the listener 'Don't go for second best, baby, put your love to the test. You know, you know, you've got to make him express how he feels and baby then you'll know your love is real.' Expression, or articulation, point to specificity;

⁵⁴ Dworkin (1977), p 86.

⁵⁵ Dworkin (1977), p 87.

⁵⁶ Dworkin (1977), p 93.

⁵⁷ Dworkin (1977), p xi.

⁵⁸ Mandziuk (1993), p 167.

⁵⁹ Madonna (1989) 'Express Yourself' *Like a Prayer*.

⁶⁰ Madonna (1985) 'Into the Groove' *Like a Virgin*.

⁶¹ Madonna (1989) 'Express Yourself' *Like a Prayer*.

which is the quality that gives rights their strength. Rights have to be concentrated to be robust.

Dworkin asserts that, because of the ease at which vague rights can be infringed upon, people have no general right to liberty, but should enjoy protection for specific liberties.⁶² Madonna evidences the difference specificity makes in terms of rights. Madonna's version of the rock star is noticeably comprised of multiple activities, including singing, dance routines, and varied costuming. Similarly, a collection of specialised rights are the fragments that help constitute the legal self. Each of these rights is focused. Madonna's actions are comparably focused. For example, while numerous performers move as they sing, Madonna's movements are deliberate, choreographed, and precise. Taking Madonna's dancing as analogous to a right provides an example of how specific rights are asserted against the general will. Throughout The Confessions Tour concert, Madonna is accompanied by a troupe of dancers who accentuate Madonna's dancing and dramatise her songs through their physical performance. In the 'Urban Bedouin' segment of the Confessions Tour concert, Madonna leaves the stage and three dancers act out 'confessions' that are narrated through pre-recorded video displays.⁶³ The first, who recounts childhood abuse at the hands of his father, says, 'I dance to escape my troubles,' and claims that 'you can't rely on other people to make you happy.' The second dancer, who self-harms, explains that her actions were 'not to kill myself,' but that she 'did it so the physical pain could calm the pain that was eating me inside. Nothing was erased.' This pain 'exploded' out of her when she danced. The third dancer formerly belonged to a gang, and was pressured to commit homicide, but rejected the demands made of him, as he 'wasn't out to kill anybody.' The stories of these dances express

⁶² Dworkin (1977), p xiii.

⁶³ Akerland (2007), Chapter 5.

the relationship between individuals, others, and the protection and empowerment afforded by rights. The first dancer faces harmful intrusions from the other and the third dancer is threatened with damaging consequences resulting from coercion. The second dancer demonstrates that detrimental forces may be confronted through outwardly directed activity; gestures that communicate with others. Through a focused activity, in this instance, dance, the other is engaged with and their will is challenged. Confrontation with the other is also evident in 'Like It Or Not',⁶⁴ where Madonna sings 'You can call me a sinner, or you can call me a saint. Celebrate me for what I am, dislike me for what I ain't,' and that 'You can love me or leave me, 'cause I'm never gonna stop.' Madonna's 'love or leave' attitude is commensurate with the steadfast protection rights provide.

A system of rights safeguards the individual's pursuit of the life they wish to lead. As Dworkin states: '...[rights-based theories] presuppose and protect the value of individual thought and choice.'⁶⁵ Offering this protection is the raison of a system of rights. To reveal that this is so, Dworkin juxtaposes rights-based systems with other theories, such as Aristotelian political arrangements designed to channel it citizens towards a particular model of excellence. In contrast, systems of rights do not steer their subjects towards particular ends, but '...place the individual at the centre, and take his [sic] decision or conduct as of fundamental importance.'⁶⁶ In 'Cherish',⁶⁷ Madonna sings 'Don't underestimate my point of view,' conveying a view that is similarly oriented around individual discretion. Rights-based systems also share with 'Like It Or Not'⁶⁸ that they are not preoccupied with adherence to a moral standard. Madonna is uninfluenced by others; their views do not stymie her

⁶⁴ Madonna (2005) 'Like It or Not' *Confessions on a Dance Floor*.

⁶⁵ Dworkin (1977), p 172.

⁶⁶ Dworkin (1977), p 172.

⁶⁷ Madonna (1989) 'Cherish' *Like a Prayer*.

⁶⁸ Madonna (2005) 'Like It or Not' *Confessions on a Dance Floor*.

activities: ‘...I’m never gonna stop.’ The quote from ‘Like It Or Not’⁶⁹ shows that Madonna does not conceptualise her actions in terms of morality. Madonna is unfazed by the prospect of being labelled as a sinner or a saint. Such judgments are unimportant. What does matter to her is that she is able to continue to act as she wishes. Similarly, in comparing Kant’s duty-based theory to rights, Dworkin remarks that: ‘...the two types put the individual in a different light. Duty-based theories are concerned with the moral quality of his [sic] acts...’, whereas: ‘Right-based theories are, in contrast, concerned with the independence rather than the conformity of individual action.’⁷⁰ Madonna expresses independence when she asserts ‘love me or leave me,’ with moral controversy being acceptable for the sake of autonomy. Madonna’s music and presentation often incorporate less conventional elements of the culture, such as the ‘Equestrian’ segment of The Confessions Tour concert, which features dancing and costuming evocative of BDSM practices. Liberal rights protect an individual’s activities from infringement. As Dworkin explains: ‘It [government] must not constrain liberty on the ground that one citizen’s conception of the good life of one group is noble or superior to another’s.’⁷¹ This resistance to having one’s identity and way of life imposed from above is like the ubermensch’s ‘nay’ to the established values indiscriminately applied to all. Dworkin’s ‘discovery’ of rights as the true animator of law can be construed as an act of value creation; a redefinition of the meaning of things that, in Zarathustrian style, enables a person to convey their identity to society rather than the other way around. However, while meant to protect individuality, rights may actually be another tool of the mainstream, functioning to reinforce the consolidation of power. Dworkin’s legal system has a unified veneer. It promises certainty, presenting itself as always knowing, at least

⁶⁹ Madonna (2005) ‘Like It or Not’ *Confessions on a Dance Floor*.

⁷⁰ Dworkin (1977), p 172.

⁷¹ Dworkin (1977), p 273.

hypothetically, the right way to resolve a conflict.⁷² Even in the absence of express law, there exist rights that judges can draw upon to decide cases. Principles can be discovered in the law that were not previously known to exist.⁷³ However, as will be discussed in the following section, there is a possibility that this is an overly-optimistic explanation of judicial decision making that masks society's conflicts and conceals law's use of power.

II – Critical Legal Studies' Rebuke of Rights

Varied conclusions have been drawn about the significance of Madonna's work, and some of these appraisals do not cast Madonna as an empowering figure. For example, Mandziuk cautions against assuming that Madonna has advanced a feminist agenda simply because she is a financially successful woman.⁷⁴ Similar scepticism is found in critical legal scholars' analysis of rights, who have argued that rights are not necessarily helpful.⁷⁵ Critical legal scholar⁷⁶ Tushnet critiques rights in four ways.⁷⁷ First, Tushnet contends that rights are 'unstable' and make little sense when viewed outside of their social context.⁷⁸ Second, rights are indeterminate.⁷⁹ Contra to Dworkin, rights do not provide foreknowledge of how a case will be decided. Third, rights reify human 'experiences' that should not have to be phrased

⁷² Dworkin (1977), p 81; p 115.

⁷³ Dworkin (1977), p 116: 'Hercules must discover principles...'

⁷⁴ Mandziuk (1993), p 167.

⁷⁵ Price (1989), p 271.

⁷⁶ A 'direct descendant of [Legal] Realism': Tushnet (1984a), p 626, critical legal studies repudiates the foundations of law postulated by the legal academy's orthodoxy: Hutchinson and Monahan (1984), p 199. For example of such a critique, see Singer (1984). While the original CLS scholars have not engaged in extensive critique of Dworkin, commentators such as Altman (1986), Balkin (1987), and Litowitz (1994) have interrogated Dworkin and CLS in relation to each other.

⁷⁷ Tushnet (1984b), p 1363.

⁷⁸ Tushnet (1984b), p 1363, Price (1989), p 273, Hutchinson and Monahan (1984), p 206.

⁷⁹ Tushnet (1984b), pp 1363-1364, Kennedy (1973), p 363, Trubek (1984), p 578, Hutchinson and Monahan (1984), p 206.

in rights terms to be worthwhile.⁸⁰ Fourth, rights do not aid social reform.⁸¹ These criticisms will be examined sequentially and then analysed through Madonna.

Rights, Tushnet contends, are unstable because their coherence is dependent on the context in which they are understood.⁸² For example, Tushnet cites the unintelligibility of demanding the right to birth control in a society technologically incapable of effecting such a programme.⁸³ The contextual quality of rights is significant to subsequent critiques, including the claim of indeterminacy. Rights are indeterminate: any outcome might result from their invocation.⁸⁴ They are so unclearly defined that any agenda can be pursued in their name.⁸⁵ They provide equal support for conflicting standpoints.⁸⁶ In two specific ways; technically and fundamentally, rights are indeterminate.⁸⁷ Technical indeterminacy demonstrates that the mechanisms by which rights are operated can be made use of to either found or reject a rights-claim.⁸⁸ Tushnet notes three techniques belonging to rights discourse through which rights may be established or refuted.⁸⁹ First is the process of ‘balancing’ interests to arrive at a right.⁹⁰ This involves ‘either an ad hoc comparison of the interests at stake in a specific case or a comparison of the interests in a broadly defined category of cases.’⁹¹ The outcome of this process is indeterminate.⁹² To balance is to compare interests that do not share a standard by which they can be

⁸⁰ Tushnet (1984b), p 1364, Gabel and Kennedy (1984), p 26.

⁸¹ Tushnet (1984b), p 1364.

⁸² Tushnet (1984b), p 1364, Hutchinson and Monahan (1984), p 206.

⁸³ Tushnet (1984b), p 1364.

⁸⁴ Tushnet (1984b), pp 1363-1364, Tushnet (1980), p 1384, Price (1989), p 273.

⁸⁵ Tushnet (1984b), p 1371, Hutchinson and Monahan (1984), p 206, 211.

⁸⁶ Tushnet (1984b), p 1371.

⁸⁷ Tushnet (1984b), p 1371.

⁸⁸ Tushnet (1984b), p 1371, See also Hutchinson and Monahan (1984), p 206.

⁸⁹ Tushnet (1984b), p 1371.

⁹⁰ Tushnet (1984b), p 1371.

⁹¹ Tushnet (1984b), pp 1371-1372.

⁹² Tushnet (1984b), p 1372.

judged and prioritised, and there exists no way of selecting an appropriate standard.⁹³ Additionally, the interests that are to be balanced must be identified.⁹⁴ However, the repercussions of a decision are usually too vast to apprehend, making it difficult to ascertain which interests will be impacted upon by a legal decision.⁹⁵ Moreover, balancing can be used to make interests seem more or less important by linking the interests to ‘abstract values’.⁹⁶ Overall, then, the balancing process allows for control over the acceptance or rejection of a putative right by facilitating discretion as to the right’s ‘...necessary measure of value, the necessary consequences, and the necessary level of generality.’⁹⁷ The indeterminacy of rights is further exposed in a second technical feature. Multiple established rights may overlap and conflict with each other.⁹⁸ In such cases, judges freely select from an assortment of possible rights to define the parameters of the legal dispute.⁹⁹ Third, the interpretation and application of rights is carried out in reference to a context, or ‘background’ of legal understanding (for example, other laws).¹⁰⁰ Different parts of the law can be emphasised, creating different backgrounds for interpretation.¹⁰¹

As well as the indeterminacies arising out of these technicalities, rights are fundamentally indeterminate due to their abstractness.¹⁰² Rights discourse asserts undeniably worthy abstractions,¹⁰³ such as Dworkin’s ‘equal concern and respect’. This unimpeachable quality is lost, however, when the implementation of a right is

⁹³ Tushnet (1984b), p 1372.

⁹⁴ Tushnet (1984b), p 1372.

⁹⁵ Tushnet (1984b), p 1372.

⁹⁶ Tushnet (1984b), p 1372.

⁹⁷ Tushnet (1984b), p 1373.

⁹⁸ Tushnet (1984b), p 1373, Singer (1984), p 15, and Trubek (1984), p 578.

⁹⁹ Tushnet (1984b), p 1373, Singer (1984), p 15.

¹⁰⁰ Tushnet (1984b), pp 1373-1374.

¹⁰¹ Tushnet (1984b), p 1374.

¹⁰² Tushnet (1984b), p 1375.

¹⁰³ Tushnet (1984b), p 1375.

discussed.¹⁰⁴ The generality of a right hides divergent assumptions as to its meaning,¹⁰⁵ and gaining recognition for an abstract term may not affect material conditions in the way hoped for by the term's proponent.¹⁰⁶ The third critique of rights is that they reify human activities and ordeals, abstracting and narrowing them into rights. This process ignores what people have gone through and the meaning of these individual experiences, making rights unhelpful in dealing with material human issues.¹⁰⁷ Fourth and finally, rights are not useful for changing social conditions. Any influential deed is so because it has political currency within the culture in which it is performed, not because it is linked to some right.¹⁰⁸ As well as being of no help, rights may even be a hindrance to reform.¹⁰⁹ One of the ways in which this is so: rights are traditionally classified as either negative, if they offer protection, or positive, if they provide entitlements.¹¹⁰ According to Tushnet: 'In our culture, the fear of being crushed by others so dominates the desire for sociality that our body of rights consists largely of negative ones.'¹¹¹ The predominately negative character of rights means they can be used to prevent measures that would correct substantive inequalities.

The instability critique displays the contextual dependency of rights. Part of the concrete setting for rights discourse is the uneven distribution of resources in society. Because of their indeterminacy, different interpretations of rights can be argued for. The interpretations favoured by law may be those asserted by the wealthy

¹⁰⁴ Tushnet (1984b), p 1375, Singer (1984), p 18. Additionally, see Tushnet (1981), pp 1212-1213 on the difficulty of implementing Dworkin's theory due to its abstractness.

¹⁰⁵ Singer (1984), p 18.

¹⁰⁶ Tushnet (1984b), p 1375.

¹⁰⁷ Tushnet (1984b), pp 1382-1383, Gabel and Kennedy (1984), p 26.

¹⁰⁸ Tushnet (1984b), p 1371.

¹⁰⁹ Gabel and Kennedy (1984), pp 32-33.

¹¹⁰ Tushnet (1984b), p 1382.

¹¹¹ Tushnet (1984b), p 1392. See also Singer (1984), pp 69-70.

and influential, for, as Tushnet points out, economic and social capital make rights-claims useful:

‘Even more generally, because rights have a social context, their realization as a fact of social life rather than their mere recognition in political and legal rhetoric requires that right-holders have the material and psychological resources that will allow them to exercise their rights.’¹¹²

Tushnet’s critiques expose the unequal efficacy of rights that is cloaked beneath their abstractness.¹¹³ Legal liberal creations such as rights are more likely to be of use to elites.¹¹⁴ The appeal of Madonna’s project of self-creation is made attractive in part by her considerable success and influence, which can be traced to multiple sources. First is her material wealth. Henderson remarks that the apparatus necessary for Madonna to carry out her ventures includes ‘personal trainers’, ‘bodyguards’, and ‘camera crews’.¹¹⁵ Madonna’s stage attire on The Confessions Tour, designed by Jean Paul Gaultier,¹¹⁶ suggests a wealth and privilege that helps in having one’s desires realised. According to Tetzlaff, Madonna is an attractive figure to the disenfranchised, who are enticed by the regalia of wealth displayed by Madonna and made hopeful that such avenues of empowerment are open to them.¹¹⁷ While it appears that Madonna provides a method for the oppressed to resist majority opinions as to how they should conduct themselves, the method of empowerment that Madonna advocates takes place within the economic framework responsible for

¹¹² Tushnet (1984b), p 1380.

¹¹³ See also Hutchinson and Monahan (1984), p 210.

¹¹⁴ Hutchinson and Monahan (1984), p 209.

¹¹⁵ Henderson (1993), p 123.

¹¹⁶ Gaultier is listed as ‘Costume Designer’ on page 1 of the booklet that is included with the *The Confessions Tour* DVD: Akerland (2007).

¹¹⁷ Tetzlaff (1993), p 260.

the oppression of the powerless in the first place.¹¹⁸ Even though Madonna may inspire the marginalised that number amongst her audience, it is unlikely that this feeling of empowerment will provide an effective method for improving their situation.¹¹⁹ Individuality and competitiveness, found in systems of rights and in Madonna's world, are not values, it is argued, that will help the disadvantaged.¹²⁰ The second source of Madonna's influence is the currency afforded by the potency of her image. O'Brien describes Madonna as a 'quasi-religious icon'¹²¹ that 'we have all created'.¹²² The label of 'icon' is affirmed by the rehearsal footage of The Confessions Tour, where several people involved in the production indicate their desire to please Madonna due to her iconic status.¹²³ Madonna's vision for herself and her art (the two are intertwined, as has been stated) is manifested using substantial resources and influence. Here, Madonna recalls the Nietzschean connection between art and one's interpretation of the world. Her example demonstrates that the interpretations of rights propounded by the materially powerful are more likely to be realised in the concrete world than are the than those of the less affluent. It is as Madonna famously remarked: 'We are living in a material world,'¹²⁴ and Madonna, with the clout to impose her subjectivity on the concrete, is a material girl. The abstract nature of rights does not make them impervious to the workings of the material world. According to the reification critique, this abstractness does, however, serve to move rights discourse away from humanity.

Through rights, information about the subjective experiences of humanity cannot be communicated, preventing those making rights-claims from connecting

¹¹⁸ Tetzlaff (1993), p 260.

¹¹⁹ Tetzlaff (1993), p 262.

¹²⁰ Tetzlaff (1993), p 262.

¹²¹ O'Brien (2008), p xvii.

¹²² O'Brien (2008), p xvii.

¹²³ Akerland (2007), 'Bonus Material', Chapter 1.

¹²⁴ Madonna (1984) 'Material Girl' *Like a Virgin*.

with others. The way that rights take subjectivities and phrase them in terms of an abstract language that erodes their uniqueness has similarities to Madonna's appropriation and mainstream use of sub-cultural identities (for example, through the song 'Vogue',¹²⁵ and its video,¹²⁶ Madonna introduced into the public the 'voguing' dance originally practiced by gay African-American men¹²⁷). Patton draws attention to the paradoxical nature of using mainstream acknowledgement to make political gains for same-sex activism.¹²⁸ In tension are the gay aversion to essentialising and the recognition of a gay 'identity' that is necessary to make rights-style arguments, a format of discourse that might exclude local and unique conceptions of self.¹²⁹ Likewise, Madonna draws upon minority cultural practices and, in exhibiting them in the mainstream, risks severing these cultures from their origins,¹³⁰ bolstering the critical legal studies argument that rights, in their reification, abstract away from the details of the human and the social, isolating individuals and occluding the importance of the political.

In the final critical legal studies critique to be examined through Madonna, the isolation of individuality is further explored as a hindrance to concrete reform. The desire for individuality and the fear of the other cause a reliance on negative rights. These impulses also prevent the creation of entitlements for others that may help to improve concrete circumstances. Like the negative freedoms that maintain the integrity of the rights-bearing self against others, Madonna asserts her singularity in relation to the people that surround her. She emerges from inside the oversized disco ball that appears at the beginning of the Confessions Tour concert, symbolising

¹²⁵ Madonna (1990) 'Vogue' *I'm Breathless*.

¹²⁶ Fincher (1990) *Madonna, Vogue*.

¹²⁷ Patton (1993), pp 83-86.

¹²⁸ Patton (1993), p 87.

¹²⁹ Patton (1993), p 87.

¹³⁰ Patton (1993), p 83.

her position as an individual set apart from the many points of light that reflect outwards from her position. While there are times during The Confessions Tour performance when the backing dancers move independently of Madonna, they mostly appear as a group behind her, performing a choreographed and synchronised routine that accentuates Madonna's own movements. In performing Madonna's songs, the musicians on the tour are subject to the same collectivising pressures. During rehearsals, Madonna instructs her backup singers to improve the precision of singing and better harmonise with Madonna's voice. Madonna tells them 'You have to be really with me, otherwise it's not gonna work.'¹³¹ In the song 'Music',¹³² Madonna sings that 'Music makes the people come together,' as well as claiming that 'Music makes the bourgeoisie and the rebel,' which is evocative of her musical output as a kind of categorising or collectivising force. Madonna transforms her audience into a collective.¹³³ In the beginning of The Confessions Tour concert, pre-recorded footage of Madonna appears on large screens. Speaking along with the opening lines from 'Future Lovers',¹³⁴ Madonna asks the audience to leave behind their identities: 'Let's forget your life. Forget your problems: administration, bills, and loans. Come with me.'¹³⁵ In forgetting the details of their lives, the people who constitute the audience lose their individuality. Unlike even the narrated dancers in the 'Urban Bedouin' section of the concert, the audience comes to the dance floor not as a way of pursuing their own goals, but as witnesses to Madonna's performance. In passing, it can be mentioned that Madonna's spoken introduction provides another glimpse of the reifying effects of rights, showcasing how they

¹³¹ Akerland (2007), *Madonna The Confessions Tour*, 'Je Suis L'Art', Chapter 1.

¹³² Madonna (2000) 'Music' *Music*.

¹³³ Emphasising the collectivity that Madonna inspires in others, O'Brien (2008), p xvii writes that '...she commands a kind of mass worship.'

¹³⁴ Madonna (2005) 'Future Lovers' *Confessions on a Dance Floor*.

¹³⁵ Akerland (2007), Chapter 1.

might expunge concrete human experiences. Mainly, though, Madonna's relationship to the audience in this moment is an animation of the ways in which rights can hamper the empowerment of others and the improvement of social conditions. Madonna desires autonomy, as evidenced in 'Like It Or Not'¹³⁶ where she sings 'Cleopatra had her way, Matahari too. Whether they were good or bad is strictly up to you'. For Madonna to have her way, she must ensure that her freedom is not compromised. Those who do not like what she does must not be able to curtail her work: 'This is who I am, you can like it or not...' Just as Madonna instructs her audience to forget their lives, positive rights are deemphasised so as not to crowd out negative freedom. This lack of empowerment for others stymies social change.

Likewise, Madonna's project may not improve social structures, as suggested by some cultural studies scholars. According to Mandziuk, Madonna reinforces patriarchal expectations of the feminine by focusing on beautifying herself rather than pursuing political action to address social plights.¹³⁷ Tetzlaff also argues that Madonna's work does little to redress social inequalities. As she seeks to be free of any restrictions that might impinge of her creation of self, Madonna's expressions of solidarity with subcultures are only ever temporary, and are used to rejuvenate interest in her music.¹³⁸ Again, freedom trumps the empowerment of others. Madonna remains loyal to mainstream value structures because she maintains no permanent ties to subcultural groups.¹³⁹ In support of the argument that Madonna perpetuates existing structures of domination, Tetzlaff claims that Madonna is perceived as a positive role model when viewed through a framework that places value on mainstream understandings of success. Given that, to Tetzlaff, Madonna's

¹³⁶ Madonna (2005) 'Like It or Not' *Confessions on a Dance Floor*.

¹³⁷ Mandziuk (1993), p 184.

¹³⁸ Tetzlaff (1993), p 259.

¹³⁹ Tetzlaff (1993), p 259.

performances are unremarkable in their content, Madonna's popularity must arise from her audience's postmodern approach to reading texts.¹⁴⁰ The imagery adopted by Madonna is deprived of its original social connotations, leaving meaning to be found elsewhere, such as economic measurements of popularity which are often equated with artistic merit.¹⁴¹ While Madonna may offer resistance to traditional moral values, she adheres readily to economic convention and structures that maintain inequalities.¹⁴² Economically, she expresses the idea that individuals must pursue their own interests regardless of the others' needs.¹⁴³ While Madonna's seductive behaviour can be read as empowering to women, it is also designed to please male viewers in a display of the patriarchal feminine.¹⁴⁴ Madonna plays to the desires of the patriarchy while allowing her to amass wealth and retain control over her image.¹⁴⁵ This compromise might be detrimental to women's efforts at making political gains.¹⁴⁶ Helped by her prosperity, Madonna is able to realise her art while social conventions sustain her privilege and prevent intrusions upon her work. Rights may appear to enfranchise while remaining, on the inside, mechanisms of domination. Madonna's freedoms may not be the source of her power, but only protect it, accentuating that rights usual only maintain the standing of the already privileged, neglecting others in the process. It is the perspective that the less privileged have on rights that is now investigated.

¹⁴⁰ Tetzlaff (1993), p 248.

¹⁴¹ Tetzlaff (1993), p 248.

¹⁴² Tetzlaff (1993), p 249.

¹⁴³ Tetzlaff (1993), p 249.

¹⁴⁴ Tetzlaff (1993), p 252.

¹⁴⁵ Tetzlaff (1993), p 253.

¹⁴⁶ Tetzlaff (1993), p 254.

III – Rights, Feminism, and Critical Race Theory

Peter Goodrich argues that a number of critical legal studies scholars are themselves elites.¹⁴⁷ Due to their privileged station, these scholars, who offer negative evaluations of rights such as the critiques arrayed above, may not notice the benefits that rights afford. It is possible that their critiques fail to present a balanced portrayal of rights. Conversely, people occupying more disadvantageous positions in society have demonstrated that rights are in fact a complex proposition. Marginalised people have acknowledged both the contribution of rights in maintaining the status quo and rights' possible usefulness in counteracting social inequities. This section examines discussion on rights from feminist and racial perspectives to highlight both the flaws and helpful features of rights. A feminist appraisal of rights is detailed first.

Schwartzman examines MacKinnon's feminist critique of Dworkin's system of rights and draws out its implications. Schwartzman remarks upon the possibility of rights both as a format through which to voice female equality and as a way of reinforcing existing distributions of power.¹⁴⁸ Schwartzman describes some of the negative effects that rights have upon women, citing MacKinnon and Andrea Dworkin's argument that the oppressive use of power by a societally dominant force is called an exercise of rights,¹⁴⁹ while opposition to equality is justified on the basis

¹⁴⁷ Goodrich (1993), p 398. Also, White (1984), pp 670-672.

¹⁴⁸ Schwartzman (1999), p 26. The observation that liberalism has a 'double-edged potential to help and harm women': Brennan (2008), p 220 is affirmed by the differing stances within feminism as to liberalism's usefulness. Olsen (1984), pp 392-401 sets out some of these contrasting views in relation to particular features of rights discourse. To briefly illustrate that liberalism encompasses negative and positive qualities: Kensinger (1997) argues that classifications such as liberalism are unable to fully accommodate or help understand feminist projects. Kiss (1996) acknowledges criticisms of rights discourse while finding such reproaches overstate rights' flaws. Nussbaum argues in favour of liberalism, while pointing out shortcomings in the way it is currently understood in relation to women: Nussbaum (1999) and Nussbaum (2000). Watson (2010) argues that while certain implementations of liberalism are deeply flawed, liberalism generally can be complimented by a feminist methodology, because, as Hartley and Watson (2010), p2 argue, liberalism's essential values should screen out interpretations that do not require an attentiveness to women's actual circumstances.

¹⁴⁹ MacKinnon (1993), p 14.

that an alteration of societal structures would infringe upon rights.¹⁵⁰ Rights are enjoyed by the powerful, and those without power are not aided by rights. From MacKinnon's work, Schwartzman extracts three critiques of Ronald Dworkin's liberal conception of rights: first, that rights are asserted against the majority, second, that rights attach to individuals, and third, that rights are separate from goals.¹⁵¹ These critiques will be discussed.

The first critique takes issue with Dworkin's liberal understanding that rights function to protect individuals from government, the embodiment of the majority.¹⁵² As well as government, there are other social conduits for power through which oppression is committed.¹⁵³ Other forms of interaction that are configured to oppress may collude with government, but are 'not entirely dependent on or derivative from it.'¹⁵⁴ The view of government as the only agent of disempowerment is the vantage of those not subject to oppression.¹⁵⁵ Outside the realm of government, power runs through '...relations of class, race, and gender hierarchy...' that a theory such as Dworkin's, with its focus on 'policies and procedures,' ignores.¹⁵⁶ Rights are needed that safeguard people from oppression regardless of the oppression's source.¹⁵⁷ A theory of rights that promises 'equal concern and respect' is incomplete if it does not target inequalities in all areas.¹⁵⁸ The rights currently available to people have been formed in the image of the affluent white male and offer little help in regards to the problems suffered by people in other situations.¹⁵⁹ A further problem with defining

¹⁵⁰ Schwartzman (1999), p 26.

¹⁵¹ Schwartzman (1999), p 27.

¹⁵² Schwartzman (1999), p 32.

¹⁵³ Schwartzman (1999), p 32. For example, MacKinnon (1993), pp 13-14.

¹⁵⁴ Schwartzman (1999), p 32, Okin (1994), pp 41-42, Bottomley, Gibson, and Meteyard (1987), p 52.

¹⁵⁵ Schwartzman (1999), p 33.

¹⁵⁶ Schwartzman (1999), p 33.

¹⁵⁷ Schwartzman (1999), p 33.

¹⁵⁸ Schwartzman (1999), p 34, Langton (1990), p 312.

¹⁵⁹ Schwartzman (1999), p 34, MacKinnon (1991b), p 1281, MacKinnon (1993), p 19, Olsen (1984), p 398.

rights in opposition to government is that this understanding proceeds from the mistaken assumption that absence of government intervention is all that is needed to ensure equality.¹⁶⁰ This focus on negative freedoms disowns the responsibility and capacity government has to aid in not only keeping people free from encumbrances but to take initiative in empowering them.¹⁶¹ Lastly, as well as being insufficiently helpful in rectifying inequality, negative rights can also be harmful.¹⁶² Negative rights prevent a person's activities from being curtailed, allowing the powerful to enjoy the full exercise of their power and ensuring the subjugation of others.¹⁶³

The second critique is of rights as the entitlement of individuals.¹⁶⁴ Associating rights with individuals means that the only harms that rights are attentive to are those that are limited to a single person, not those that affect a group of individuals.¹⁶⁵ For example, pornography goes mostly undetected as a harm by the individualistic rights system, as pornography is damaging to women generally rather than a specific woman.¹⁶⁶ Focusing on individuals neglects the injury that people can experience as from their belonging to a particular group;¹⁶⁷ Schwartzman writes that '...the harms women suffer are not reducible to the sum of the harms each individual woman suffers...'¹⁶⁸ Rights are needed that are able to identify this collective suffering.

¹⁶⁰ Schwartzman (1999), pp 34-35, Qureshi (2012).

¹⁶¹ Schwartzman (1999), p 34, Minow and Shanley (1996), pp 5-6.

¹⁶² Schwartzman (1999), p 35.

¹⁶³ Schwartzman (1999), p 35. However, Olsen (1984), p 393 and Bottomley, Gibson, and Meteyard (1987), p 52 also write of the dilemma whereby legal protection risks bringing 'state domination' along with it.

¹⁶⁴ Schwartzman (1999), pp 36-37.

¹⁶⁵ Schwartzman (1999), p 37.

¹⁶⁶ Schwartzman (1999), p 37. MacKinnon (1991a), p 795, Olsen (1984), p 387.

¹⁶⁷ MacKinnon (1991b), p 1301.

¹⁶⁸ Schwartzman (1999), p 37.

The third and final critique argues that Dworkin's anti-utilitarian system deprives rights of the ability to improve society.¹⁶⁹ Without goals, which require change in order to attain, rights are mere crystallisations of existing entitlements, products of unsatisfactory societal arrangements.¹⁷⁰ In making rights descriptive rather than holding 'equality' out as a goal, Dworkin keeps to the mistaken view that the state of affairs in society is one where liberal rights are equally effective for all citizens.¹⁷¹ The neutral detachment that liberal rights associate with equality sustains the disadvantaged position occupied by women.¹⁷² In order to be successful, the attempt to correct inequality must be made a goal.¹⁷³ If equality is not focused on in this way, then all rights become a vehicle for the use of power to oppress.¹⁷⁴

The above critiques have highlighted that, in prioritising individuality and freedom, rights have inadequately empowered women and protected them from injury. For MacKinnon and Schwartzman, pornography is a focal subject for the application of the above critiques,¹⁷⁵ with Schwartzman calling it a 'sexist harm'.¹⁷⁶ In this matter, the aforementioned critiques find the law wanting. Ronald Dworkin has written that pornography cannot be regulated against.¹⁷⁷ Rights, as they are presently conceptualised, are incapable of regulating against pornography as they value the preservation of individual freedoms over the furthering of social goals. To some extent, Madonna enacts the same priorities as are found in these rights. Pornography is a focal matter in some feminist appraisals of rights and charges of exploitative, pornographic behaviour are often central to accusations that Madonna is

¹⁶⁹ Schwartzman (1999), p 40.

¹⁷⁰ Schwartzman (1999), p 40.

¹⁷¹ Schwartzman (1999), p 40.

¹⁷² Schwartzman (1999), p 40. MacKinnon (1982), p 516 writes that '...social arrangements of patterned disparity can be internally rational yet unjust.'

¹⁷³ Schwartzman (1999), p 40.

¹⁷⁴ Schwartzman (1999), p 40.

¹⁷⁵ MacKinnon (1989), p 315, Bottomley, Gibson, and Meteyard (1987), p 52.

¹⁷⁶ Schwartzman (1999), p 37.

¹⁷⁷ Dworkin (1981).

anti-feminist. Among other scandals, Madonna attracted controversy over the video for her song 'Justify My Love'¹⁷⁸ and over her *Sex*¹⁷⁹ book which contained sexual photography of Madonna. Madonna defended her endeavours on the basis of freedom of expression, echoing the privileging of personal freedoms in rights discourse as pointed out in the first and third of the above critiques. Madonna also maintained that no harm was inflicted as a result of her exposing herself in a sexual fashion because personal choice motivated her displays.¹⁸⁰ This argument evinces the notion of injury as something that can only be inflicted upon an individual rather than on a group, as identified above in the second critique of rights. In explaining her work, Madonna adduces the empowerment that her endeavours bring her. However, Madonna's work does not necessarily empower others. Nor do rights usefully facilitate the efforts of the powerless. The comparison between rights and Madonna here exposes that while rights are phrased in terms of beneficence, this benefit is not generally accessible. The image of the empowered individual may not provide the resources necessary for the empowerment of the group, even if it is often read as such. Madonna's success arises from her commensurability with dominant social values such as capitalism and patriarchy and enabled by the freedoms she lays claim to. Her freedoms allow Madonna to exercise her power, but they do not grant it. In their current formulation, rights help the dominant in society exercising their privilege and do not imbue the disadvantaged with any resources. Subsequently at issue is how rights and their relationship to the social structure should be addressed.

Schwartzman contemplates whether, in following on from the critiques it has established, feminism should reject or employ rights. Making a determination on the usefulness of rights involves ascertaining whether they are innately disposed towards

¹⁷⁸ Mondino (1990) *Madonna, Justify My Love*.

¹⁷⁹ Madonna (1992) *Sex*.

¹⁸⁰ Mandziuk (1993), p 171.

maintaining inequality.¹⁸¹ Because of the liberal framework in which they are currently expressed, to utilise rights is to reinforce ingrained power relationships.¹⁸² The freedom provided by liberal rights is unhelpful in rectifying social disparities when the actions of the dominant group, actions facilitated by rights, are what lead to oppression.¹⁸³ It appears, therefore, that negative rights such as freedom of speech do not advance feminism.¹⁸⁴ In spite of the hindrance posed by rights such as those conceived of by Dworkin, rights which have been indifferent to power and oppression, Schwartzman concludes that an alternatively formulated system of rights might help foster equality.¹⁸⁵ This system would have to detail real world oppressions, as Schwartzman makes clear:

To change a system in which certain groups of people already have powers and freedoms that are—at least in practice—unavailable to others, an alternative theory of rights would have to include an analysis of who has power over whom, and it would have to concern itself with attempting to remedy these inequalities through changing society's institutions, practices, and structures of power.¹⁸⁶

A system of rights that addresses inequalities must 'specify concretely the needs and interests of groups of oppressed people.'¹⁸⁷ While Dworkin argues that the rights provided for by his theory are specific, such abstract and universally applied rights are not an effective means of empowerment for the downtrodden. New, more specialised rights are required. The possibility of giving expression to the needs of various 'others' in society indicates that, despite its flaws, the rights-based system

¹⁸¹ Schwartzman (1999), p 42.

¹⁸² Schwartzman (1999), p 27.

¹⁸³ Schwartzman (1999), p 42.

¹⁸⁴ Schwartzman (1999), p 42.

¹⁸⁵ Schwartzman (1999), p 43.

¹⁸⁶ Schwartzman (1999), p 43.

¹⁸⁷ Schwartzman (1999), p 43.

need not be discarded. Despite aspects of Madonna's performativity being harmonious with the status quo, she remains an inspiring figure. Madonna represents the possibility of defence against the harms inflicted by the world and the recognition of one's equality. Rights offer to perform these functions, making them a continuing source of hope for acknowledgement and respect.

From a critical race perspective,¹⁸⁸ Williams takes issue with wholly dismissive attitudes towards rights, drawing attention to the complex mixture of oppression and recognition¹⁸⁹ that rights offer:

'I by no means want to idealize the importance of rights in a legal system in which rights are so often selectively invoked to draw boundaries, to isolate, and to limit. At the same time, it is very hard to watch the idealistic or symbolic importance of rights being diminished with reference to the disenfranchised, who experience and express their disempowerment as nothing more or less than the denial of rights.'¹⁹⁰

A blend of positive and negative elements is present in Madonna's work, which has been interpreted by some as reinforcing harmful attitudes of dominant groups, and by others as progressive and emancipatory. Scott discusses some of these contrasting readings of Madonna in relation to her 'Like a Prayer'¹⁹¹ video, which depicts an African American man being wrongly arrested for a murder witnessed by Madonna's character. Madonna dreams of meeting an African American saint and

¹⁸⁸ Mirza (1999) p 113: 'C.R.T. [critical race theory] scholars disagreed profoundly with the C.L.S. [critical legal studies] critique that reliance on rights led to the legitimisation of existing inequalities...' Dalton (1987), p 440 calls the critical legal studies attitude towards rights one of 'the most significant theoretical divides' separating the two groups. Cook (1990) p 992 states that: '...CLS' theoretical deconstruction of liberalism fails to explain – or even ask – why subordinated individuals, those most disadvantaged by hierarchies of wealth and power, place such faith in the liberal state.' Rights' enduring desirability in spite of critique will now begin to be examined.

¹⁸⁹ Similarly, Matsuda (1987), p 333 writes: 'The dissonance of combining deep criticism of law with an aspirational vision of law is part of the experience of people of color.'

¹⁹⁰ Williams (1987), p 405.

¹⁹¹ Lambert (1989) *Madonna, Like a Prayer*.

then helps ensure the release of the innocent man from incarceration. This video was controversial in the white mainstream. Scott argues that, nonetheless, the thematic content of the video was accepted by a lot of African Americans and that Madonna presents positive aspects of African America and calls attention to the detrimental effects of racism.¹⁹² The positive qualities of Madonna's work have a beneficial effect. Rights, too, can be helpful.

Williams maintains that, despite the criticism raised by some legal scholars, rights can be used to advance the interests of minorities.¹⁹³ Madonna's ability to create her identity remains attractive to her audience even if they have not enjoyed similar opportunities to do so. For example, Pisters maintains that Madonna is not envied by her female audience, but is perceived as an empowering ally, or a 'girlfriend'.¹⁹⁴ As a lot of Madonna's fans are heterosexual females, Tetzlaff argues that her audience does not view Madonna solely as an object to possess, but as a person worthy of their attention.¹⁹⁵ Hawkins says that Madonna's music not only defines Madonna's desires but influences the desires of her audience,¹⁹⁶ highlighting the attractiveness of Madonna's pursuit of selfhood. Supporting the claim that the audience seeks to emulate Madonna in her assertion of self, some studies define Madonna's audience as being populated by 'wannabes'.¹⁹⁷ Madonna's fans aspire to Madonna's autonomy and effectiveness. For the marginalised, the rights that the privileged are seen to enjoy exude the possibility of equality and respect.

¹⁹² Scott (1993), p 57; p 60.

¹⁹³ Williams (1987), p 405.

¹⁹⁴ Pisters (2004), p 23.

¹⁹⁵ Tetzlaff (1993), p 242.

¹⁹⁶ Hawkins (2004), p 3.

¹⁹⁷ Pisters (2004), p 24.

Rights imbue their bearer with benefits that may go unappreciated by the privileged.¹⁹⁸ Williams contrasts her interpretation of formal legal structures with attitudes of the dominant group. While the privileged may attempt to eschew formality, believing it obstructs the interpersonal¹⁹⁹ to Williams, formality provides for the explicit acknowledgement of one's humanity.²⁰⁰ Rights are formal structures that allow the oppressed to create selves that are distanced from assumptions about their inferiority that exist at the informal level.²⁰¹ This control over the structuring of one's identity is often cited by fans of Madonna as a primary reason for their attraction to her music. For example, one fan said of Madonna: 'She's not just sexy... she's what she wants to be.'²⁰² Structuring one's identity through formal legal relationships allows people to set out in clear terms how they wish to be treated.²⁰³

Control over identity is identified by Henderson as a quality that Madonna's gay and lesbian followers also perceive as congruent with their own aspirations. Madonna's often controversial behaviour is akin to way in which gay and lesbian people seek the freedom to define themselves without being sanctioned by the dominant culture.²⁰⁴ The way in which Madonna conveys her sense of self through image finds a parallel with the methods that gay and lesbian people use to communicate their identity to the mainstream.²⁰⁵ In 'Hung Up',²⁰⁶ Madonna sings 'Time goes by so slowly for those who wait,' and 'I'm fed up, I'm tired of waiting on you,' expressing her desire to be responsible for the acquisition of the things she

¹⁹⁸ Crenshaw (1988), p 1365.

¹⁹⁹ Delgado (1987), p 306, Mirza (1999), p 117.

²⁰⁰ Williams (1987), p 406, Sparer (1984), p 514, Barnes (1990), p 1868.

²⁰¹ Williams (1987), p 407.

²⁰² Schulze, White, and Brown (1993), p 15.

²⁰³ Williams (1987), p 407.

²⁰⁴ Henderson (1993), p 112.

²⁰⁵ Henderson (1993), p 109.

²⁰⁶ Madonna (2005) 'Hung Up' *Confessions on a Dance Floor*.

wants rather than being dependent on others. Reinforcing that these assertions are appealing to her audience, Tetzlaff describes Madonna as having ‘legions of fans’.²⁰⁷ According to Tetzlaff, Madonna’s continued and widespread popularity is not generated by the qualities of her music or the values she supposedly represents, but arises from her ability to retain the attention of popular media.²⁰⁸ The metatextual narrative of power through which the audience views Madonna explains why she is admired. This narrative exists outside of Madonna’s music and videos and describes the way in which Madonna, through her career as a popular musician, has obtained attention, material resources, and self-sufficiency.²⁰⁹ Madonna’s power to reshape her image and control how she is seen by her audience is the main narrative by which she is understood. The trope of ‘manipulation’ informs how Madonna is conceptualised both by those who argue for and against the helpfulness of Madonna’s work.²¹⁰ The primary concept utilised by audiences in understanding and interpreting Madonna’s work is the way in which she has developed and managed her career as a popular figure.²¹¹ Reflecting the conflicting opinions on the effect of rights between critical legal scholars such as Tushnet and the argument of Williams, Tetzlaff explains that those who portray Madonna negatively emphasise her desire for power over her audience, while those who see Madonna’s work in a positive light contend that the way she uses the media to further a project of self is evidence of autonomous and strong-minded behaviour.²¹² Madonna is listened to by others, an experience that is desirable to those ignored by the dominant culture. Madonna’s self-centred efforts are viewed positively by her fans. Even though Madonna obtains

²⁰⁷ Tetzlaff (1993), p 239.

²⁰⁸ Tetzlaff (1993), pp 240-241.

²⁰⁹ Tetzlaff (1993), p 243.

²¹⁰ Tetzlaff (1993), p 243.

²¹¹ Tetzlaff (1993), p 243.

²¹² Tetzlaff (1993), p 243.

influence through the commodification of her personal and sexual experiences, her transgression of moral standards is always placed in a performative context and presented as a way of developing as a person rather than as an aggressive or combative mission.²¹³ Madonna's supposedly ironic use of the patriarchal feminine is used to demonstrate Madonna's control over her image, her ability to create and discard facades at will.²¹⁴ Madonna's audience perceives her as a 'heroine of self-actualization, and believe that Madonna's material wealth and influence over others are tools by which she can realise herself and make this self known to others.'²¹⁵ Using rights to construct a self that renders the marginalised visible is a step towards equality.

Critical legal scholars advocate the disassembly of rights in the belief that doing so would allow minorities to discuss their needs in language that does not produce unequal power relationships.²¹⁶ This view ignores that minorities lack a construction of self that is recognised by the majority.²¹⁷ Without an identity that affords respect, the shift to informality would leave minorities open to even more discretionary and discriminatory forces with no way of phrasing their concerns that would be heard by the powerful.²¹⁸ This necessary combination of self-expression and respect is identified by Madonna in 'Express Yourself',²¹⁹ where she encourages the listener to 'express yourself' and 'respect yourself'. Without rights, the only argument that minorities would be able to make would be that they should be helped because they have no rights, and this argument would have no legal standing.²²⁰

²¹³ Tetzlaff (1993), p 245.

²¹⁴ Tetzlaff (1993), p 246.

²¹⁵ Tetzlaff (1993), p 246.

²¹⁶ Williams (1987), p 408, Mirza (1999), p 117.

²¹⁷ Williams (1987), p 408, Crenshaw (1988), p 1357.

²¹⁸ Williams (1987), p 409, Mirza (1999), pp 117-118, Delgado (1987), p 315, Crenshaw (1988), p 1368.

²¹⁹ Madonna (1989) 'Express Yourself' *Like a Prayer*.

²²⁰ Williams (1987), p 422.

Even though the distinct categories of formal rights constrict thought, they enable minorities to speak in terms recognised by the powerful.²²¹ To Scott, popular media such as music also make it possible for the experiences of minorities to be recognised.²²² In presenting issues of race in her music videos, Madonna has drawn attention to the concerns of oppressed people and prompted discussion that may allow for advancements towards racial equality. Even though Madonna, as a wealthy white woman, presents issues of race within frameworks of privilege, she has made it known that issues of racism need to be addressed. Just as doing away with rights would leave minorities unable to voice their concerns, the alternative in popular music videos at the time was for issues of race to not be confronted at all, as African American musicians were not displayed on music video channels such as MTV.²²³ Even though rights are the creations of the elite and sustain certain structural inequalities, they are preferable to elites ignoring the concerns of oppressed people.

Parallel to the way that rights may sustain existing relations of power or may be used to by minorities to gain recognition, Scott argues that products of popular media are open to interpretations that are the result of more conservative thinking as well as interpretations that highlight the concerns of the disadvantaged.²²⁴ Peñaloza argues that Madonna's work attracts contradictory interpretations,²²⁵ and Jarman-Ivens argues that Madonna's work will be understood differently within various subcultures.²²⁶ Henderson puts forward a similar view, demonstrating that Madonna's work dealing in matters relevant to gay and lesbian people is received in a different way by gay and lesbian circles than it is in the mainstream. Henderson

²²¹ Williams (1987), p 408.

²²² Scott (1993), p 60.

²²³ Scott (1993), p 62.

²²⁴ Scott (1993), p 60.

²²⁵ Peñaloza (2004), p 180.

²²⁶ Jarman-Ivens (2004), p 83.

analyses the controversy surrounding the video for Madonna's 'Justify My Love',²²⁷ which presents scenes suggestive of same-sex sexual activity and was banned from being screened on MTV. While Madonna presents herself as the unequivocally feminine centre of the video, 'Justify My Love'²²⁸ also contains images of more ambiguous sexuality.²²⁹ While it may be argued that such ambiguity is an avoidance of presenting a clear political message about gay and lesbian sexuality, this view does not take into account that resistance can be based upon the use of imagery that is considered by the mainstream to be part of straight culture.²³⁰

Mainstream reporting of the 'Justify My Love'²³¹ video neglected to mention the gay and lesbian audience that Madonna was engaged with. Instead of portraying it as a critique of mainstream sexual values the controversy surrounding the video was described as a plan to generate attention for the record.²³² Commentary on the video that appeared in the *New York Times* described the video as interesting and refuted that it was pornographic.²³³ Due to its failure to identify or discuss the gay and lesbian content of the video, this account did not explain why the video was banned by MTV, as there is no other clear reason for the video's being prohibited.²³⁴ Conversely, gay and lesbian reporting of the video presented Madonna's work as directed towards or particularly congruent with the world of the gay imagination.²³⁵ These reporters maintained clear barriers between the mainstream and gay subculture, arguing not that Madonna had appropriated gay culture into the mainstream, but that Madonna, by publicising same-sex content in the world of the

²²⁷ Mondino (1990) *Madonna, Justify My Love*.

²²⁸ Mondino (1990) *Madonna, Justify My Love*.

²²⁹ Henderson (1993), p 112.

²³⁰ Henderson (1993), p 113.

²³¹ Mondino (1990) *Madonna, Justify My Love*.

²³² Henderson (1993), p 117.

²³³ Henderson (1993), p 118.

²³⁴ Henderson (1993), p 118.

²³⁵ Henderson (1993), p 119.

popular, was effectively 'out'.²³⁶ The relationships between Madonna, gay and lesbian subcultures, and the mainstream display the complexities of recognition and the limits of awareness in the dominant culture, reinforcing critical legal studies' contention that a marginalised group's recognition in the abstract dominion of rights is insufficient to produce significant change to the attitude of the privileged if not coupled with concrete political change. Madonna's incorporation of subcultures in mainstream entertainment constitutes a recognition of sorts, but appears to be, at least somewhat, a recognition without understanding. However, Madonna's example also highlights that recognition, the inclusion of difference, is also a necessary step towards the discussion of meaning in the mainstream and the affording of respect to difference. Rights help create a forum in which different groups can meet as equals.

Critical legal scholars view rights as counterproductive to wider social reforms by excluding from discussion other needs that do not fit within these rights.²³⁷ The abandonment of rights in favour of needs is deemed ill-advised by Williams, as minorities can be portrayed as undeserving of having their needs fulfilled while rights are conceptualised as fundamental, and thus undeniable.²³⁸ Rights advance the interests of minorities, whereas needs are not considered relevant to political change. Abandoning rights will not allow minorities to communicate their experience more fully, as the minority experience is already one without categories of expression and members of the minority are seen by the privileged as indistinct from each other.²³⁹ Rights enable personal power²⁴⁰ and development of the self. The ability to create one's self through rights leads to social recognition as an individual

²³⁶ Henderson (1993), p 120.

²³⁷ Williams (1987), p 412, Mirza (1999), p 117.

²³⁸ Williams (1987), p 412.

²³⁹ Williams (1987), p 414.

²⁴⁰ Barnes (1990), p 1868.

and as a human being.²⁴¹ Zarathustra offers empowerment but risks perpetuating oppression. This section has made apparent that rights similarly hold out the possibility of both positive and negative consequences. Rights have drawbacks but they also help the oppressed in being acknowledged as worthwhile. Like the metamorphic regimen advertised by Zarathustra, rights are a transformative concept, at least in terms of social interactions. They can change people from being overlooked or shunned to being entitled to respect. Despite their flaws, rights continue to be useful and desirable as vessels for empowerment, as Williams observes:

‘There are many good reasons for abandoning a system of rights which are premised on inequality and helplessness; yet despite the acknowledged and compelling force of such reasons, most blacks have not turned away from the pursuit of rights even if what CLS scholars say about rights—that they are contradictory indeterminate, reified and marginally decisive in social behavior—is so.’²⁴²

Rights may be prone to reinforcing unequal distributions of power, but they also afford influence within the structure of society, making them attractive to those seeking acknowledgement of their humanity. The following section looks to post-modern theory for an understanding of the simultaneous helpful- and harmfulness of rights.

²⁴¹ Williams (1987), p 416.

²⁴² Williams (1987), p 404.

IV – Rights in Post-Modernity

Working from a post-modern and psychoanalytic perspective, Douzinas draws attention to the paradoxical consequences of rights. Contemporary society views the development of self through the assertion of rights as an essential and beneficial activity.²⁴³ Nonetheless, conflict has increased as rights have proliferated.²⁴⁴ Rights are supposed to ensure that people are acknowledged and respected, yet this approach results in conflict amongst individuals seeking to defend their own rights against others.²⁴⁵ Madonna uses her resources and freedom to distinguish herself. This individuality is attractive to the audience, who are prompted to witness and emulate Madonna. Peñaloza shows that Madonna's audience use her work to formulate 'codes of reality and of behaviour for themselves, including how to relate to work, to others, and to their culture'.²⁴⁶ Additionally, members of subcultures, people such as 'women, blacks, and gays',²⁴⁷ conceptualise Madonna's adoption of their identities and interact with her work in ways that allow them to 'make demands of Madonna in their own interests'.²⁴⁸ The thudding dance beats of the disco become symbolic of togetherness. Madonna becomes subsumed within collectivity. To set herself apart once more, Madonna must obtain new rights, renewing her difference from and attraction to the audience and continuing the cycle. That differentiating herself from her audience is how Madonna renews her appeal is supported by Gauntlett, who describes Madonna's 'recipe for 'longevity' as involving frequent image changes, collaborations with innovative producers whose

²⁴³ Douzinas (2000), p 1.

²⁴⁴ MacNeil (1997), p 377, Douzinas (2000), p 2.

²⁴⁵ Tensions between the individual and the collective in liberalism have also been noted CLS critiques of rights (for example: Kennedy (1976), p 1733, Kennedy (1979), p 257; 354, and Singer (1984), p 70) and in subsequent theories.

²⁴⁶ Peñaloza (2004), p 184.

²⁴⁷ Peñaloza (2004), p 185.

²⁴⁸ Peñaloza (2004), p 186.

work is beginning to gain recognition, and controversial behaviour.²⁴⁹ The first two of these practices see Madonna discarding images and approaches that have become widespread, and in the case of the third, Madonna deliberately provokes attention through her divergence from conventionality. Madonna's modus operandi shows that rights operate through the assertion of difference.

The act of asserting identity reveals²⁵⁰ that rights are not only about the self, but the relationship between the self and the rest of the world:

‘Self-realisation is not merely liberation from external constraints and impositions, as Foucault has shown, and does not lead to the attainment of some “essential” identity. Self-realisation is a process of shaping the self... which can only be carried out in relations with others and within a community.’²⁵¹

Madonna's songs are often addressed to another, whose attention Madonna invites. In ‘Get Together’,²⁵² Madonna sings ‘Can we get together? I really want to be with you. Come and check it out with me. I hope you feel the same way too’. In Lacanian psychoanalysis, the lack felt by the subject is partly assuaged by the attention the subject gains from others.²⁵³ The subject seeks to attract the desire of others in order to gain recognition as a unique individual.²⁵⁴ For Madonna, this recognition comes from attracting an audience to witness her music and performance. With the subject's need for recognition in mind, it can be said that to assert a right is to make two demands of the other. The first is an appeal to fulfil a

²⁴⁹ Gauntlett (2004), p161.

²⁵⁰ MacNeil (1997), pp 382-383 states that ‘....rights are first and foremost a language of identity.’

²⁵¹ Douzinas (2000), p 319.

²⁵² Madonna (2005) ‘Get Together’ *Confessions on a Dance Floor*.

²⁵³ Douzinas (2000), p 302.

²⁵⁴ Douzinas (2000), p 306.

particular need of the bearer of the right.²⁵⁵ Madonna requires freedom of self-expression in order to create music. The second demand asks of others that they recognise the subject as a complete and worthy individual.²⁵⁶ Madonna's work, therefore, is not simply artistic expression, but contains a secondary request that she be noticed and loved. Even infringing the rights of another in a way that would only mildly inconvenience that person may instil deep feelings of worthlessness, as that person has not been acknowledged as a valued individual.²⁵⁷ When Madonna's uniqueness is contravened by her audience following along with the styles and attitudes she has adopted, she can no longer be recognised as a unique individual. Madonna becomes the same as her audience, and is no longer as desirable. This lack of uniqueness prompts Madonna to further distinguish her from her audience. Madonna needs to acquire new rights in order to remain desired. Tetzlaff identifies that Madonna's 'chameleon phase', where Madonna continually changes her image and creates work that deals in contentious issues of culture, has increased her popularity.²⁵⁸ These constant reinventions bolster the audience's conception of Madonna as a successful business figure and demonstrate her ability to (re)define her identity.²⁵⁹ The narrative of success and recognition through skilful marketing makes Madonna popular, admired.²⁶⁰ Rights promise a fulfilment that comes from recognition, and a recognition that comes from fulfilment, as will now be argued.

The subject is always searching for ways of making itself whole, and thus desirable, in the eyes of the other.²⁶¹ The Lacanian validation of worth is supported by Tetzlaff's commodity perspective, which maintains that, for Madonna, the

²⁵⁵ Douzinas (2000), p 320.

²⁵⁶ Douzinas (2000), p 320.

²⁵⁷ Douzinas (2000), p 321.

²⁵⁸ Tetzlaff (1993), p 255.

²⁵⁹ Tetzlaff (1993), p 257.

²⁶⁰ Tetzlaff (1993), p 257.

²⁶¹ Douzinas (2000), p 321.

measure of success is the extent to which her image is duplicated and disseminated throughout the culture.²⁶² There are no rights that can fulfil the impossible task of making a person feel complete, as the subject always feels incomplete, regardless of how much recognition they gain.²⁶³ Madonna expresses uncertainty as to her worthiness in 'How High',²⁶⁴ with a very tentative statement as to her entitlements: 'How did it earn it? Nobody's perfect, I guess I deserve it.' The rights a person has seem insufficient and open to attack, so they seek more and more rights in order to be further recognised.²⁶⁵ For this reason, new rights are constantly being created.²⁶⁶ In the previous section, Schwartzman suggested that new, specialised rights be constructed in order to redress an imbalance in society. Here, it is revealed that the desire for new rights is in fact native to the very structure of a system of rights. Madonna's frequent transformations, facilitated through music videos (in which her appearance changes for nearly every video) and multimedia concerts (such as *The Confessions Tour* and its four themed segments), have led to both the proliferation and the devaluation of Madonna's various images. Hawkins says that Madonna's appearance and recordings are made out of more than what can be conveyed in a 'live' performance, giving her a 'hyper artificiality'.²⁶⁷ Madonna's image proliferates through the various media in which she works. Through music videos especially, the currency of the image is inflated, necessitating ever increasing numbers of reproductions of the self to make an impression. As in the Jeff Beck and Nile Rodgers quote offered at the beginning of this chapter, Madonna is not 'bad' in

²⁶² Tetzlaff (1993), p 262.

²⁶³ MacNeil (1997), p 379, Douzinas (2000), p 321.

²⁶⁴ Madonna (2005) 'How High?' *Confessions on a Dance Floor*.

²⁶⁵ Douzinas (2000), p 321.

²⁶⁶ Douzinas (2000), p 321. MacNeil (1999), p 138: 'In short, the less they work, the more symptomatic rights become, locking themselves into a cycle of hysterical overproduction as they endlessly expand their ambit...'

²⁶⁷ Hawkins (2004), p 6.

wanting to assert herself this way; she merely shows that doing so instils an unavoidable and intensifying ambitiousness. The more rights a subject gains, the more the subject desires, resulting in an inflationary practice²⁶⁸ of acquiring more and more in order to distinguish one's self.

Rights are bestowed upon the subject as compensation for the way in which the law divides people into a collection of legal attributes, depriving them of wholeness.²⁶⁹ Rights adumbrate and have effect over specific, contained areas of the self. In consequence, rights contribute to the very problem they are supposed to remedy.²⁷⁰ Any harm that may be caused by the establishment of a right is to be remedied with the creation of another right.²⁷¹ For example, the right to free speech might threaten the privacy of the subject, so a right to privacy is created, which will in turn threaten some other attribute.²⁷² In this way, rights often create rather than address conflict.²⁷³ People become afraid of having their rights infringed so they lust after more rights and adopt defensive tactics to protect their existing rights.²⁷⁴ Increasing the number of rights held by a person dilutes the value of the rights they already have. The more rights a person has, the more susceptible they are to harm, making the acquisition of yet further rights seem necessary.²⁷⁵ Douzinas uses the example of defensive medicine, which arose out of patients' rights to diligent treatment, but resulted in doctors withholding care in order to protect themselves from malpractice suits.²⁷⁶ This leads people attack the rights of others while defending their own. When Madonna asserts her identity, she attracts an audience

²⁶⁸ Edley (1986), p 11, Salecl (1994), p 155.

²⁶⁹ Douzinas (2000), p 323, MacNeil (1998), p 38; 40.

²⁷⁰ Douzinas (2000), p 324.

²⁷¹ Douzinas (2000), p 323.

²⁷² Douzinas (2000), p 324.

²⁷³ Douzinas (2000), p 324.

²⁷⁴ Douzinas (2000), p 324.

²⁷⁵ Douzinas (2000), p 324.

²⁷⁶ Douzinas (2000), p 324.

that seeks out similar forms of expression. Madonna is then forced to counter the audience with new ways of performing that will make her unique once more. This differentiation renews her attractiveness to the audience and the cycle begins anew. The Mobius-strip relationship between performer and crowd, between the rights-bearing individual and society, is perpetuated by the kind of paradoxes found in the critiques of the *ubermensch*. First, Zarathustra's potential to repeat the problem he attempts to alleviate is evident in the way rights arguably reinforce collectivity. Second, Zarathustra's trouble with finding contentment, his propensity to aggravating his insecurities is evident in the insatiable need for more rights that the legal subject may always feel. Third, Zarathustra's self-imposed exile and then, upon his return, fraught relationship with society is like the infinitely returning need for the individual to set themselves apart. Matching the *ubermensch*'s desire for freedom from the herd, Madonna asserts her individuality. Zarathustra, having sampled the invigorating effects of self-determination, returned to civilisation to extol the creation of values. Madonna also praises the acts that define the self. Through Nietzsche, Madonna reveals that legal rights involve a complicated duality, being a concept that functions to repel the other from the rights bearer while being attractive to the other in doing so.

'Over the borderline', to the Next Reinvention

The creation of identity through rights is a simultaneously inwardly focused and outwardly directed activity. In consequence, a system of rights gives rise to tension between the individual and the collective. Madonna is admired by her audience for distinguishing herself, but in order for Madonna to fulfil the role of outstanding individual, the audience must comprise a mass against which Madonna's

identity is asserted. Madonna deals in the controversial, working with meanings that are contested by different social groups. 'You just keep on pushing my love over the borderline,' Madonna sings, depicting the trials of being in relationship. Her example demonstrates that a system of rights is not unitary, as Dworkin supposes, but involves the conflict between subjectivities. Madonna fights to establish and maintain her standing in relation to others, just as rights are involved in gaining recognition for their bearers. While rights can be unhelpful and unwieldy at times, their continuing attractiveness and usefulness means that they cannot be given up on and will continue to be of importance in efforts at personal and political expression. Unlike other rock stars, who retire or whose performativity ossifies, Madonna is ceaseless and fluid. So are rights, reflecting as they do the endless push and pull of human interactions. If rights are not going to disappear, if they cannot quit, then like Madonna's reinventions, they must always be redefined in the attempt to make them more helpful, more suited to the human realities, differences, sufferings, and triumphs to which they relate. In moving from this chapter to the next, the examination of jurisprudence and rock music crosses another borderline. Reinvention becomes preservation, ambiguity becomes definitiveness, and complexity becomes unity as positive law comes under examination. Positivism is scrutinised by moving from a star that came out of the 1980s to one who emerged in the 1990s, the following chapter focuses on Liam Gallagher, the confident and commanding frontman of English rock band Oasis.

‘A man with psychedelic picture frames of happiness to shade his eyes.’

– Jamiroquai.¹

¹ Jamiroquai (1994) ‘Space Cowboy’ *The Return of the Space Cowboy*.

Chapter Seven

You Gotta Rule with It: Liam Gallagher and Legal Positivism

In moving from the 1980s to the mid-1990s, this analysis leaves the United States of America and returns to England, where destabilisations of identity characterised by Madonna give way to a desire for certainty amongst some of the new generation. ‘Britpop’ was a style of rock music that occupied a central space in the popular culture of mid-1990s England.² Distinguished not only by the mainstream attention it courted and received,³ Britpop was also notable for its mix of nostalgia for the England of the 1960s and confidence in the England of the then-present 1990s. During Britpop, the 1960s were consciously referenced in support of the idea that English music had been restored to its previous excellence.⁴ Through their frontman Liam Gallagher, Oasis emanated a hopefulness and self-assurance that helped them become the most popular band of the time and a prominent fixture of the contemporary culture.⁵ This last analysis of jurisprudence and the rock star brings together Liam Gallagher and legality to elucidate H.L.A. Hart’s positivist theory.

In this chapter, it is argued that Oasis’ immense popularity can be analogised to, and comment upon, Hart’s intention to account for the pervasive acceptance of law. Additionally, Oasis and Hart both yearned for a bygone England, and Britpop’s deliberate resuscitation of the 1960s aligns with the publishing history of Hart’s main text, *The Concept of Law*,⁶ which appeared first in 1961 and then received a new edition in 1994, the same year that Oasis’ debut album was released. Moreover, the

² Harris (2003), p xv.

³ Harris (2003), p xv.

⁴ Bennett and Stratton (2010), p 1.

⁵ Such was Oasis’ popularity at this time that the band played to an audience of two hundred and fifty thousand people across two nights in 1996: Harris (2003), p 298.

⁶ Hart (1961).

certainty projected by Liam Gallagher (henceforth ‘Liam’) is kindred with Hart’s (apparently) sharp distinction between law and morality. With Liam and Hart there is a belief that the subject matters of their professions; rock music and laws, respectively, preside exclusively over their domains. For Hart, laws were more serious and more binding than other rules of behaviour.⁷ For Oasis, rock ‘n’ roll was the only music that was ‘real’, and a band performing it properly was entitled to a massive, adoring audience. Separating law from non-law and rock ‘n’ roll from inferior types of music was to be done by reference to communal understanding: Hart offered an account that saw people accepting law properly enacted rather than being forced into obedience. Oasis supposedly gained widespread attention because their music was made in keeping with a format, set out by the Beatles, Stones, et al, of what is commonly acknowledged as ‘classic’ rock music. Both Hart and Oasis enjoyed success in these endeavours. Hart was one of the most influential legal philosophers of the 20th century,⁸ while Oasis were a stadium-playing juggernaut. However, the accounts that Hart and Oasis expressly provide do not accurately explain how the two established law and rock ‘n’ roll as ‘binding’ on their audiences. Hart’s system of rules, with its barely-disguised contempt for the sheeplike general population does not truly constrain Austinian violence, while the convincingness of Oasis’ claims to be heirs to a particular musical tradition have less to do with their fidelity to a musical template than to Liam’s assured delivery on and off stage. Comparison with Liam demonstrates that, under Hart’s system, law’s validity depends only on the belief of those imposing it. Section one of this chapter outlines why and how Hart proposes that the legal system procures acceptance in its subjects. Section two examines the techniques of authority that are more covertly at play in

⁷ Hart (1994), p 87. Oasis also presented their music as important, in contrast to the supposedly ironic and frivolous output of other bands.

⁸ Lacey (204), p 1; Kramer, Grant, Colburn, Hatzistarvou (2008), p xiii.

Hart's theory, and section three discusses the dilemmas associated with the hegemony of law that Hart attempts. To begin with, Hart's objectives are outlined.

I – 'D'You Know What I Mean?': Shared Understanding and Identifying Law

Oasis have implied that their music is descended from that of the Beatles. In chapter 4 of this thesis, Beatle John Lennon was read as 'sovereign'. Hart launches his theory with a critique of sovereignty as an explanation of law.⁹ The threatening sovereign command fails to connect with the essence of legality, Hart contends.¹⁰ It does not explain why people accept laws as legal.¹¹ Hart's attention is focused not just on law's exterior movements, but the interior lives of its subjects.¹² Law is identified by the attitude that people have towards it. Hart therefore shifts law from a regime that forces obedience to a system that is sustained by knowing assent.¹³ Two features of Hart's move from obedience to acceptance are the transition from violence to consensus and the importance of community. First, Hart tries for an understanding of the legal system that does away with violence as necessary for legal validity, substituting violence with acknowledgement of law. Douzinas and Gearey call Hart's theory a 'celebration of a spirit of compromise'.¹⁴ Without violence to secure conformity, the legal system becomes about consensus. Consensus is a theme

⁹ Hart (1994), p 18.

¹⁰ Hart (1994), p 79. In place of sovereign power, Hart (1994), p 155 asserts that there are '...two types of rule, [and] that their union may be justly regarded as the 'essence' of law...'

¹¹ The authoritativeness of law is addressed in Hart (1994), pp 53-55.

¹² Hart (1994), p 56.

¹³ Which, Hart (1994), p 57 states '...should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticisms and demands are justified, all of which find their characteristic expression in the normative terminology of 'ought', 'must' and 'should'...'

¹⁴ Douzinas and Gearey (2005), p 141.

detectable in Oasis, indeed, in Britpop music generally, sitting, as it did, in the mainstream:

‘In some ways Britpop was indie’s nemesis. It began as an offshoot of the independent British music scene but arguably ended up killing it, as a convergence took place between indie and mainstream, removing the distinctive ‘protest’ element of British-based independent music.’¹⁵

Compromise is linked to community, the second highlighted feature of Hart’s system.¹⁶ Devoid of ‘protest’, Britpop eschewed discord for togetherness. Oasis’ ambitions for mainstream popularity and the mass attention the band gained echo the community that Hart’s theory strives for: ‘After the individualist ideology of the Thatcher years, Oasis brought back enthusiasm for the collective.’¹⁷ Of the band’s debut album, Noel Gallagher (Liam’s brother, henceforth ‘Noel’) remarked:

‘Well, it appealed to everyone. It appealed to people who were into guitar music, it appealed to people who were just into fucking going out getting high, d’you know what I mean? It was rock ‘n’ roll, it was pop. Girls liked it, lads loved it. It appealed to everybody, every single person.’¹⁸

In response to the individualism and difference of the previous era and its music (as exemplified by Madonna), Oasis attempted to revitalise that which brings people together. Hart is another who accents the enduring ties of community (reinforced by Hart’s concern with the continuity of the law, which will later be examined).¹⁹ Like Hobbes, Hart’s theory is an answer to war.²⁰ Although the two

¹⁵ Huq (2010), p 93.

¹⁶ Hart (1994), p 59.

¹⁷ Scott (2010), p 119.

¹⁸ Oasis The Classic Interviews Part 4’

<http://www.youtube.com/watch?v=4O3kZhgtYQ4&feature=relmfu>

¹⁹ Douzinas and Gearey (2005), p 157.

legal philosophers formulated different responses to this experience, with Hobbes relying upon an unquestionable authority and Hart placing faith in comradeship, both theories are responses to the disintegrating power of conflict. While not the same as the aftermath of the World Wars, the post-Thatcher era, with its memories of war in the Falklands, and the turmoil of class-conflict and self-serving individualism, in which the working class Gallaghers began Oasis, may have prompted a similarly communal spirit. Hart abandons sovereignty and its lone ruler, the supreme gesture of individuality. In its place is concordance, which Douzinas and Gearey argue is ‘nostalgia for a settled community with a more or less explicit value consensus.’²¹ Britpop and Oasis attempt to resolve the ‘civil-war’ of differing musical tastes with a homogenous and yearning appreciation for the music of the 1960s. Community is an environment adumbrated by shared understandings and values. It is in this environment that law can be identified. Hart does not provide a definition of law²² such as Austin’s ‘orders backed by threats’.²³ Instead, law is to be observed in situ. The legal system is to be understood as a collection of practices and interpretations that occur in an environment defined by rules.²⁴ A rule does not force conformity, but invites critical evaluation.²⁵ Those that accept the system of rules belong to a community of understanding.

²⁰ Douzinas and Gearey (2005), p 157. Douzinas and Gearey write that: ‘It is no wonder that the *Concept of Law*, like *Leviathan*, came after a long and hard war [WWII for Hart]. Both texts aspire to revive and sustain a strong community.’

²¹ Douzinas and Gearey (2005), p 157.

²² Hart (1994), p 15.

²³ Hart (1994), p 19; p 81.

²⁴ Hart (1994), p 100 sets out this environment as a ‘...complex social situation where a secondary rule of recognition is accepted and used for the identification of primary rules of obligation.’ Hart (1994), p 81: ‘...most of the features of law which have... eluded the search for *definition* [my emphasis] can best be rendered clear, if these two types of rule and the interplay between them are understood.’

²⁵ Hart (1994), p 57.

Hart claims that law is best explained as system of primary and secondary rules.²⁶ Primary rules contain the law's content and guide the behaviour of legal subjects.²⁷ Secondary rules establish the processes by which primary rules may be created, abolished, or altered.²⁸ Secondary rules reflect the understanding that is required of participants in the legal system. Even though a reflective attitude may not be the first disposition to be associated with the gung-ho Liam, it is possible that this prejudice is erroneous, as the commentary he supplies, through interviews, on what counts as good music and what presentation and conduct are becoming of a rock star, exhibits a substantial account of the values contained within his conception of rock stardom. Likewise, in Hart's system secondary rules constitute an understanding of what may be allowed into the legal system and what is to be denied entry because of its incompatibility with the community's values. In other words, and consistent with his legal positivist approach, secondary rules are used to sort law from-non law. Law is not to be confused with other rules, such as morality, which lack the appropriate legal characteristics.²⁹ The legal system is not dependent on morality for its validity because law is defined by community practices.³⁰ One type of secondary rule in particular, the rule of recognition, is used to ascertain law. The rule of recognition contains within it the characteristics of legality which can be measured against a rule to determine whether that rule forms part of the legal system (significantly, as will be discussed further below, the rule of recognition establishes its authority to determine legality because it is observed by the officials of the system³¹). Using the rule of recognition gives a confidence to the identification of law. Hawkins describes

²⁶ Hart (1994), p 81.

²⁷ Hart (1994), p 81.

²⁸ Hart (1994), p 81.

²⁹ Hart (1994), p 86.

³⁰ Hart (1994), pp 107-108.

³¹ Hart (1994), p 116.

Britpop as ‘Victorious and flagrantly bloke-ish’,³² a description that could apply to Liam. The self-confidence projected by Liam through his assured swagger, stoic on stage posture, and definitive pronouncements in interviews make him an impressive and compelling frontman. The magnetism in Liam’s air of certainty makes clear that, in promising a certain distinction between legality and everything else, whatever Hart’s rule of recognition identifies as law is given a persuasiveness that encourages critical examiners to follow it. Legal rules have a kind of ‘star quality’, a special character which makes them binding.

Just as Hart seeks to outline an ‘all you need is law’ system of rules, Oasis’ musical objective was to make music with a self-sufficiency, a purity of style. Projecting the image of a mini-collective, the members of Oasis can be analogised to various roles that make them the ‘officials’ of their musical world. In writing the band’s songs, Noel acts as legislature. His activities fall under the secondary rules of change, which authorise the modification of existing rules and the creation of new rules.³³ Liam, who was responsible for the vocal delivery of Oasis’ songs, acts similar to a judge applying the law. Liam is bound to follow the rules of adjudication, which authorise the judiciary to decide whether a person bound by the law has contravened a primary rule.³⁴ The other band members form a musical executive. They were required to follow the instructions of Noel and were charged with realising the supportive elements of the band’s music (rhythm guitar, bass guitar, and drums) in a purely workmanlike fashion. Harris writes that the rest of the band was instructed to play in a style of ‘brutal simplicity’, saying that ‘[rhythm guitarist] Paul Arthurs was instructed to stick to bar chords, meaning that his fingers need never alter their basic configuration; Paul McGuigan’s bass played little more

³² Hawkins (2010), p 145.

³³ Hart (1994), p 95.

³⁴ Hart (1994), pp 96-97.

adventurous than root notes; Tony McCarroll took comfort from the fact that his basic 4/4 rhythms were seemingly all that was required.³⁵ Oasis presented themselves as if they derived their legitimacy from the 'official' positions they inhabited rather than from any personal characteristics. Harris comments that at the time of their Knebworth concerts, Oasis' casual appearance suggested that they could have been culled from the crowd to which they played.³⁶ Similarly, Liam claimed that the members of the band were 'not wizards' and '...just happen to be in the best band in the world.'³⁷ Oasis did not require extraordinary technical musical capabilities. The band's sense of self-sufficiency draws out the independence of the positivist legal system. Positivism privileges itself and excludes non-law. Oasis argue that the rock 'n' roll style within which they work is 'real' music,³⁸ distinguishing it from the work of most other popular musicians, whose music is unworthy because it does not conform to the rock 'n' roll genre. Liam connects being real with rock 'n' roll music, saying 'We're the best 'cos we're real,' and then continuing '...that's what you need in indie these days. But we're not an indie band. We're a rock band, pal.'³⁹ Separating the 'real' from the unworthy enables identification of the values that are important to a community.

Determinations on what is and is not legal come out of and support tradition. The law is not only self-sufficient in that, as stated previously, it does not require the support of external standards such as morality, but also in that it is not powered by a finite sovereign and rather is capable of perpetuating itself through the continuity generated by its rules.⁴⁰ The community of the law survives independently of its

³⁵ Harris (2003), p 127.

³⁶ Harris (2003), p 299.

³⁷ Harris (2003), p 378.

³⁸ Harris (2003), p 296

³⁹ Shaw (2006), p 116.

⁴⁰ Douzinas and Gearey (2005), p 159, Hart (1994), p 61.

particular members. Mirroring law's endurance across time, Oasis situated themselves within a musical tradition, the acknowledgement of which is contemporaneous with their arrival. Scott notes that 'Britpop was made possible in the 1990s by the emergence of a rock canon and, consequently, the idea of classic rock.'⁴¹ Harris remarks that Britpop musicians 'were knowingly reconnecting their music to a fleetingly forgotten heritage' of 1960s English rock,⁴² in which, Bennett observes, the Beatles were a predominant group.⁴³ Oasis established their connection to the rock 'n' roll artists of the past, particularly the Beatles, through their lyrics, music, and presentation. On *Definitely Maybe*,⁴⁴ 'Supersonic'⁴⁵ references the Beatles' 'Yellow Submarine'⁴⁶ in the line 'You can sail with me in my yellow submarine.' 'Supersonic'⁴⁷ B-side 'Take Me Away'⁴⁸ includes a partial recitation of the opening line from 'Octopus's Garden'.⁴⁹ On *Morning Glory*,⁵⁰ 'Wonderwall'⁵¹ takes its title from a George Harrison album,⁵² and 'Don't Look Back In Anger'⁵³ begins with the same chords used in the opening of John Lennon's 'Imagine'.⁵⁴ 'Don't Look Back In Anger'⁵⁵ also includes the line 'So I start a revolution from my bed, 'cause you said the brains I had went to my head,' a quote from Lennon's memoirs.⁵⁶ 'She's Electric'⁵⁷ ends with the closing chord progression of the Beatles'

⁴¹ Scott (2010), p 110.

⁴² Harris (2003), p xv.

⁴³ Bennett (1997), p 22.

⁴⁴ Oasis (1994) *Definitely Maybe*.

⁴⁵ Oasis (1994) 'Supersonic' *Definitely Maybe*.

⁴⁶ The Beatles (1966) 'Yellow Submarine' *Revolver*.

⁴⁷ Oasis (1994) 'Take Me Away' *Supersonic*.

⁴⁸ Oasis (1994) *Supersonic*.

⁴⁹ The Beatles (1969) 'Octopus's Garden', *Abbey Road*.

⁵⁰ Oasis (1995) (*What's the Story*) *Morning Glory?*

⁵¹ Oasis (1995) 'Wonderwall' (*What's the Story*) *Morning Glory?*

⁵² Harrison (1968) *Wonderwall Music*.

⁵³ Oasis (1995) 'Don't Look Back in Anger' (*What's the Story*) *Morning Glory?*

⁵⁴ Lennon (1971) 'Imagine' *Imagine*.

⁵⁵ Oasis (1995) 'Don't Look Back in Anger' (*What's the Story*) *Morning Glory?*

⁵⁶ Shaw (2006), p 67.

⁵⁷ Oasis (1995) 'She's Electric' (*What's the Story*) *Morning Glory?*

‘With a Little Help From My Friends’,⁵⁸ and the song ‘Morning Glory’⁵⁹ references ‘Tomorrow Never Knows’,⁶⁰ saying ‘Tomorrow never knows what it doesn’t know too soon.’ Homages to the Beatles made through the band’s presentation include Liam holding Paul McCartney and Wings’ *Red Rose Speedway*⁶¹ album in the video for ‘Shakermaker’.⁶² A photograph of John Lennon’s childhood home appears on the cover of the ‘Live Forever’⁶³ single. The cover of the ‘Don’t Look Back In Anger’⁶⁴ single depicts a room of instruments covered in flowers similar to a display arranged by the Beatles to welcome back their drummer Ringo Starr after he briefly quit the group.⁶⁵ Wearing round glasses and having grown a beard, Liam appears nearly identically to Lennon in the video for ‘Champagne Supernova’.⁶⁶ In the same video, Liam uses dominoes to spell out *Help*,⁶⁷ the title of the Beatles album. The band covered ‘I Am the Walrus’⁶⁸ in live performances from the beginning of their career, playing the song with a Beatles cover group at a concert at Earl’s Court in 1995.⁶⁹ Also evoked on *Definitely Maybe*⁷⁰ are glam rock group T-Rex, from which Noel derived the opening riff to ‘Cigarettes and Alcohol’,⁷¹ while ‘Wipe the shit from your shoes’, a lyric from *Morning Glory*’s⁷² opening track ‘Hello’⁷³ recalls the Rolling

⁵⁸ The Beatles (1967) ‘With a Little Help from My Friends’ *Sgt. Pepper’s Lonely Hearts Club Band*.

⁵⁹ Oasis (1995) ‘Morning Glory’ (*What’s the Story*) *Morning Glory?*

⁶⁰ The Beatles (1966) ‘Tomorrow Never Knows’ *Revolver*.

⁶¹ McCartney & Wings (1973) *Red Rose Speedway*.

⁶² Szaszy (1994) *Oasis, Shakermaker*.

⁶³ Oasis (1994) *Live Forever*.

⁶⁴ Oasis (1996) *Don’t Look Back in Anger*.

⁶⁵ Robb (2009), p 375.

⁶⁶ Dick (1994) *Oasis, Champagne Supernova*.

⁶⁷ The Beatles (1965) *Help!*

⁶⁸ Beatles (1967) ‘I Am the Walrus’ *Magical Mystery Tour*; Oasis (1998) ‘(It’s Good) To Be Free’ *The Masterplan*.

⁶⁹ Dick (1995) *Oasis Live By The Sea*, Chapter 17; and Szaszy and Carruthers (1996) *Oasis ...There and Then*, Chapter 17.

⁷⁰ Oasis (1994) *Definitely Maybe*.

⁷¹ Oasis (1994) ‘Cigarettes & Alcohol’ *Definitely Maybe*.

⁷² Oasis (1995) (*What’s the Story*) *Morning Glory?*

⁷³ Oasis (1995) ‘Hello’ (*What’s the Story*) *Morning Glory?*

Stones' 'Sweet Virginia's'⁷⁴ 'Got to scrape the shit right off your shoes.' Law's tradition determines legal authority, and the archetype of rock stardom set by the canon of 1960s rock groups, the Beatles foremost among them, is used by Oasis in judging the work of other musicians. Liam and Noel contrast 'real' rock 'n' roll music with the bands and musicians that they disapprove of. Liam said of popular music when Oasis began that '...it was just Phil Collins and all these boring people in boring bands and it were playing big gigs but it was like, you know, you got nowt to say. You don't look like rock stars; you look like dicks in tights.'⁷⁵ Here, Liam contrasts the musical style and presentation of Phil Collins with rock 'n' roll stardom, the latter implied to be the standard of appropriate music-making Collins has failed to achieve. The majority of contemporary bands at the time of any interview with Liam will be dismissed as being un-rock 'n' roll. Responding to one interviewer, Liam said:

'There's lots of bands I like, but as for all that, the ones that you said, the Scissor Sisters, then, no, I'm not having it. I'm sorry. I'm sure they're all nice people, but fuck them and fuck Bloc Party and fuck Pete Doherty and his stupid mess, and all the rest of it. And Franz Ferdinand, they don't do it for me mate, you know what I mean?'⁷⁶

Noel also portrays other bands as unworthy by contrasting these bands' music with the rock 'n' roll produced by Oasis. As with Liam's use of Phil Collins as a representative of the whole of popular music, Noel uses a specific band, in this instance, Blur (whose third album is titled *Parklife*⁷⁷), as an example of the inferiority of non-rock 'n' roll music. Noel said "Music for me at the moment is

⁷⁴ Rolling Stones (1972) 'Sweet Virginia' *Exile on Main St.*

⁷⁵ Carruthers (2004) *Definitely Maybe*, Chapter 5.

⁷⁶ Walsh (2006) Oasis *Lord Don't Slow Me Down*, Chapter 11.

⁷⁷ Blur (1994) *Parklife*.

dead.’ ‘It’s poncey and serious and everyone’s got to make some sort of statement, whether it’s about “Parklife” or their feminine side or their politics. But we’re a rock ‘n’ roll band...’⁷⁸ Here, Noel expressly excludes from music morality and politics, the same concerns that Hart excludes from law to maintain its purity. Harris calls these protests against bands who created music other than rock ‘n’ roll a ‘constant refrain’.⁷⁹ The bands condemned by Oasis have failed to match a particular conception of how things should be. They have not given support to a tradition that requires upkeep.

This tradition includes a longing for England’s past. Hart’s theory is infused with Englishness,⁸⁰ as is Oasis’ music, expressed, amongst other ways, via ‘mod’ style clothes, Noel’s iconic Epiphone Sheraton guitar with its union flag paint job, and remarks such as Liam’s in the following exchange:

‘...when a passing Creation [Oasis’ record company] staff member enquired about the design on the cover of the Oasis demo – the colours of the Union Jack arranged in a vortex, as if being sucked down the plughole – Liam dispensed a snarling reply. His words, in the right-on days of 1993, must have sounded striking indeed. ‘It’s the greatest flag in the world and it’s going down the shitter,’ he said. ‘We’re here to do something about it.’’⁸¹

To be valid, a rule must be in keeping with the tradition of the law. With Oasis, those who do not make music that is sympathetic to a particular interpretation of the history of English music are to be excluded. Englishness is also a covert requirement of validity in Hart’s system. It is an Englishness venerated from a distance:

⁷⁸ Harris (2003), p 144.

⁷⁹ Harris (2003), p 144.

⁸⁰ MacNeil (2007), p 55, Douzinas and Gearey (2005), p 141; p 156.

⁸¹ Harris (2003), pp 129-130.

‘...as a latecomer, this spirit of England appears in sharpest form when viewed from elsewhere; indeed, Hart’s sensibility is very much that of the last period of Empire, and... there are ideological links between Hart and the visions of colonial administrators who were trying to save the British empire.’⁸²

Hart’s ‘cricket pitch’ conception of England,⁸³ and Oasis’ nation of ‘Strawberry Fields’⁸⁴ and ‘Penny Lane’⁸⁵ (doubly nostalgic since these songs were written as reminiscences by Lennon and McCartney⁸⁶) must be preserved, both because these traditions hail from far away, bringing with them the danger of erosion from the passing of the ages, but also because their distance saturates them with a nostalgic attractiveness that makes them seem worthy of preservation. They must be made to ‘Live Forever’,⁸⁷ as one of Oasis’ most anthemic tunes would have. The tradition is to be perpetuated, and anything that does not adhere to it will be met with disapproval. The specific vision of the past is applied as a universal standard,⁸⁸ and most of which it is applied to is found wanting, is excluded from the insular system of positivist law, or the canons of classic rock. The English legal system becomes ‘law’, and the Gallaghers’ record collection becomes canonical. In bringing the tradition into the present, the shadows of the past are brought back as something harsher. The idealised vision of a golden ages makes for a stringent test of validity, and one that requires, as will now start to emerge, a ‘master’ who has to be followed.

Oasis demonstrates that tradition, while it may outlive individuals, is also in their hands, as it requires maintenance. The stewards of the tradition are able to

⁸² Douzinas and Gearey (2005), p 156.

⁸³ MacNeil (2007), p 55.

⁸⁴ The Beatles (1967) *Strawberry Fields Forever/Penny Lane*.

⁸⁵ The Beatles (1967) *Strawberry Fields Forever/Penny Lane*.

⁸⁶ See Daniels (2006) for a discussion of the past in relation to these two songs.

⁸⁷ Oasis (1994) ‘Live Forever’ *Definitely Maybe*.

⁸⁸ Douzinas and Gearey (2005), p 141.

define the tradition. The tradition does not exist merely in its texts, but in the people that currently embody it. In consequence, validity and exclusion issue forth spontaneously from the system's custodians. There is no telling ahead of time what music Liam and Noel approve and disapprove of, for example. As Louise Wenner remarked: 'They [the Gallaghers] were incredibly volatile; you never knew what they were going to say next.'⁸⁹ Their appraisals of other musicians and bands are not based on any explicit criteria. The brothers provide little to explain why certain musicians can be described as 'real' or as 'rock 'n' roll' when others cannot. In fact, Oasis are generally averse to literal expression. The lyrics to 'Roll With It',⁹⁰ according to Harris, 'meant very little at all.'⁹¹ Songs such as 'Shakemaker'⁹² include a litany of storybook-like characters; 'I've been driving in my car with my friend Mr. Soft. Mr. Clean and Mr. Ben are living in my loft,' and nonsense lines such as 'I'd like to build myself a house out of plasticine.'⁹³ A number of Oasis lyrics describe ineffability. In 'Columbia',⁹⁴ Liam sings 'I can't tell you the way I feel because the way I feel is oh so new to me.' 'Supersonic'⁹⁵ includes 'You need to find out, 'cause no one's gonna tell you what I'm on about.' In 'Acquiesce',⁹⁶ 'I don't know what it is that makes me feel alive,' in 'Wonderwall',⁹⁷ 'There are many things that I would like to say to you but I don't know how,' in 'Hey Now!',⁹⁸ 'You might never know that I want you to know what's written inside of your head', and

⁸⁹ Dower (2003) *Live Forever: The Rise and Fall of Brit Pop*, Chapter 5.

⁹⁰ Oasis (1995) 'Roll With It' (*What's the Story*) *Morning Glory?*

⁹¹ Harris (2003), p 229.

⁹² Oasis (1994), 'Shakemaker' *Definitely Maybe*.

⁹³ Other nonsensical lyrics include 'Supersonic's' 'I know a girl called Elsa, she's into Alka Seltzer. She sniffs it through a cane on a supersonic train.' 'Some Might Say' says 'The sink is full of fishes. She's got dirty dishes on the brain,' and 'Champagne Supernova'; 'Slowly walking down the hall, faster than a cannon ball.'

⁹⁴ Oasis (1994) 'Columbia' *Definitely Maybe*.

⁹⁵ Oasis (1994) 'Supersonic' *Definitely Maybe*.

⁹⁶ Oasis (1998) 'Acquiesce' *The Masterplan*.

⁹⁷ Oasis (1995) 'Wonderwall' (*What's the Story*) *Morning Glory?*

⁹⁸ Oasis (1995) 'Hey Now!' (*What's the Story*) *Morning Glory?*

in ‘Cast No Shadow’,⁹⁹ ‘Bound with all the weight of all the words he tried to say’. Liam has been equally vague when talking about how real rock ‘n’ roll music is to be created. For example, when asked ‘What are the characteristics that make a great rock band?’ he replied ‘Having it, just having it. I don’t know what it is. You’ve just got to have it and I’ve got it. And by us having it hopefully some other people will learn how to have it, you know what I mean?’¹⁰⁰ A lot of the phrases used by members of Oasis as well as fans of the band centre around this ineffable ‘it’, such as the expression ‘mad for it’, which appears to mean being enthusiastically devoted to a rock ‘n’ roll lifestyle. It must be noted that all this vagueness is not a deficiency. Rather, it is intentional. Noel has expressed ‘his admiration for Beatles lyrics that remain a mystery...’¹⁰¹, and his own lyrics are not supposed to be profound, an attitude towards song writing which he expresses here: ‘...everyone’s dead into analysing, but don’t analyse our band. “That’s a good song, that is. What does it mean?” Who gives a fuck what it means?”’¹⁰² This ineffability is echoed in the technicalities of Hart’s legal system where the rule of recognition cannot be expressly articulated.¹⁰³ Like Liam’s ‘mad for it’ way of life, the rule of recognition is exists in the attitudes of the system’s officials.

Given its concealment, how is the rule of recognition to be identified? The answer (in the form of a question, no less), may be found in ‘(It’s Good) To Be Free’,¹⁰⁴ where Liam sings ‘So what would you say if I said to you “it’s not in what you say it’s in what you do”?’ The rule of recognition has no one formulation, and in what Hart calls ‘developed’ legal systems, it might involve the use of different

⁹⁹ Oasis (1995) ‘Cast No Shadow’ (*What’s the Story*) *Morning Glory?*

¹⁰⁰ Dower (2003) *Live Forever: The Rise and Fall of Brit Pop*, Chapter 13.

¹⁰¹ Scott (2010), p 119.

¹⁰² Harris (2003), p 144.

¹⁰³ Hart (1994), p 101.

¹⁰⁴ Oasis (1998) ‘(It’s Good) To Be Free’ *The Masterplan*.

methods to ascertain whether a rule is part of the legal system.¹⁰⁵ Because of this complexity and the previously outlined ineffability, the rule of recognition is more easily observed when it is actually used in the process of discerning whether a rule is legal.¹⁰⁶ Likewise, that the work of bands such as the Beatles and the Rolling Stones are chosen by Oasis' as real music tells something of Oasis' criteria of musical validity. This process also creates a paradox in that what the rule of recognition chooses is legal, but what is legal creates the rule of recognition. While the rule of recognition specifies which rules belong to a legal system, it cannot gain legal legitimacy through self-recognition, so its inclusion in the legal system comes from its being used by the system's officials.¹⁰⁷ The rule of recognition determines what is law, thereby empowering the system's officials. Oasis pay homage to the music that (they claim) grants them benediction. Liam and Noel justify the argument that they are making music as it should be done by comparing themselves to groups of the past. Commenting on his style of vocal performance, for example, Liam remarked that 'John Lennon and John Lydon are the best vocalists, and if I'm somewhere in between I'd be very happy.'¹⁰⁸ Noel's song writing is often compared to that of previous musicians, with Marcus Russell, Oasis' manager, saying that band's music was 'Basically drawing on, you know, all the great rock 'n' roll music from the Beatles through to Slade through to, you know, the Sex Pistols.'¹⁰⁹ Proceeding beyond meagre associations, Liam positions himself as the equal of the musicians to which he is successor; 'You couldn't put any of these other bands near any of them greats years ago like Keith Richards, Elvis, John Lennon. Put me in the middle of

¹⁰⁵ Hart (1994), pp 94-95.

¹⁰⁶ Hart (1994), p 101.

¹⁰⁷ Kramer (1988), p 407.

¹⁰⁸ Carruthers (2004) *Definitely Maybe*, Chapter 12.

¹⁰⁹ Carruthers (2004) *Definitely Maybe*, Chapter 3.

them and I'd look fucking pretty cool with them,' he remarked.¹¹⁰ Despite the excellence of these past bands, they are not inherently definitive. They are dependent on people in the present day to acknowledge their authority. There are numerous other bands that Oasis could have drawn influence from. It is Oasis (and others') anointment of these bands as worthy of following that gives the bands their prestige.

Furthermore, there is no necessary connection between Oasis and the bands they selected. The music of Beatles, the band to which Oasis is supposedly most similar, is usually not as 'heavy' (through use of distorted guitar signals) as Oasis' tracks. Scott observes discrepancies in the sound of the two groups: 'Oasis records have a much fatter and louder sound than those of the Beatles, and are cut at a high level for good measure.'¹¹¹ Maggie Mouzakitis, Oasis' Tour Manager remarked of Oasis' 'Columbia'¹¹² that 'No one can say "Oh, it sounds like the Beatles or it sounds like the Stones." To me it's Oasis.'¹¹³ Also demonstrating that there is little in the essence of these bands that matches them to Oasis other than having been chosen by the band is Liam and Noel's occasional misreading of their canon. Harris says that, early in their career, Noel '...merrily rewrote rock history according to his own prejudices.'¹¹⁴ Noel ignored the serious art rock aspirations of the Sex Pistols, claiming that they were a light hearted band, while Liam portrayed John Lennon's joke making as more important than his musical output.¹¹⁵ Oasis 'worshipped music made before their birth but there was no respect to their love',¹¹⁶ their similarity to groups such as the Beatles are imposed by force of the Gallaghers' conviction. As

¹¹⁰ Dower (2003) *Live Forever: The Rise and Fall of Brit Pop*. Unseen Interview Cuts Liam Gallagher, Chapter 7.

¹¹¹ Scott (2010), p 118.

¹¹² Oasis (1994) 'Columbia' *Definitely Maybe*.

¹¹³ Carruthers (2004) *Definitely Maybe*, Chapter 10.

¹¹⁴ Harris (2003), p 144.

¹¹⁵ Harris (2003), pp 144-145.

¹¹⁶ All Music 'Review of Oasis Dig Out Your Soul' <http://www.allmusic.com/album/dig-out-your-soul-mw0000792986>

Bennett and Stratton remark: ‘The genre of Britpop, with its assertion of Englishness, evolved at the same time that devolution was striking deep into the hegemonic claims of English culture to represent Britain.’¹¹⁷ Hart and the Britpop groups both reach back to an England that never was, or at least one that has disappeared.

Given the arbitrary connection between Britpop groups and bands of the past, Oasis were not simply making ‘real’ music, but expounding a rhetoric that justified their authority. Liam Gallagher exemplifies this attitude, for example, when brushing aside the aestheticism and androgyny of 1980s English music, saying ‘It was time for some real lads to get up there and take charge, and I think that’s what we did.’¹¹⁸ Affirming that a coup was the process by which the band established themselves, rhythm guitarist Paul Arthurs said ‘It needed somebody to sort of say “Out of the way. We’ll take charge here. This is what you’re getting. This is what it’s going to be from now on.”’¹¹⁹ It is Oasis’ position of authority as officials that bestow authority upon their chosen bands. Oasis established this authority by claiming it for themselves. The rule of recognition grants authority to that which it recognises, but is imbued with authority by the focus of its attention. This ‘circular’¹²⁰ process appears successful. Liam and Noel are constantly asked for their opinions of other bands. Authority is claimed by force. Berns notes that force needs authority ‘...for authority alone can legitimate its use,’¹²¹ and so are authority and force bound together in the legal system. Force in Hart’s theory will now be addressed.

¹¹⁷ Bennett and Stratton (2010), Abstract.

¹¹⁸ Carruthers (2004) *Definitely Maybe*, Chapter 5.

¹¹⁹ Carruthers (2004) *Definitely Maybe*, Chapter 1.

¹²⁰ Duncanson (1979), p 218.

¹²¹ Berns (1999), p 1.

II – ‘Acquiesce’: Force and Acceptance

Oasis justify the validity of their music by referencing a selection of bands of the past. However, as demonstrated, the connections Oasis make to these canonical groups are largely superficial.¹²² It is argued that Oasis in fact substantiate their claims to authority through the forceful performance of their music. The band’s use of their music reveals that Hart’s account of law depends on the use of force to ensure the compliance of its subjects. This is the opposite of the kind of law that Hart claims to portray. By explaining the legal system in terms of rules, Hart attempts to demonstrate that people’s acceptance of the legal system is not dependent on violence. The difference between law that forces obedience and law that is voluntarily accepted is the difference between being obliged and being obligated.¹²³ Under a system of legal rules, a person has an obligation to act in keeping with the law.¹²⁴ Conversely, under a legal system that uses threats of force to ensure compliance, a person is said to be obliged to obey the law.¹²⁵ Where a person is obliged, their desire to avoid being harmed by the legal system is motivation for their obedience.¹²⁶ The existence of an obligation, however, need not be proven by reference to the reason for a person’s actions.¹²⁷ An obligation exists separate from the motivation and actions of the obligated. It is possible to have an obligation that one fails to achieve, whereas being obliged means that a person has a motivation to do what is required of them and does that thing.¹²⁸ If a person is obliged due to a

¹²² It is not argued that Oasis could have nominated merely any prior band as a source of authority, as the Beatles are the logical choice for a white rock group from the north of England claiming pop supremacy. However, Oasis’ connection to the Beatles is superficial in the sense that Oasis’ music is not in the same style as their predecessors.

¹²³ Hart (1994), pp 6-7; p 82.

¹²⁴ Hart (1994), p 82.

¹²⁵ Hart (1994), p 82.

¹²⁶ Hart (1994), p 82.

¹²⁷ Hart (1994), p 83.

¹²⁸ Hart (1994), p 83.

threat being made against them, that person will most often do what is being asked of them by the threatening party. The obligation and the act go together.¹²⁹ However, there is a discretionary element as to whether or not to fulfil an obligation. This discretion is explained by Hart in terms of the internal and external points of view that he ascribes to legal rules. The internal point of view is the mindset of a person towards the rule that they are following.¹³⁰ The external point of view observes from the outside a person following a rule.¹³¹ To someone on the outside of a legal system only the actions of those under observation need be considered in determining whether those people are following the rules.¹³² The internal aspect, however, allows voluntary acceptance of the rules as they can be considered and evaluated before being complied with. However, Hart undercuts the voluntary nature of this system by requiring only the system's officials to take the internal point of view. While it is preferable that the people also view the law from this internal perspective, it is not a fundamental requirement.¹³³ The people are required to obey the law, but their reasons for obedience are irrelevant. Provided that the people can be seen from the outside to be following the rules, they do not have to agree with them. If the people do not agree with the laws, then the use of force to compel obedience will be sufficient to satisfy the external aspect of rule following required for non-officials.¹³⁴ Hart admits to this, saying that amongst the 'variety of different reasons' for obeying the law, a person might obey out of the desire to avoid the various types of harm that can be perpetrated by the law.¹³⁵ Even if the system perpetrates violence towards the

¹²⁹ Hart (1994), p 83.

¹³⁰ Hart (1994), p 89.

¹³¹ Hart (1994), p 89.

¹³² Hart (1994), p 89.

¹³³ Hart (1994), pp 116-117.

¹³⁴ Sherwin (1986), pp 404-405.

¹³⁵ Hart (1994), p 114.

people (reminiscent of Pink Floyd's *Animals*,¹³⁶ Hart analogises non-officials to 'sheep' who 'might end up in the slaughter-house'¹³⁷), the system is nonetheless a legal one.¹³⁸ Through their confidence and the intensity of their musical delivery (the latter of which will be examined presently) Oasis secure the listener's attention by force.

There are two means by which Oasis' musical impresses itself upon the listener. The first is the sonic qualities of the band's instrumentation. Oasis relied upon a 'heavy' style that utilised distorted guitars and countless overdubs. Harris called the band's playing as '...positively monolithic: a sound so divorced of finesse and complexity that it came out sounding pretty much unstoppable.'¹³⁹ Adding to their playing style, Oasis' producer, Owen Morris, pioneered a mixing technique that raised the volume levels of their albums above that of all other records.¹⁴⁰ Morris described this effect as a 'wall of noise', and said that 'There are no dynamics... it's just full on...'¹⁴¹ Alan McGee, head of the record label that Oasis were then signed to, stated that this technique gave the album 'an aggression.'¹⁴² Oasis' instrumental sound is unassailable and self-sufficient, like the closed system of positivism. The second, and most important, way that the group impacts upon its audience is through Liam's singing style and onstage charisma. Liam's vocals, delivered in a sharp, sneering tone and with unusual emphases (Liam's extension of the word 'sunshine' in the line 'I need some time in the sunshine,' on 'Rock 'n' Roll Star'¹⁴³ is an hoary example of his unique vocal expression) are the most distinct, prominent, and

¹³⁶ Pink Floyd (1977) *Animals*.

¹³⁷ Hart (1994), p 117.

¹³⁸ Hart (1994), p 117.

¹³⁹ Harris (2003), pp 127-128.

¹⁴⁰ Carruthers (2004) *Definitely Maybe*, Chapter 12, Hawkins (2010), p 148.

¹⁴¹ Carruthers (2004) *Definitely Maybe*, Chapter 12.

¹⁴² Carruthers (2004) *Definitely Maybe*, Chapter 12.

¹⁴³ Oasis (1994) 'Rock 'n' Roll Star' *Definitely Maybe*.

forceful element of Oasis' music. Paul Arthurs said that 'For me personally it's Liam's voice. That's the Oasis sound. You know, anyone can crank up the guitars and sound like "wow, you sound big." But without the right voice behind you you're not going to sound that big.'¹⁴⁴ Kasabian frontman Tom Meighan conceptualises Liam's contribution to the band in terms of 'anger and aggression and passion' and that '...he [Liam] could sing the menu to my local Indian and you'd want to 'ave it with him.'¹⁴⁵ Hawkins argues that '...the voice discloses the 'realism' and credibility of the singer as frontman.'¹⁴⁶ The voice is a tool of authority. Liam also exudes authority through his singing stance, where he stands unmoving with his hands clasped behind his back. The stance is an expression of his self-assuredness. Liam said 'Why don't I move on stage? 'Cos I don't feel as if I have to.'¹⁴⁷ It is also a visual representation of the force with which Liam delivers his vocals. Journalist Keith Cameron said that 'The way that he's singing is so physical, you know, he's just wrenching the sound out from his legs, from his throat.'¹⁴⁸ Liam's powerful delivery exposes the force hidden in Hart's theory. Hart strove for a legal system that could be accepted rather than imposed. Oasis are avidly embraced by their fans. This fan reaction is approximately comparable to the critical acceptance that Hart argued was present in law. However, despite, or (as will be suggested) to elicit the acceptance of their fans, Oasis are always forceful. This suggests that Hart's system cannot avoid imposing itself because, inevitably in law, acceptance and force are intertwined.

Forceful delivery establishes Oasis' music as special. It is not argued that Oasis' work is of poor or average quality and that their confidence and aggression

¹⁴⁴ Carruthers (2004) *Definitely Maybe*, Chapter 16.

¹⁴⁵ Meighan (2010), p 96.

¹⁴⁶ Hawkins (2010), p 151.

¹⁴⁷ Shaw (2006), p 129.

¹⁴⁸ Carruthers (2004) *Definitely Maybe*, Chapter 16.

are used to distract from the shortcomings of their work. On the contrary, Oasis' songs are beautifully written. However, Oasis' music was not merely scrutinised and accepted (from the 'internal' point of view of its fans) on the basis of the quality of the group's song writing. The band attracted a profound response from a mass of people. They were considered more than merely competent. They were interpreted as culturally significant, representative of the spirit of the times. The way in which the delivery of Oasis' music influenced its reception shows that Hart distinguishes his system of rules as 'special' (i.e. legal) through the use of a rhetoric and force that guides how these rules are understood. Simply praising Oasis' songs as accomplished would be like, in Hart's scheme, identifying a network of rules that relate to a sporting match, while observing that Oasis' music is the 'sound track' of an era, would be like identifying a system of law. Oasis' music and Hart's legal rules are understood as significant, and this interpretation is enabled by their forcefulness, which frames them as important. Force claims authority, but authority may also be facilitated by force. The 'with us or against us', good vs. bad music, law vs. non-law distinction, rather than being divisive, may attract a mass of followers due to its implied promise of certainty. Oasis are forceful because of their conviction as to the worthiness of their music. In believing their music to be superior, an attitude which is conveyed through the use of force, others are convinced of its importance. In Hart's system it is the belief of the officials that signals validity. It is suggested that the forceful conduct inspired by this belief is the frame that prompts the system to be interpreted as authoritative by its subjects. The audience is made to see the work through the eyes of the performer.

The musician believes in the special quality of their work, and so performs it forcefully. The audience interprets the music through this force, and thus agree to its

importance, gaining the mass audience which validates the performer's belief. Respectful and thankful in regards their audience, Oasis are not patronising in the way that Hart sees legal subjects as sheep. Nonetheless, Oasis comment upon Hart and his 'flock', the mass of people. Oasis embrace the rock 'n' roll life and are comfortable with having a large audience. According to Harris, 'Oasis were... the group who managed to purge British music of any lingering difficulties with the idea of vast success.'¹⁴⁹ Oasis' music seems corroborated by its broad acceptance: 'Their most iconic moments – the Gallagher brothers taking the stage at Earl's Court, Maine Road or Knebworth – were bound up with the spectacle of mass adulation.'¹⁵⁰ Likewise, Hart's system is in need of its flock. The law is a special set of rules and it establishes a domain which must be populated by the right kind of follower. At this point, it may appear that there is a fracture in the metaphorical connection between Hart and Oasis. Hart's legal subjects are permitted to be indifferent, while Oasis' fans are rapturously supportive. However, Oasis helped to revitalise rock 'n' roll music in England for a period of time before and after which people were indifferent to rock 'n' roll. Likewise, legal subjects are often indifferent, there are critical moments when the law asserts its authority through force. In these moments, when the law comes into contact with lives amongst the flock, their apathy is dissolved. Forcefulness provides a context in which the law is understood to have authority.

Present in the idea of claims to validity being acts of force, acts of will, is the critique of the *ubermensch* that is alert to Zarathustra's potential for both enlightenment and imposition. As with chapter 4's examination of sovereignty, rather than being alternatives, these two effects are here combined into one. The understanding of law provided by Hart's theory and the force that makes the legal

¹⁴⁹ Harris (2003), p xvii.

¹⁵⁰ Harris (2003), p xvii.

system recognisable are united. There is a convergence of the force that Hart tried to push out of the legal system and the internal perspective with which he sought to replace it. The certainty in Hart's system begins to break down, as will be witnessed in the next section.

III – 'Definitely Maybe': Certainty and Uncertainty

Through their internal dimension, rules are supposed to be evaluated and accepted. As has been argued, however, critical appraisal of a rule may include assessment of the rule's delivery, evaluating force itself. Force is motivated by a belief in the certainty provided by rules. Rules are meant to clearly distinguish law from imposters and provide clear expression of community values. These functions are in play when a case is decided; rules should be identified and applied with certainty.¹⁵¹ Hart explains judicial decision making by saying that the activity is usually a mechanical process. Liam is the embodiment of certainty in Oasis. Laws are written and then applied by judges. Oasis' songs are written by Noel and then sung with confidence by Liam. Hart admits to the presence of a limited amount of uncertainty in his legal system. Within every legal rule is a core of settled meaning that allows for an uncontroversial application of the rule.¹⁵² Every rule also has a penumbra of uncertainty.¹⁵³ In a small number of cases rules will be unable to clearly guide a decision. In these instances where rules are of no help, a judge may have recourse to that which sits outside of the law in order to decide the case. Matching

¹⁵¹ Hart (1994), p 145: 'Whatever courts decide, both on matters lying within that part of the rule which seems plain to all, and those lying on its debatable border, stands till altered by legislation...' Also, Dworkin (1977), p 81, describes Hartian positivism as holding that: 'His [the judge's] opinion is written in language that seems to assume that one or the other party had a pre-existing right to win the suit, but [in Dworkin's opinion] that idea is only a fiction.'

¹⁵² Hart (1994), p 123.

¹⁵³ Hart (1994), p 123.

this, Liam draws upon unwritten elements in his performance of Oasis material. The uncertainty, it transpires, is more severe than Hart's text explicitly acknowledges.¹⁵⁴

To show the extent of this uncertainty, another analogy between Liam and Noel and Hart's system will be made at this point: Centre stage and in the spotlight, Liam is akin to the legal rule's core of certainty. Standing to one side is Noel, the penumbra. Liam is cocksure, Noel ambivalent. *Definitely Maybe*,¹⁵⁵ the title of Oasis' debut album, illustrates the relationship between the two brothers. Noel is the *maybe*, writing lyrics that expressing the same kind of indeterminacy that lies on the outskirts the legal texts as they are presented in Hart's system. Instances of this include, 'I can see the signs but they're not very clear,' in 'Columbia',¹⁵⁶ 'I tried praying but I don't know what you're saying to me,' in 'Slide Away',¹⁵⁷ 'And I want you to say "do you know what I'm saying?"' in 'She's Electric'.¹⁵⁸ Noel's songs are rife with ineffability, questions, uncertainties. Even his confidence is second-guessed: '...you said the brains I had went to my head.'¹⁵⁹ In contrast, Liam is the *definitely*. His onstage presence grave and unmoving,¹⁶⁰ like an authoritative judge at the bench. Liam's response to Noel's ambivalence is eerily similar to the mentality of the Hartian judge, as described (using psychoanalysis) by MacNeil: 'I know that the rules are essentially ambiguous, but nonetheless I continue to judge on the basis that their meaning is certain.'¹⁶¹ Whereas some of the lyrics on Oasis' second album hint at Noel suffering from fatigue and doubt, Liam's sings these words with vitality and sureness:

¹⁵⁴ Although Hart himself was beset with uncertainty: Farrell (2006), p 983, Lacey, p 338, a condition which might pervade *The Concept of Law*.

¹⁵⁵ Oasis (1994) *Definitely Maybe*.

¹⁵⁶ Oasis (1994) 'Columbia' *Definitely Maybe*.

¹⁵⁷ Oasis (1994) 'Slide Away' *Definitely Maybe*.

¹⁵⁸ Oasis (1995) 'She's Electric' (*What's the Story*) *Morning Glory?*

¹⁵⁹ Oasis (1995) 'Don't Look Back in Anger' (*What's the Story*) *Morning Glory?*

¹⁶⁰ Harris (2003), p 145.

¹⁶¹ MacNeil (2007), p 51.

‘Its [(*What’s the Story*) *Morning Glory?*]’s] best songs were seemingly built on a compelling contradiction... Though Noel’s words betrayed a weary, questioning response to the group’s ascent, Liam’s bulgy-veined delivery suggested that he had no such misgivings: if the group were ever to slow down, it would not be his foot on the brake.’¹⁶²

To MacNeil this disregard of uncertainty is an indirect acknowledgement of its existence.¹⁶³ Unintentionally, Hart’s theory divulges that uncertainty is epidemic. Because the very purpose of Hart’s legal rules is to be evaluated, their uncertainty is not confined to their penumbra but is shot through their core.¹⁶⁴ ‘Don’t Look Back in Anger’¹⁶⁵ contains a warning to the people, sung by Noel: ‘But please don’t put your life in the hands of a rock ‘n’ roll band, who’ll throw it all away.’ Noel sounds Hartian as he asks for critical evaluation and acceptance rather than blind obedience. Permeating Hart’s system is the battle between uncertainty and certainty. On one hand, uncertainty comes in from the outskirts to try and conquer the rule. On the other, judges decide cases with an affected certainty, trying to deny the ambiguity that afflicts the rule. The war between certainty and uncertainty is enacted by the fraternal squabbling of the brothers Gallagher. Their debate as to whether ‘attitude’ is an essential ingredient of rock ‘n’ roll music is an example of this conflict. Noel has remarked that ‘We’re supposed to have an attitude, but attitude never sold a record... If attitude sold records, then drug dealers would be Number 1 all the time because they’ve got sub-machine guns and that’s loads more attitude than me.’¹⁶⁶ While, conversely, in one lengthy debate, Liam advanced the belief that certain ‘rock

¹⁶² Harris (2003), p 255 attributes this insight to John Robinson’s NME review of (*What’s the Story*) *Morning Glory?*

¹⁶³ MacNeil (2007), p 51.

¹⁶⁴ MacNeil (2007), p 51.

¹⁶⁵ Oasis (1995) ‘Don’t Look Back in Anger’ (*What’s the Story*) *Morning Glory?*

¹⁶⁶ Shaw (2006), p 116.

‘n’ roll’ type behaviours were essential in order for a band to be convincing. Noel took the view that only the songs were important. ‘If you think rock ‘n’ roll is getting arrested and all that,’ said Noel. ‘Rock ‘n’ roll is about being yourself,’ replied Liam. ‘No it’s not,’ Noel countered, ‘rock ‘n’ roll is about music.’ The (mostly) verbal conflicts between Liam and Noel reinforce the observation that the core and penumbra are one. Even though they clash and seem to differ, like the Gallaghers, the certain rule and its ‘shadow of doubt’ share the same DNA.

The familial unity of core and penumbra shows the collapse of certainty in Hart’s theory. Pronouncements upon the usual matters of positivism, such as the distinction between law and non-law, cannot be made. The legal system can no longer be told apart from other networks of rules.¹⁶⁷ Likewise with Oasis, any lyric could be meaningless or significant, and any kind of music could be worthy of the zeitgeist or unremarkable, depending on one’s perspective. The only surviving indicator of legality in Hart’s theory is the ‘inner compulsion’ towards acceptance.¹⁶⁸ Liam’s compulsion may be his devotion to following the example set by Lennon. The ‘psychedelic picture frames’ through which Jamiroquai’s Space Cowboy sees the world can at this point be compared to Liam looking through his Lennon glasses, judging what counts as worthy music by reference to his personal cosmology of rock stars. This subjective realm is all that remains, casting doubt upon the authority of positivism’s claims.

An event that, by analogy, illustrates the collapse of certainty in Hart’s system is the making of Oasis’ third album, *Be Here Now*.¹⁶⁹ The album is mix of cocaine powered bombast¹⁷⁰ (one track, for example is ‘...caked in strings, horns,

¹⁶⁷ MacNeil (2007), pp 51-52.

¹⁶⁸ MacNeil (2007), pp 51-52.

¹⁶⁹ Oasis (1997) *Be Here Now*.

¹⁷⁰ Harris (2003), p 333.

superfluous vocal overdubs, grandiose drum fills and squalling guitar solos, none of which gave up the ghost until the song's ninth minute.¹⁷¹) and noncommittal song writing ('... songs that...tended to barely pass muster.'¹⁷²). Harris quotes Noel Gallagher's explanation of *Be Here Now*'s creation: "I wasn't prepared to make things any better," he rued. "I'd get to a certain point and go, "Fuck it, that'll do.""¹⁷³ It appears that Oasis were caught in the middle of the conflict between certainty and uncertainty. Conclusive thinking on the matter is unattainable. The album may be an audacious, assertive triumph, or a hubristic disappointment. Everything is scrambled by indeterminacy. The distinctions made by Hart's theory are themselves an 'oasis', or, more accurately, a mirage.

The indeterminacy of Hart's theory is betrayed in the insecurity that is perceptible in its secondary rules. Rules about rules are a self-conscious, second-guessing tactic, as can be highlighted by comparing them to their Gallagherian equivalent: exposition, through interviews, on the correct form of rock 'n' music. The Gallaghers do not only make music, but talk about what 'proper' music is, as if defending it. Their opinion perhaps requires voicing because it is no longer indisputable. This is congruent with a broader habit of Britpop's, which, as discussed above, is the affirmation of cultural constructs that have become less viable, or have ceased to exist. Cultural certainties that have been destabilised across time (these disruptions are enacted by artists such as Madonna) may instil some with a concern for the 'real' (Madonna's frequent transformations compared to Oasis' conservative mission, for example). 'Real' music, the 'real' England, and, in the instance of Hart's, actual law. The contrast between Madonna and Oasis suggests the certainty of law that has been interrogated and disordered by various critical perspectives.

¹⁷¹ Harris (2003), p 334.

¹⁷² Harris (2003), p 334.

¹⁷³ Harris (2003), p 334.

Hart's internal acceptance may be equated to the voluntary, artificial assumption by some in the 1990s of the illusion that the golden age had returned. This revival, like Hart's rules, is self-conscious, an assertion against the uncertainties of the present and of the social bond. Once more, as with Zarathustra elevating his insecurities as he scales the mountain, Hart's concerns are proliferated by his efforts to placate them. The quest for certainty about law is undone, core and penumbra are one; there is ambiguity throughout the system of legal rules.

Hart's theory appears to deny uncertainties and shut out that which does not fit the vision of community. This exclusionary element is noticeable in the vision of togetherness offered by Oasis, which is defined in opposition to the other. When Liam asks 'Where were you while we were getting high?' in 'Champagne Supernova',¹⁷⁴ it sounds faintly like an accusation. Liam sings 'We see things they'll never see,' in 'Live Forever',¹⁷⁵ and '... 'cause people believe that they're gonna get away for the summer, but you and I we live and die,' in 'Champagne Supernova'.¹⁷⁶ The chorus to one of Oasis' uber-anthems, 'Don't Look Back In Anger',¹⁷⁷ always sung with the utmost enthusiasm by the audience, contains the lines 'And so Sally can wait, she knows it's too late as we're walking on by. Her soul slides away...' Sally is regretful and finds herself ignored by the group. Savage expresses concern that the community's force might be exerted against those in contrast to which it defines itself, those who are part of:

'...an outsider thing that was beginning to be forgotten in this great community thing that Oasis and New Labour were starting to project. If we all want to come together, fine, but what about the people who still

¹⁷⁴ Oasis (1995) 'Champagne Supernova' (*What's the Story*) *Morning Glory?*

¹⁷⁵ Oasis (1994) 'Live Forever' *Definitely Maybe*.

¹⁷⁶ Oasis (1995) 'Champagne Supernova' (*What's the Story*) *Morning Glory?*

¹⁷⁷ Oasis (1995) 'Don't Look Back in Anger' (*What's the Story*) *Morning Glory?*

want to be mis-shapes, who still want to be different? You know, who are worried, like so many people are still today, about going into town and getting a smack in the mouth because you look different. And that still happens a lot, and partly as a result of the intolerance that has come out of that community idea that started in the mid-90s, okay?’¹⁷⁸

It may be that jurisprudences of the outsider should be granted admission to this community in order to redress its insecurities and confusions. Recalling natural law’s role as one (at least possibly) ‘outsider’ jurisprudence, Hart possibly acknowledged this point in the postscript to the 2nd edition of *The Concept of Law*, which suggests that acceptance of legal rules by the system’s officials requires a ‘minimum content’ of morality (or ‘values’, as Nietzsche would put it?).¹⁷⁹ The example of Oasis bolsters this suggestion. For, if rules are songs, their lyrics legal texts, and singing legal force, what analogy does Noel’s beautiful (and hitherto in this chapter, almost unacknowledged) melodic sensibility find in jurisprudence if not the unguarded and questioning field of critique and concern, tolerant of multiplicities, of various facets of meaning and interpretation? As Noel sings in ‘Acquiesce’:¹⁸⁰ ‘...we need each other.’ Perhaps into the purity of positivism’s closed system must be introduced a feeling that it has ‘lost inside’:¹⁸¹ a new attitude towards difference.

¹⁷⁸ Dower (2003) *Live Forever: The Rise and Fall of Brit Pop* Unseen Interview Cuts – Jon Savage, Chapter 5.

¹⁷⁹ Hart (1994), p 247.

¹⁸⁰ Oasis (1998) ‘Acquiesce’ *The Masterplan*.

¹⁸¹ Oasis (1995) ‘Roll With It’ (*What’s the Story*) *Morning Glory?*

‘Different Gear, Still Speeding’: Legal Philosophers Going Their Own Ways

Matching positivism’s attempts to identify the law and find some basis for its binding quality, Oasis seek to establish their music as ‘real’. Oasis exert their claims to legitimacy via association with the musical forebears they have selected and through Liam Gallagher’s formidable delivery. Liam demonstrates that attempts to create a certain world are acts of will, exposing Hart’s failure to move out of Austin’s shadow. Hart’s drive to escape the uncertainties and discord of the social is echoed in the cultural shift of which Britpop was a part:

‘The mid-nineties was a very up time, but I don’t think really anyone was thinking about the consequences of it, you know. The government as well, I think, got carried away. It was just “my god we’ve got to change.” A change in climate.’¹⁸²

Battling with uncertainties creates a conflict of its own, and may result in disintegration. Oasis broke up, its members now belonging to the groups Beady Eye¹⁸³ (fronted by Liam) and Noel Gallagher’s High Flying Birds.¹⁸⁴ Both Liam and Noel are freely pursuing their own styles, Liam as a rock ‘n’ roller, and Noel as (an often acoustic) troubadour. Like the collapse of the hegemonic ‘Pax Oasisia’, monolithic conceptions of jurisprudence may also have come to pieces. In the final chapter, the implications of this fragmentation of musical (as exemplified by the cellular division of Oasis in its demise) and jurisprudential endeavours will be discussed.

¹⁸² Dower (2003) *Live Forever: The Rise and Fall of Brit Pop* Damon Albarn – Chapter 17.

¹⁸³ Beady Eye (2011) *Different Gear, Still Speeding*.

¹⁸⁴ Gallagher (2011) *Noel Gallagher’s High Flying Birds*.

Oasis' album title *Don't Believe the Truth*¹⁸⁵ suggests the Nietzschean opposition to metaphysical claims to objectivity and the imposition of its values upon the people as well as Liam Gallagher's confidence in his own interpretative acts. Oasis are self-assured in their opinions on music, just as Hart's officials are not dependent on the 'sheep' in their recognition of legality. Liam suggests both the fruition and collapse of the *ubermensch*. He is its highest incarnation, immersed in his own creative acts, but this self-contained attitude also makes him the precursor to the fragmented concerns of rock music and jurisprudence that will be examined in the following chapter.

¹⁸⁵ Oasis (2005) *Don't Believe the Truth*.

The Encore

‘There’s a reason for the 21st century. Not too sure but I know that it’s meant to be.’
– Red Hot Chili Peppers.¹

¹ Red Hot Chili Peppers (2006) ‘21st Century’ *Stadium Arcadium*.

Chapter Eight

Sympathy for the Legal:² The End of the Rock Star?

It's time to go on. The members of Oasis casually walk down aisle stairs at the venue.³ They are surrounded by empty seats, but there is a hollow roar on the air. The stadium is not empty at all; Oasis are merely behind the stage. As they climb the walkway and walk out on the deck, a panorama unfolds. Tens and tens of thousands of people encircle the band. The roar magnifies exponentially when Noel and Liam make their entrance. The people reach out. Countless hands extended, waving like the tendrils of an undersea plant. The band plays; a heavy rock 'n' roll beat starts thumping. The audience jumps up and down. The members of the crowd are squashed together; the place is a crucible. Clapping as loud as the drumming. Chants as loud as the singer.

Rock and Law, Then and Now

This thesis has brought together jurisprudence and rock music, travelling through worlds of power chords and legal power, riffs and rules, jamming and judging. Combining the two enterprises is intended to elucidate jurisprudence by placing it in the context of the cultural. For example, in the previous chapter, the vivid togetherness of Britpop underscored the desire for community found in H.L.A. Hart's account of the legal system. The succession of rock stars in the preceding chapters has progressed chronologically from the 1960s, and arrives in the early 21st

² Rolling Stones (1968) 'Sympathy for the Devil' *Beggars Banquet*.

³ Walsh (2006) Oasis *Lord Don't Slow Me Down*, Chapter 6.

century, inviting consideration of the repercussions of the rock star for present day jurisprudence.

After time spent engaging with mass culture, the musicians sampled in this study refocused their efforts on more individual concerns. Hendrix was left surveying vistas of possibility that lay beyond rock, Lennon became a family man looking for satisfaction in everyday life, Bowie abandoned his dictatorial affectations and began work with new collaborators, while Madonna embarked once again on her mission of renewal, and the Gallagher brothers ended up in their personalised niches. These cases represent a transformation from the general to the specialised that has occurred throughout the music industry, where digital technology has enabled the effortless dissemination of musicians' work, but has also fragmented the industry:

‘For example, the internet has increased the ease of distribution, leading to the rise of self-publishing and fan remixes in the music industry, as well as user-generated video content on YouTube. Also, there has been an explosion of creative diversity and niche audiences, as evidenced by hundreds of new music genres, dozens of specialized cable television networks, millions of new websites, and thousands of mobile applications.’⁴

‘The Internet thus enables the development of widely dispersed audiences for musical products, and therefore the emergence of highly fragmented and highly specific niche markets for any conceivable form of music.’⁵

‘As a result of this audience fragmentation, popular music and its performers have lost the cultural centrality they once enjoyed...’⁶

⁴ Simmons (2009) *Fragmentation in Digital Media / Entertainment*: http://todd-simmons.com/docs/MBA06_DigitalMedia_Fragmentation.pdf, p 12.

⁵ Hughes and Lang (2003), p 181.

⁶ Shumway (2007).

It may be that fragmentation of the people's taste has changed the relationship between musician and audience and has eroded the rock star's position in culture. The extraordinary performer has disappeared; any and all music can be 'published' on the internet, while the mainstream audience has broken up as its constituent members turn to their particular interests. Unnecessary are individuals whose work is defined in relation to the masses, imposing themselves upon society in the broadest manner.

The demise of the rock star comments upon jurisprudence, which has also transitioned from the homogenous to the personalised.⁷ Legal philosophies no longer purport to explain the entirety of the law and people's experiences under it (as does, for example, Dworkin's theory, which makes sense out of the social experience and explains the workings of the legal order by conceptualising interpersonal dealings and judicial decision-making as rights-based). In the past, prominent jurists assumed an importance equal to, or greater than, law's masses by defining an essential meaning for the whole of society. Now, jurisprudence concerns itself with exploring facets of law (for example, examining the influence law exerts through aesthetics) or examining the law's impact upon particular subjectivities (for example, critical feminist and race theories). After the late 20th century's 'Ballad in Plain D'(econstruction)⁸, numerous theorists have stopped positing any single element as law's fundamental animating principle. Justice, sovereign power, goods, rights, and rules have been decentred.⁹ This is not to denigrate the usefulness of these concepts but to demonstrate that any one of them, and indeed, any theorist, cannot monopolise value. There has been a cessation of the claim 'This is the meaning of the law and it

⁷ Or, as Hirvonen (1998) contends, at no time has law actually been a homogenous entity.

⁸ Dylan (1964) 'Ballad in Plain D' *Another Side of Bob Dylan*.

⁹ If coherency or consistency of law is espoused, it is no longer on the basis of such universals as are characteristic of 20th century jurisprudence.

is I that brings this meaning to you.’ Now, everyone has, to use Noel Gallagher’s words, ‘the heart of a star.’¹⁰ All embody meaning and significance.

The reconfiguration in contemporary culture of the relationship between the individual and the masses signals both the collapse and the fruition of the Nietzschean superhuman. These outcomes involve features of Nietzsche’s work chiefly relevant to this thesis including the exceptional individual and the aesthetics of subjectivity. Cultural fragmentation may be interpreted as the demise of Nietzsche’s theory because it precludes the emergence of the exceptional individual, the lone figure who stands in contrast to the ‘herd’ and holds out for all a new way of life. Furthermore, it is possible that Nietzsche’s mantle of aesthetic responsibility has spread throughout the culture, the duty of fidelity to one’s perceptions evidenced in the uniqueness of specialised genres of jurisprudence and music, where everyone is obliged to ‘carry that weight’¹¹ of creating meaning. In the first section of this chapter, the complex interactions between rock star and audience will be used to explore the legal space and its tendency towards metamorphosis. The fragmentation that has come about of late is one such transformation. It is argued that the move away from understanding the law as homogenous is thematically similar to the Nietzschean quest for individual meaning. The Nietzschean quest is more commentary upon the cultural forces of the West that have led to fragmentation than it is the cause of fragmentation. However, the call to individual responsibility for the poverty of human life in modernity is a helpful resource in understanding this cultural dissolution. The Nietzschean quest and its implications will be detailed in the second section. The third section addresses the implications of fragmentation for

¹⁰ Oasis (2003) ‘(You’ve Got) The Heart of a Star’ *Songbird*.

¹¹ The Beatles (1969) ‘Carry That Weight’ *Abbey Road*.

law work, before a show closing rendition of the rock star's contribution to shaping humanity's relationship with the law.

I – Space

This thesis has argued that rock stars and their work comprise a set of resources that can aid in understanding jurisprudence. The analysis conducted in chapters 3 to 7 was based on the proposition that jurists and rock stars overlap in the issues they address. However, rock stars are not only useful to jurisprudence because of their similarities. Their differences, at least in style, if not in subject matter, are also a significant part of rock stars' ability to illuminate the legal academic world. Superficially, rock's sounds, dress, vocabulary, and etiquette are strikingly unlike mainstream legal scholarship. However, when rock music is brought to jurisprudence on the assumption that the two possess similarities at a deeper level, it provides an 'all access pass' to that which is often off-limits in legal philosophy. The theories studied in this thesis are often abstract, detached from ordinary human understandings. In being presented as universal truth, they have been isolated from the circumstances that prompted their creation. In contrast, rock music is concerned with story; musicians' backgrounds and 'ascension' to fame, and sentiment; feelings conveyed by songs and attitude-as-style. Reading jurisprudence and rock together exposes that, although belied by its impassive exterior, jurisprudence is thinking on the human experience of the social that is motivated by, and full of, events, aversions, desires, and emotions. Rock stars fill out the textual frameworks that jurisprudence supplies, illustrating and animating the concerns of humanity and the humanity of its concerns. Given its multi-mediated presence and

immense popularity, rock music provides an abundance of explicatory images. It is an extensive, detailed resource from which legal thinking can benefit.

This chapter employs the image of the ‘gig’. The sampled theorists claim to make sense of the entirety of the legal system. Such interpretive acts would deliver meaning to society on a massive scale. In rock music, the closest equivalent in magnitude is the enormous concert. Therefore, the arena and the stadium are viewed here as sites of jurisprudential significance. The gig displays the aptness of popular music to the examination of jurisprudence. Performer and audience make visible the effects of an intangible force; music, in this situation, and law, by analogy, on human behaviour. The gig reproduces in a physical space the ‘world’ of the rock star: the multi-coloured outer (and inner) space of *Electric Ladyland*,¹² the world-without-borders of *Imagine*,¹³ Bowie’s dystopias, Madonna’s discothèque, and the rejuvenated England of Liam Gallagher. In its assembly of people and the enveloping presence of the music, the gig resembles society and its regulation by law: the free space secured by Rawls’ just institutions, Schmitt’s sovereign state, Finnis’ society oriented towards the good, Dworkin’s ‘seamless web’,¹⁴ and Hart’s harmonious community. The bordered space of the gig’s venue encloses a people just as law adumbrates an order. The stadium becomes the city state; people congregate at a rock show in the name of music, while law is the part of the network that ties people together in society.

These spaces are a manifestation of the meanings held by their inhabitants. Music gives voice to culture and law crystallises the beliefs of a society. Nietzsche is relevant to these acts of expression as meanings are interpretations, valuations. When perceptions are manifested, they become an interpersonal matter. Having given shape

¹² Hendrix (1968) *Electric Ladyland*.

¹³ Lennon (1971) *Imagine*.

¹⁴ Dworkin (1977), p 115.

to a feeling in the air, a song invites an audience, allowing for convergence. In providing definition to unarticulated beliefs, law provides the ‘glue’ of society, enunciations that can be held in common. Law shapes how people are expected to relate to each other. Creation is dependent on interpretation; an expression requires a point of view that can be communicated. Interpretation and creation of the world are intermingled, and, as Nietzsche stresses, the production of meaning involves exceptional individuals. The rock star stands on stage, separated from the audience and offering values to the crowd, like Liam Gallagher and Oasis defining ‘...what it’s going to be from now on.’¹⁵ Clearly, artistic creativity has its basis in subjectivity. However, Nietzsche’s argument against abstract and objective values also applies to theoretical explanations of law. Finding similarity in jurists and rock stars shows that law, too, is a product of individual points of view. The theories analysed in this thesis depend on unique perceptiveness. Rawls’ original position furnishes the traveller of the inward journey with the ability to recognise justice; the opinions of Schmitt’s sovereign are imposed on all, making disagreement, and thus, conflict, impossible; Finnis’ goods are self-evident to those who can discover them; Dworkin’s Hercules J can see the latticework of the law in its entirety and in its most noble guise; and, distinct from the flock, Hart’s official identifies a particular set of rules as legal. The exceptional, creative being appears to possess sole responsibility for the law.

As distinctive and prominent as the outstanding individual is, however, they may not be the only party to the creation of meaning. It is argued that, consistent with the spatial metaphor used above to describe law and music, values arise out of an environment. This kind of setting involves multiple participants: the gig features

¹⁵ Carruthers (2004) *Definitely Maybe* Chapter 1.

not only the rock star, but the crowd. The mass audience is vital to the live rock spectacle, and not as mere affirmation of the rock star's creative potency, but also as an actively creative entity. The rock star presents meaning to the world through, among other things, the sounds they make. The crowd also generates noise, and it is argued that these sounds – chants, cheers, screams, claps, occasional boos, and frequent sing-alongs – indicate a meaning that originates with the rock star's audience. The crowd does not cheer solely as an act of passive reception. Bono has stated that: 'When people are screaming in some stadium or arena, they're not screaming at you, they're screaming at themselves and the moment that song represents.'¹⁶ Audience members' actions are not only responses to the rock star, but are sourced in their individuality and hence, are creative. The audience's creativity shows that the law is built not by its professionals alone, but also by those who live under it. It also reveals at last how Nietzsche's challenge that each individual make the law for themselves can be met despite the law's seemingly universal and uniform applicability. In following along to music, the crowd is simultaneously a united entity with a common mood (as musician John Frusciante has said 'They're [the audience are] literally functioning as one organism.'¹⁷), and a collection of individuals. Bono's assertion that audiences are 'screaming at themselves' suggests that while audience members behaviour appears homogenous, the internal significance of their actions is unique to each person. The work of rock stars, like any cultural output, is only esteemed by people to the extent that they find it useful. Adoration for the rock star is bound up in the aliveness of meaning inflamed by one's own aesthetic experience. The individual as part of a community is reconciled to some extent with the aesthetically responsible being. Every person cultivates a

¹⁶ MacPhisto 'Back on Song' <http://www.macphisto.net/article38.html>

¹⁷ Pomerence (2010) 'Full John Frusciante Interview, July 16th, 2008' *The Heart is a Drum Machine*.

world in their head ('I'm seeing a whole nother world in my mind,' sings Liam Gallagher, for example¹⁸). While rock stars' worlds are more conspicuous owing to their celebrated external manifestations, audiences also assume Nietzsche's aesthetic labour and foster internal domains. This scenario directs an understanding of jurisprudence towards the potential for individuals to be instigators of law's renewal. The law's values are a matter for each person, and relating to law requires creating the law. While the relationship to legality has its origins within, it is more than simple acceptance of law. Those that are subject to law also contribute to it. Similarly, the movements of the audience are directed to, and impact upon, the rock star.

The spaces created by performer and audience merge at the gig, where acts of creativity are given and received on both sides. There is a mutual relationship. The musician and the crowd are at the gig for themselves and for each other. The rock star is not wholly independent in their creativity; they are also responsive. The audience's inspiration flows towards, and is drawn upon by the musician. The conduits that go back and forth between the rock star and audience may not be obvious, because, as outstanding individuals, rock stars are outwardly separate, both at the gig, and in the culture. In *Runnin' with the Devil*,¹⁹ David Lee Roth sings of the rock star existence, which is accelerated beyond the tempo of the mundane and is lacking in prosaic comforts: 'I live my life like there's no tomorrow and all I've got I had to steal. Least I don't need to beg or borrow. Yes, I'm living at a pace that kills.' 'I've got no love, no love you'd call real. I've got nobody waiting at home.' Although the rock star is outside of normal society, they remain connected to it. There is a (somewhat) hidden link between the two. Rock stars' work addresses the

¹⁸ Oasis (2005) 'Love Like a Bomb' *Don't Believe the Truth*.

¹⁹ Van Halen (1978) 'Runnin' with the Devil' *Van Halen*.

society from which they stand removed. They exemplify issues within a society and so are not truly separate from it. Rock stars pick up on matters of cultural import and present them to the culture itself. For example, the Beatles' recognition of emerging trends, such as Eastern religion in the West, which served to further popularise these nascent fashions. In a gig, the performer elicits a response from the audience, absorbs the feeling created by this reaction, and returns it, magnified. Keith Richards describes the exchange:

‘And the only way I can sustain the impetus over the long tours we do is by feeding off the energy that we get back from an audience. That’s my fuel. All I’ve got is this burning energy, especially when I’ve got a guitar in my hands. I get an incredible raging glee when they get out of their seats. Yeah, come on, let it go. Give me some energy and I’ll give you back double. It’s almost like some enormous dynamo or generator.’²⁰

A ‘feedback loop’ is created, where a cycle perpetuates itself, intensifying as it does so. In the gig, the rock star gives back to the audience the feeling that they created, and generally, helps extrapolate from the culture the culture’s identity. The exceptional individual gives to the people what is in some way already theirs. The rock star stands apart so that there will be two poles that can interact with each other, generating social vitality. This binary arrangement resembles law’s separateness from the people. Like music, law is persuasive and effective because it lies both without and within.²¹ It is because theorists and rock stars stand apart that they help make what is inside people and what surrounds them visible, and therefore comprehensible, and ultimately more useful. Things that are outside of people are

²⁰ Richards (2010), pp 550-551.

²¹ Citing Murphy, Goodrich and Valverde (2005), p 3 highlights ‘...the surprising coincidence or interdependence of the exterior scheme of norms, the law as hierarchy and legislation, and the inner life of the subject, the interior of affect, of terror and desire.’

things that people can react to, and reactions create the possibility of interchange, and actual change, indeed renewal.

The relationship between the rock star and audience has been revealed as an interactive one, producing energies that provoke motion and open up possibilities for transformation. Also creating a binary relationship with its followers, law's separateness from people allows it to be discussed, examined, contested, and adjusted. Laws are written and can be rewritten. Law affects the people to which it applies, but the relationship is two-way; there is scope for law's subjects to be heard. Like the feedback loop of rock star and audience, the law reflects back upon the people, inviting further reactions. Nietzsche talks of the conflict between old and new values and, accordingly, various meanings assert themselves in the legal realm. The push and pull of the nuanced relationship between performer and audience, between law and legal subjects raises issues of authority which will now start to be examined.

A definition of meaning must be made in a meaningful context. An audience is required for acts of communication to have significance. A rock star needs an audience, and as discussed in chapter 2 of this thesis, Nietzsche's revelation of creativity founded upon will has resulted in the understanding that, as a posited creation, law's very existence is defined by its efficacy. That rock music and law are creations that aspire to recognition prompts consideration of what makes rock stars mesmerising and what makes law binding. As well as causing its validity to be dependent on acknowledgement, its willed origins mean that law is not constrained by established definitions of what it should be. In the absence of a metaphysical dictum guiding its formulation, the law could embody anything, and the shape it takes will be a matter of discussion to which people bring their differing values.

Anything that enacts the push and pull surrounding these issues of debate in society will gain attention because people have an investment in this discussion. Rock music and law both deal in tension and conflict, which invite examination of force.

The charged atmosphere of the gig magnifies the general experience of listening to rock music. It is a matter of human energies. Both law and music fill the space that exists between people. Law deals in the connections between its subjects by regulating their interactions. Concert-goers are present for a uniform purpose: their common engagement with the performance that is taking place. At the gig, these interpersonal links travel through an energy particular to mass gatherings that have a performative aspect. John Frusciante affirms this understanding of music as establishing connections via the currents of humanity, saying of 'live' performance that '...it's the energy transference between the performer and the audience and the audience and the performer that I really enjoy.'²² Frusciante describes the activity as '...just human energy bouncing off one another the same way it does when people have sex...'²³ In associating music and sex, Frusciante highlights that music operates on the corporeal register. The gig reinforces music's effect on the tangible. As a gathering of people, the gig is noticeably physical. Bodies pack out the stadium, swelling the music just as people swell the law. Rock gigs accommodate clapping, waving, cheering, crying, screaming, booing, chanting, stage diving, mosh pits, pile-ons, fainting, rucks (and 'fighting in the dance halls'²⁴) and flashing projected on stage screens. Evident is a maelstrom of human drives, drives which animate bodies and are directed towards other bodies. Frusciante mentioned one of these drives; sex, as being relevant to music. Importantly, violence is also present. For example, Keith Richards mentions the constant presence of violence at the Rolling Stones' (a band

²² Pomeranke (2010) 'Full John Frusciante Interview, July 16th, 2008' *The Heart is a Drum Machine*.

²³ Pomeranke (2010) 'Full John Frusciante Interview, July 16th, 2008' *The Heart is a Drum Machine*.

²⁴ Bowie (1971) 'Life on Mars?'

whose influence permeates the rock star, and which, spanning most of rock ‘n’ roll’s history, is almost as enduring as law itself) early performances: ‘In England for eighteen months, I’d say, we never finished a show. The only question was how it would end, with a riot, with the cops breaking it up, with too many medical cases...’²⁵ There are numerous instances of violence in the world of rock ‘n’ roll, such as seaside clashes between Mods and Rockers,²⁶ Lennon’s assassination, and Noel Gallagher being pushed over on stage and breaking several ribs.²⁷ In the setting of the rock show, the energies of sex and violence sometimes mix together, Maenad-like, a situation described by Keith Richards:

‘It was all dripping with sexual lust, though they [the audience] didn’t know what to do about it. But suddenly you’re on the end of it. It’s a frenzy. Once it’s let out, it’s an incredible force. You stood as much chance in a fucking river full of piranhas. They were beyond what they wanted to be. They’d lost themselves. These chicks were coming out there, bleeding, clothes torn off, pissed panties, and you took that for granted every night. That was the gig.’²⁸

‘I was never more in fear for my life than I was from teenage girls. The ones that choked me, tore me to shreds, if you got caught in a frenzied crowd of them – it’s hard to express how frightening they could be.’²⁹

Richards attests to the immense force of these movements of energy, as does the Rolling Stones’ career retrospective documentary *Crossfire Hurricane*,³⁰ which, according to Neil McCormick:

²⁵ Richards (2010), p 152.

²⁶ Roddam (1979) *The Who Quadrophenia*.

²⁷ Jonze (2010) <http://www.guardian.co.uk/music/2010/mar/24/noel-gallagher-oasis-fan-attack>

²⁸ Richards (2010), pp 154-155.

²⁹ Richards (2010), p 156.

³⁰ Morgen (2012) *Crossfire Hurricane*.

‘...presents the Stones not as masters of their own destiny but as pop culture surfers battling their way through a series of storms. ...Time and again, we hear one or other of the Stones describe events as being out of their control. Keith Richards talks of “unstoppable momentum” and being “swept along”, Watts of “just being dragged down the river”. The more analytical Mick Jagger considers how the Stones became a personification of “the violence of the time”, like actors stepping into roles that were tailor-made for them.’³¹

These energies are immense; they are capable of overwhelming individuals. The Rolling Stones’ encounters with such force are a worthy comparison for the law, which visits considerable force upon comparatively powerless individuals, in which lives can be ‘swept up’, and in which people occupy various ‘roles’ with differing allocations of influence.

The riotousness of rock music can be helpful in reminding of the forceful impact of law, a dimension often neglected by mainstream jurisprudence. Even in music it is possible to ignore violence and imagine that it is all just sing-alongs. However, a more complete view of rock readily demonstrates that music is a physical form of transmission; instruments emit soundwaves that travel through cables and out of speakers, entering through the ears and breaking against the chest, making people move to a rhythm, and eliciting drives that are unleashed upon other. Equivalent to this, the law works on bodies. It is essential to recognise that law is not formed only out of the mental dimensions of creativity discussed at length above. The trinity of ‘sex, drugs, and rock ‘n’ roll’ parallels the mental and physical dimensions that coexist in law. Sex acts upon the body, drugs act upon the mind, and rock ‘n’ roll, like law, uses both. Legal authority uses force. This is a reality only

³¹ McCormick (2012) ‘Rolling Stones’ Crossfire Hurricane, London Film Festival 2012, review’ <http://www.telegraph.co.uk/culture/film/filmreviews/9618084/Rolling-Stones-Crossfire-Hurricane-London-Film-Festival-2012-review.html>

infrequently acknowledged by the core jurisprudes analysed in this thesis. Often, jurisprudence ignores the workings of power and even reinforces violence. Rawls' liberal system supports existing political arrangements and therefore entrenched distributions of power, Hobbes argues for the necessity of an unbridled force, Finnis' natural law theory appears to result in a demand for highly unquestioning obedience to a moral-less order; a system of force rather than flourishing, Dworkin hides the conflicts within law under his 'seamless web',³² and Hart sends the sheep to the slaughter in his attempt to deny the violence of legal officials. Conversely, most rock stars recognise that energy is their stock-in-trade and acknowledge that Eros and/or Thanatos might erupt from their work. As 'Gimme Shelter'³³ has it, war is 'just a shot away' and love is 'just a kiss away'. Both are impending at all times. This attitude is present in Noel Gallagher's account of the beginning to an Oasis gig:

'...we walked on stage and I walked to the mic and said 'Good evening ladies and gentlemen,' and got hit right on the face with a glass, like 'crunch', right on the top of me head like that. This was before we'd even plugged in, so it was like 'It's going to be one of them nights, then, innit?''³⁴

Noel's unsurprised and stoic reaction implies an understanding that to be a rock star means an involvement in forces that must be acknowledged and confronted. Those who conceive of law in a Nietzschean way, as a matter of human creativity, must take notice of force so that it can be held to account. Though they may go unnoticed, energy has dark and light natures, as Michael Silverblatt indicated when discussing, among other things, rock music and film making of the 1960s: '...this demonic aspect was implicit and constant during the period. It almost never got

³² Dworkin (1977), p 115.

³³ Rolling Stones (1969) 'Gimme Shelter' *Let it Bleed*.

³⁴ Szaszy and Carruthers (1996) *Oasis ...There and Then*, Chapter 8.

commented on because it was so present.’³⁵ While intimidating, and difficult to understand, control, or weather, energy demands engagement. Its ‘implicit’ presence needs to be made explicit for law.

Energy may form connections, uniting individuals. Music is something that people ‘come together’ over, giving them a sympathy towards each other, as evident in the notions of belonging explored through Hart and Liam Gallagher in chapter 7, and, as John Frusciante states as he further unpacks the comparison between sex and music, saying of the interaction between performer and audience that ‘It’s no different than when people have sex and they gradually cause each other to feel what the other one is feeling.’³⁶ Energy does not only unite, however. As was stated in chapter 2: ‘Rock’s communality is a paradoxical combination of unity and disruption.’ Energy can also separate people, for example; differences in musical taste or encounters of violence. Legal power works in the same way. It can bind people together, such as sovereignty, which homogenises values and erases discord, and can also separate them, as is seen with rights, which distinguish the individual from the other. Togetherness and separateness, peace and violence are possibilities swirling around the individual and the collective, each infiltrating the other.³⁷ For example, collectivity and violence may be associated, such as with the renowned violence of the Rolling Stones’ concert at Altamont, during which an audience member was killed,³⁸ or the Hitler rallies, which cast a shadow over future performative mass gatherings of the 20th century, suggesting connections between

³⁵ KCRW Bookworm ‘Michael Silverblatt Interview with Zachary Lazar’
http://www.kcrw.com/etc/programs/bw/bw080619zachary_lazar

³⁶ Pomerence (2010) ‘Full John Frusciante Interview, July 16th, 2008’ *The Heart is a Drum Machine*.

³⁷ Physicality is perceptible in the work of the rock stars and jurists analysed above: Hendrix’s disembodied states; the bodily violence perpetrated against Lennon; Bowie’s metamorphoses and transgression of ‘nature’; Madonna’s dancing and the assertion of the self; and certainty and uncertainty in taking action with Liam Gallagher.

³⁸ Maysles and Maysles (1970) *Gimme Shelter*.

adulation and oppression that were evoked by Pink Floyd's *The Wall*³⁹ film and opening imagery of U2's Zoo TV tour,⁴⁰ which included footage of Nazi Germany. Law is full of people coming together and moving apart. Its force can have catastrophic or helpful effects. These consequences must be held in mind when the law is engaged with, when it is made and remade. The following section deals in the work of valuation, reflecting upon the ubermensch's journey of self-definition and the teaching of others, themes in the work of the rock star, and the making of the law.

II – Questing

In chapter 1, it was remarked that there were two concepts involved in this thesis' exploration of law and the rock star, these concepts being the 'worlds' evoked by jurisprudence and rock music and the ends to which these worlds were deployed. In the previous section of this chapter, the worlds of rock music and the law were examined through the notion of space. In this section, the purposes of these worlds are contemplated by way of the meanings of the kind of jurisprudential and musical work that has been analysed.

Above, a model was established that involved binary relationships, energy exchange, and forces of unity and conflict, that together produced a kind of 'dynamo'. This model relates to the rock star's provocative behaviour. Rock stars appear to tap into energy in part by exploiting a kind of 'cultural tectonics' whereby they identify places in which differing opinions converge and create tension. The counter-cultural associations of Hendrix, the outspoken anti-establishment sloganeering of Lennon, Bowie's sexually ambiguous presentation and critical commentary of society, Madonna's innumerable controversies, and Liam Gallagher's

³⁹ Parker and Scarfe (1982) *The Wall*.

⁴⁰ Mallet (2006) *U2 Zoo TV Live from Sydney (Limited Edition)*.

abrasive demeanour all evidence creative inspiration drawn from contested matters. Liam Gallagher has lamented the dearth of musicians who involve themselves in controversy: ‘And it’s like what fucking Bobby Gillespie said. He come out with something and he said “I’m sick of all these fucking bands who ain’t got, who don’t get in situations and that no more.”’⁴¹ The term ‘situations’ suggests altercations, but also context; a space in which meanings clash. In law, as in confrontational rock music, this context is the social. Legal arguments are conducted over matters of social contentiousness. Rock stars such as Bowie and Madonna, and their work as androgynous extra-terrestrial and BDSM equestrienne, for example, provide, via analogy, vivid illustrations of the boundary pushing that occurs in the creation and recreation of laws and the making of legal determinations. Furthermore, their examples demonstrate that law is about not only the contested, but the contestable. In taking upon themselves to unsettle things, rock stars show that lines are always being redrawn, and that laws always contain the potential to be challenged and remade. These provocations are consistent with Nietzsche, whose ‘...project in his explicit discussion of old and new tables is initially precisely one of upsetting, challenging, breaking, and despoiling.’⁴² The rock star’s reimaginings match the *ubermensch*’s mission of revaluation and state of constant transformation.

The *ubermensch* disdains conventionality on the grounds that conformity to unquestioned values dampens the liveliness of the act of perception. Everyday society, in its conservative, unthinking aspects, is oppressive and unhealthy in the eyes of Zarathustra. Numerous rock stars are opposed to the prosaic and exist outside of the routine of the masses, as illustrated in Van Halen’s *Runnin’ With The Devil*.⁴³ These rock stars break from the group in order to acquire a fresher set of values. The

⁴¹ Oasis ‘Wibbling Rivalry’ <http://www.youtube.com/watch?v=wWU2ZQjQI-s>

⁴² Goodrich and Valverde (2005), p 4.

⁴³ Van Halen (1978) ‘Runnin’ with the Devil’ *Van Halen*.

sonic abrasiveness of a lot of rock music delivers the message ‘wake up, feel alive’, the ‘be here now’⁴⁴ of Nietzsche’s focus on the earthly. Rock stars’ provocative behaviour unsettles the mundane world, opening up possibilities for its redefinition. This thesis’ legal philosophers offer new perceptions of the law’s meaning, deposing previous valuations as they do so. Rawls argues against utilitarianism, Schmitt opposes liberal freedoms, and Finnis positivism. Dworkin asserts his theory against the twin oppressors that are utilitarianism and Hartian positivism, while Hart refutes the Austinian orthodoxy of the early 20th century. Received wisdom gives way to the exercising of creativity. The intensified perceptiveness (as shall be explored at various points below) of the emancipated imagination is not to be enjoyed by the exceptional individual only in isolation. After his being changes, Zarathustra descends from the mountain and enters the village. Standing in the marketplace he announces the ubermensch. Insight is to be found on the fringes, but it is brought back to the centre to destabilise convention. The outrageousness of the rock star is aimed at the values of the mainstream. The examined theorists bring their insight to the middle by providing theories that purport to comprehensively explain jurisprudence’s central concern; the law’s operation. The insights offered by the exceptional individual challenge that which is entrenched. Zarathustra’s provocation foreshadows the rock star rolling into town and causing chaos. Zarathustra puts on a show, competing with the consumer comforts of the marketplace and the entertainment of the rope dancer.⁴⁵ His targets are the denizens of the village, mediocre beings that Zarathustra implicitly compares to the last men. The last men require provocation to shake them from their stultifying disposition. One of the habits of the last men is to avoid strengthening their being by confronting life’s

⁴⁴ Oasis (1997) *Be Here Now*.

⁴⁵ Nietzsche (1999), p 3.

adversities. Conversely, Zarathustra invites difficulty as the fuel for his project of becoming. Rock stars endure the pains of creativity. For example, the Beatles musicianship was sharpened by gruelling night-long performances in Hamburg's red light district.⁴⁶ Jurisprudes grapple with intellectual challenges to create their accounts of law. The last men also practice moderation. The indulgences are tempered. Rock stars, in their drug use and simultaneously squalid and opulent lifestyles are not this restrained. Nor do the examined jurisprudes limit their theoretical ambitions to parochial matters. Their work is offered as explanatory of the breadth and depth of the legal system. In their writing they create all-inclusive worlds.

The intrusion of the exceptional individual's imaginative world threatens the conventions of the collective mind space. Extreme behaviour attracts the resentment of the herd. Zarathustra is laughed out of the village. Rock stars have been run out of town, or arrested and put on trial.⁴⁷ Hendrix was freaky, Lennon self-important, Bowie outlandish, Madonna a 'social disease',⁴⁸ and Liam Gallagher belligerent, according to their detractors. Overcoming this kind of disparagement is a part of the ubermensch's mission. Zarathustra climbs higher up the mountain, ignoring the criticism of the dwarf, and for rock stars, it is a 'long way to the top'.⁴⁹ Jurisprudence must accept that law is a product of conflict. The inspiration that helps the law to endure this adversity is the knowledge that conflict provides the possibility of definition to be contested, lines redrawn, transforming the law.

The ubermensch's struggle is to be a joyous work. Accordingly, gleefulness is often characteristic of the rock star. This thesis mostly sampled rock stars who

⁴⁶ Riley (2011), p 106.

⁴⁷ Consult, for example, Richards (2010) to find copious incidents of this sort.

⁴⁸ Schwichtenberg (1993a), p 20.

⁴⁹ AC/DC (1975) 'It's a Long Way to the Top (If You Wanna Rock 'n' Roll)' *T.N.T.*

were provocative in order to free up the structures of the world and advance their own projects. They unfettered energies, pursued their desires, and revelled in doing so. The ‘abundance’⁵⁰ of the ubermensch is seen in the rock star’s vigour, appetites, and intensified perceptions. This attitude transfigures the everyday, as is evident in Oasis’ ‘Shakermaker’,⁵¹ a song that makes psychedelic familiar melodies, lines extracted from television broadcasts, and local (for the song’s author) landmarks. In the same way, law can be improved viewing it afresh. Consistent with the joyful inventiveness of the rock star, the jurisprudences of this thesis are affirmative; in explaining how the law works, they imply that the law is functional and helpful, as well as celebrating the imaginative constructs of law, including, for instance, justice and rights, creations intended to support human existence.

The exceptional individual separates from the established ways of life in order to create new values, but returns to the mundane in order to help transform it. Accordingly, the rock star’s uniqueness is paradoxically established in part by their penetration of the everyday world. The rock star is woven throughout the population via reproductions of their image. They are part of the everyday while contrasting with the mundane. The image of the rock star, found onscreen at the gig, on television broadcasts and internet video, and in printed magazines. These reproductions enhance the distinctiveness of the rock star, but this distinctiveness is here achieved through dissemination throughout the crowd. Law’s domain is also a multi-mediated one. As Peter Goodrich has observed: ‘... law has escaped, has diffused into new media, into a new media environment, and increasingly the law is outside of the courtroom and outside of the library and outside of the text.’⁵² Law pervades the different layers of reality in which people’s lives are acted out.

⁵⁰ Steinbuch (1994), p12.

⁵¹ Oasis (1994) ‘Shakermaker’ *Definitely Maybe*.

⁵² ‘Interview of Prof. Peter Goodrich’: <http://vimeo.com/35896835>

Commensurate with this portrait of music and law as involved in the lives of others, in chapter 2, it was stated that Zarathustra was ‘a traveller, a teacher, and a leader’. The rock star is a traveller, living ‘life on the road’. The rock star’s songs teach, prompting reflection upon life, and their separation from the crowd is a kind of leadership. Jurisprudence also travels, with its exponents headquartered in different jurisdictions: Hobbes (like the Rolling Stones of 1972⁵³) writing as an exile in France; Finnis an Australian expatriate in Oxford; and, also journeying to Oxford for stints there were the Americans Rawls and Dworkin. Jurisprudence, mostly academically situated, has a strong educational focus, and assumes a leadership role in supplying prominent explanations of the law. The lesson being imparted is transformation.

Transformation is the main undertaking of the *ubermensch*. Chapter 2 set out three elements of Zarathustra’s quest for metamorphosis chiefly relevant to this thesis: transformation, activity and reactivity, and self-determination. The first element established that the received definitions of ‘man’ are a restrictive condition. Change is the means of escape. Such transformation is epitomised by Liam Gallagher, who reinterpreted his everyday identity, turning it into the extraordinary. Unglamorous items of clothing, such as Gallagher’s signature parkas, become the accoutrements of the rock star. Surpassing man does not mark the end of Zarathustra’s labour. Constant transformations are required to avoid the deadening of values that dulls the human senses. Madonna is an exemplar of devotion to endless reinvention. She finds value in that which lies beyond her current state, and strives to realise those distant possibilities. While jurists do not usually engage in the same dramatic visual transformations as do artists such as Madonna, their

⁵³ Kijak (2010) *Stones in Exile*.

reformulations of the ways in which law is understood evidences a similar method of imbuing their work with the constant motion of life. Life stimulates desire. Liam Gallagher and Madonna's transformations are about desirability. Gallagher makes the mundane desirable, converting everyday objects and situations into tokens of confidence and worthiness. Madonna channels the novel and the exotic to create the allure of the unattained. As with Gallagher's extra-ordinariness and Madonna's romance yet-to-come, validity and unobtainability make the law desirable. Law asserts itself as deserving of human attention, as rightfully influential, and yet is always distant. Jurisprudence's promises to protect, to enable, or provide, be it the promise of safety in Hobbes, flourishing in Finnis, or community in Hart speak to the imperfection of the self and the other, and make law a matter of longing. The legal subject 'can't get no satisfaction.'⁵⁴ The persistent incompleteness felt in the human experience means that fulfilment of law's promise remains pending. Like Madonna's values, just out of reach, law must always be drawn closer to the particular of concrete circumstances. Closing the distance between humanity and the law requires the purging of the values in law that have wilted (so as to prepare for the replacement of these values). This heralds the second element of transformation, the reactive gesture. Freeing one's self to create lively and suitable values requires the casting out of the impositions of the irrelevant and the out-dated. Rock stars reject the conventions of the mundane. Jurisprudes mostly begin their theories with refutations of other accounts of law. Inventiveness is inaugurated by denying the values of the past. Nietzsche calls this the work of the lion. A line from a Red Hot Chili Peppers song suggests another animal metaphor: 'Birds that blow the meaning into bebop.'⁵⁵ Meaning becomes malleable, a space of free creativity is prepared, encouraging

⁵⁴ Rolling Stones (1965) *(I Can't Get No) Satisfaction*.

⁵⁵ Red Hot Chili Peppers (2002) 'Can't Stop' *By The Way*.

improvisation and personal interpretation. This situation of creative enfranchisement is the situation described by the third element, self-determination. Once liberated from imposition, there is an onus to make values for one's self. These new values are not forged in resentment towards the lifeless conventions that one has been subjected to, but should affirm the autonomy and positivity of the will. The examined rock stars write songs to present their visions to the world. The jurisprudes move beyond critique of other theories to offer unique descriptions of the law. However, the creations birthed in this third phase may be less pure than Nietzsche intended. There are difficulties in Zarathustra's model for freedom.

Three critiques are adduced here in order to make out complications in the premise, implementation, and repercussions of Zarathustra's quest. The first of these critiques draws attention to the problematic nature of Zarathustra's objective. Zarathustra brings the message of the *ubermensch* to civilisation, endeavouring to save the people from their slavishness to the hollow, lifeless values of the collective. The dilemma is that Zarathustra's method of emancipation might be taken upon by the people as a new authority to which they mindlessly devote themselves. The people are resolutely dedicated to the values in which they are incarcerated, and may not easily be convinced to change their ways. Breaching their resistance could require a commanding approach, but such imposing behaviour may attract obedience. If the people become Zarathustra's devotees, then he will have replaced their oppression by one thing with unthinking obedience to another. Saving risks becoming enslaving. The sampled rock stars have a similarly problematic relationship with their audiences, as demonstrated by Bowie's dictatorial leanings of the mid-1970s and Madonna's messages to her listeners informing them of their worthiness, which are contradicted by her need to set herself apart from these people.

Zarathustra offered the chance for people to find values that would improve their way of life. Discovery of these values was a task for the autonomous individual, although, in delivering this message, Zarathustra risked reinforcing the people's subjugation. Similarly, the jurisprudences analysed in this thesis offered beneficial existences, founded upon enlivening values, persuasive to all those who perceived them, and discoverable by the unencumbered individual. Rawls argued that there are principles of justice that would be assented to if society was viewed through the original position. Hobbes specified a social contract agreeable to all as a way out of the inhibiting state of nature. Finnis promised goods that were self-evident to those who undertook self-reflection. Dworkin offered rights as fundamental to a proper understanding of how cases are decided, and Hart claimed that legal rules are found to be acceptable once they are critically examined. Like Zarathustra's method of emancipation, however, the supposedly independent thought processes advocated in these theories have an authoritative undercurrent. Each of the aforementioned jurisprudences begins with free, contemplative processes but end in dictating what the results of those processes will be. The outcomes of independent thought posited by these theories are values that all must subscribe to. For example, in Finnis' theory, self-evidence cannot be proven through argument and must be experienced on a personal basis, as it is only available to individuals who reflect upon their actions. However, Finnis argues that universal goods inevitably result from this personal undertaking. Coupling the definition of a worthy state of existence with the necessity of personal responsibility creates a paradoxical situation. Zarathustra challenging humanity to realise its creative potential is reminiscent of the Rolling Stones' manager Andrew Loog Oldham locking Mick Jagger and Keith Richards in a kitchen

and refusing to let them out until they had become songwriters.⁵⁶ The jurisprudences of this thesis provide values and, in doing so, encourage creativity, offering a format in which human activity is usefully directed. However, in defining all of the parameters through which the individual is to conceive of their existence and positing deterministic outcomes to creative processes, these theories appear to fuse the freedom of doing with a conceptual incarceration that is almost like being locked in a kitchen.

The second critique questions whether it is possible to fully escape the values one initially finds oneself subjected to. Zarathustra's quest is prompted by the rejection of that which limits his being. Similarly, the jurisprudences in this thesis are responses to human weaknesses such as strife, insecurity, and confusion. The experience of war, as in Rawls, Hobbes, and Hart, and the aversion to misdirected activity, such as in Finnis and Dworkin, have informed legal philosophy. In trying to gain distance from human inadequacy, Zarathustra finds himself followed by it. In the words of Neil and Tim Finn: 'Everywhere you go, you always take the weather with you'.⁵⁷ Flaws reside within. The rock stars and legal thinkers under discussion may also have failed to escape the things to which they were averse. Hendrix gained total freedom to do what he wished with his music, and was left not knowing what to do. Lennon tried to secure peace and his life ended in violence. Bowie thinks highly of humanity's potential, telling people that they have 'gotta get smart',⁵⁸ but starts treating people as if they cannot think for themselves. Madonna proclaims empowerment for all but distances herself from the masses, asserting her identity through contrast and controversy. She pursues self-definition but is reabsorbed into

⁵⁶ Loewenstein and Dodd (2003), p 84, at least according to Richards; Jagger maintains that this domestic incarceration never occurred.

⁵⁷ Crowded House (1991) 'Weather With You' *Woodface*.

⁵⁸ Bowie (1976) 'Golden Years' *Station to Station*.

collectivity. Oasis attempts to restore a certainty to rock music, but deploy a commentary that only increases confusion. Rawls seeks agreement from all, but alienates people with the haziness of his vision of others. Hobbes' sovereign is intended to delineate a safe place, but, as Agamben demonstrates, unleashes violence throughout the system, making war inseparable from routine. Finnis tries to guide people towards the particular ways of living that bring satisfaction, but advocates an ersatz positivism where any ordering of human activity is adequate. Dworkin tries to afford people the freedom to be themselves, but his system ignores those who do not fit a particular conception of the individual. Hart attempts a clear distinction between law and non-law so as to draw up the borders of community, but produces uncertainty and alienation. The struggle to be free of one's troubles and lead a joyful existence is paralleled by the Rolling Stones' famous dictum: 'You can't always get what you want.'⁵⁹ The jurists studied here have, in some regards, not achieved the results they set out to.

Escape through transformation may be a recreation of one's aversions. Zarathustra, disdainful of the prosaic and the weak, climbs to great heights, but in doing so he elevates his flaws. The will is insatiable and blind to any negative effects it might have on the self in which it resides. The Nietzschean quest is to transcend the meaninglessness of modern society, but once the individual is free of this environment, they are exposed to the danger of the unconstrained will, which requires no reason to keep perpetuating itself by animating behaviours. It does not matter to the will whether these behaviours are harmful and so the will may power creative acts that inflame one's insecurities. For example, John Lennon's anguish was not assuaged by his work as a rock star. Chapter 2 described Berkowitz's

⁵⁹ Rolling Stones (1969) 'You Can't Always Get What You Want' *Let it Bleed*.

critique of Nietzschean positivism: that law required only will for its validation, warning that nothing kept this sort of legal power from harming others. Another danger of the will may be the harm that it does to its bearer.

One's pathologies will perpetuate themselves until 'you get what you need'.⁶⁰ How can the legal creative act avoid repeating its fears? In 'Waiting for the Rapture',⁶¹ Noel Gallagher sings 'I'm tired. Come get off the merry-go-round.' Lennon discovered that rock stars can replace the everyday grind with the grind of the tour. Eventually, Lennon came to appreciate family life. Bowie abandoned his emotionless dictator persona and welcomed 'hours of laughter' in the company of Brian Eno.⁶² It is not until one steps off the 'merry-go-round' that one's insecurities die down. This does not mean the abandonment of the rock star. The only change required is to accept the incompleteness of humanity that possibly cannot be surpassed. A revaluation of Nietzsche himself may be required, one that allows the flaws of humanity to be celebrated. As another Noel Gallagher composition asserts: 'True perfection has to be imperfect. I know that that sounds foolish but it's true.'⁶³ Jurisprudences that have attempted to avoid incompleteness and imperfection by explaining and reconciling the entirety of the law have may ended up trying out of desperation to achieve the impossible goals of pure completeness and coherence by recommending the imposition, through violence, of their designs. It is not the work of the individual to fix everything. Through multiplicity, people can make up for each other's imperfections.

The individualising effects of Zarathustra's quest are the subject of the third and final critique to be addressed here. In deriving inspiration from outside of society

⁶⁰ Rolling Stones (1969) 'You Can't Always Get What You Want' *Let it Bleed*.

⁶¹ Oasis (2008) 'Waiting for the Rapture' *Dig Out Your Soul*.

⁶² MacDonald (2003a), p 146.

⁶³ Oasis (2002) 'Little By Little' *Heathen Chemistry*.

and teaching others to ‘shake the will to comply’⁶⁴ and ‘walk away from the rank and file’,⁶⁵ the ubermensch may disrupt society. Equally, rock stars are often volatile, iconoclastic, ‘mad, bad, and dangerous to know.’ Even jurists may perform a kind of destabilising function by recasting theoretical understandings of law and life. This critique may have a positive interpretation, however. In keeping with the suggestion made at the end of the previous critique, encouraging individuality may, along with an acceptance of the limitations of the individual that fosters a cooperative disposition, allow people a uniqueness that can be used to encourage and assist all to realise their aesthetic responsibilities. The final section of this chapter will consider how the culture at present may nourish this kind of individuality.

III – Fragments

The fragmentation of culture is consistent with several facets of Zarathustra’s quest. In one respect, the disintegrations of present times may be seen as evidence that the message of the ubermensch has been dispersed throughout society. Contemporary individuality may be seen as the realisation of Zarathustra’s mission to disrupt the imposition of collective values. The view of Nietzschean individual responsibility as finding manifestation in people’s behaviour may be perceived in jurisprudence, which has ceased to offer models of law that speak for everyone. No longer are values created by a few and applied to all. Conversely, fragmentation may be considered relevant to the difficulties and paradoxes encountered in Zarathustra’s attempts at overcoming. Witnessing that Zarathustra’s grandiose and vertiginous climb serves to magnify his insecurities may be congruent with the realisation that jurisprudence has been dominated by theories that imprint upon the law various

⁶⁴ Oasis (2008) ‘To Be Where There’s Life’ *Dig Out Your Soul*.

⁶⁵ Red Hot Chili Peppers (2006) ‘Make You Feel Better’ *Stadium Arcadium*.

dilemmas as a result of their quest to eradicate uncertainty, inconsistency, and disharmony. Taken together, these two interpretations of the repercussions of Zarathustra's quest demonstrate that the ubermensch, exemplified in this thesis by the rock star and the 20th century jurisprude, is a significant figure for the understanding of law. Through both his triumphs and mistakes, Zarathustra illustrates a way in which the law may be invigorated. The liveliness Zarathustra locates in the individual may encourage the empowerment of the legal subject, while the negative effects of Zarathustra's attempts to surpass his imperfections provide a warning that the law must acknowledge and wrestle with, rather than attempt to evade, the imperfections of the self and of society. Perhaps what is needed is not the exceptional individual but a multiplicity of unique individuals. 'There's a reason for the 21st century. Not too sure but I know that it's meant to be.': Sympathetic to the uncertainty and optimism expressed in this quote from the Red Hot Chili Peppers,⁶⁶ it is argued here that the results of fragmentation and the coming apart of jurisprudence are not yet clear, but that there is a significance to these developments. The very fact that change has occurred can be positive when viewed from a Nietzschean perspective. The demise of the overarching legal philosophy may be seen as the next in the endless process of transformation, as Nietzsche likely would have wished. The law must always be willing to redraw its lines. Law must not keep to self-conscious ideas of what it should be, but work with senses and feelings, and respond accordingly, reshaping itself to the people that live the law. This rejuvenation will not undermine legal validity. The rock stars of this thesis, in moving from one phase to another, have demonstrated that transformation can occur without loss of identity. Music absorbs the past, responds to the present, and moves

⁶⁶ Red Hot Chili Peppers (2006) '21st Century' *Stadium Arcadium*.

into the future. To Keith Richards, it can be said of the dutiful musician that ‘He passed it on.’⁶⁷ Influences are taken to new places, bringing the old along with the new. There is a continuity in transformation, regardless of what course it takes. As Ramshaw observes, ‘Law...is constantly betraying itself in order to transmit some sort of determinate and fixed meaning.’⁶⁸ Change does not destroy law but enlivens it. Fragmentation means the chance for all to assume the mantle of responsibility held out by Zarathustra. His call of challenge has been loud.

Voices

‘Feel free to join in on the chorus.’⁶⁹ Further into the gig, Noel plays ‘Don’t Look Back in Anger’.⁷⁰ The crowd sing. They’re just as loud as his voice coming out the sound system. It’s a bellowing sea of people. He stands back and lets it wash over him. Sublime. Noel mouths the words away from the mic. The crowd sings the chorus on their own. They’re allowed to; they are what make it, after all. He lets them sing the outro and then sings it to them. He looks up to the sky. They roar.

This thesis has brought rock music to bear on jurisprudence, demonstrating that the theories analysed are products of experiences, desires and aversions, and that, in keeping with Nietzsche’s account of creativity, are works that have their origins in personal visions. Uncovering the subjectivity beneath the universal claims of these jurisprudences has shown that law can and should be energised by keeping an ear to the quickening of human perceptions. Law is something that must be made, and so can tap into the vigour that is circulates through acts of creativity. Assuming

⁶⁷ Keith Richards – ‘About “passing it on”’ <http://www.youtube.com/watch?v=1ZRqhzLQmes>

⁶⁸ Ramshaw (2010), p 13.

⁶⁹ Gallagher ‘Emotional version of Don’t Look Back in Anger – Live’:

<http://www.youtube.com/watch?v=jBbyc3t-Ctc>

⁷⁰ Oasis (1995) ‘Don’t Look Back in Anger’ (*What’s the Story*) *Morning Glory?*

responsibility for this legal change can be an opportunity to share one's unique internal space into the realm of the social, being like the person described in U2's *Zooropa*,⁷¹ who is '...gonna dream up the world she wants to live in. She's gonna dream out loud.' 'Law up loud' suggests a vision for legality that taps into the provocative effects of volume, awakening the senses and allowing a multiplicity of voices to be heard. In the stadium, the audience is as loud as the band. The lesson of the rock star for jurisprudence is that, just as they make the gig, people make the law. They give law its voice.

⁷¹ U2 (1993) 'Zooropa' *Zooropa*.

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