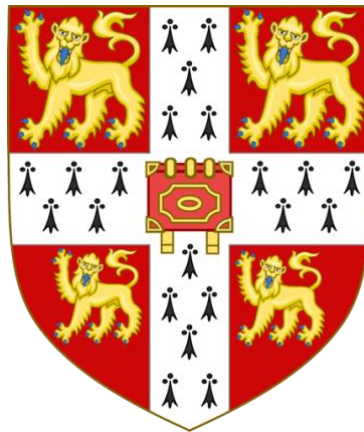


Law and the Paranormal: A Critical Perspective on Legal Rationality



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PREFACE

This thesis is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the preface and specified in the text. It is not substantially the same as any that I have submitted, or, is being concurrently submitted for a degree, diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text. I further state that no substantial part of my dissertation has already been submitted, or, is being concurrently submitted for any such degree, diploma or other qualification at the University of Cambridge or any other University of similar institution except as declared in the Preface and specified in the text. It does not exceed the prescribed word limit for the relevant Degree Committee.

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ABSTRACT

This thesis develops a genealogy tracing how law has constructed witchcraft and related ‘paranormal’ practices throughout English legal history. It shows how early modern witchcraft laws evolved into modern fraud and consumer protection laws regulating mediumship, astrology, and fortune-telling. It argues that this development provides a case-study reflecting the emergence of several elements of the modern legal system. These include its conceptions of private property, contract, and the legal subject, but also, probabilistic causation and the juridical valorisation of natural-scientific empiricism. Linking this evolution to the emergence of capitalism, the thesis builds a unique theoretical framework drawing inspiration from critical realism, systems theory, and Marxian-inspired legal approaches, using its genealogy to offer a novel lens on law’s constitutive role within capitalist social relations. Accordingly, it posits that modern law expresses, and is bounded by, a rationality that struggles to reify certain concepts and practices, particularly paranormal practices, because of its capitalistic axioms.

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Likewise, I believe my years at Cambridge would have greatly suffered without the camaraderie of the friends I've made during my time here. Similarly, the solidarity from my brother and sister, Alex and Becky, who are also undertaking PhDs, has proven a continual source of motivation. Finally, I would be nowhere without the tireless love and care from my parents; I hope this thesis, along with all work I produce, may serve as a testimonial to how they raised me.

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1. Paranormal Practices and the Legal System: Introduction and Context

1.1 Themes, Questions, and Tensions

Belief in paranormal phenomena like astrology, spiritual mediumship, and witchcraft remains prevalent in contemporary British society.¹ Under the influence of these beliefs, some consumers may be led to spending money on what can be termed ‘paranormal services’, such as hiring a medium to commune with deceased relatives or employing a fortune-teller to predict their financial prospects. However, countless natural-scientific studies have raised serious doubts about the empirical existence of phenomena like spiritual entities or the ability to perceive the future. As such, paranormal beliefs are sometimes regarded as ‘irrational’ or ‘superstitious.’ By extension, traders seeking to profit off such ‘irrationality’ by offering paranormal services in exchange for payment may be considered delusional, or even fraudulent and exploitative, taking advantage of the misguided beliefs of others for profit.² For the law, this presents several issues related to how, if at all, these transactions should be regulated.³

On the one hand, the presumed non-existence of the paranormal leads some legal scholars to suggest that fortune-tellers and spiritual mediums should be universally treated as frauds: the law, that is, should always intervene to protect vulnerable consumers from exploitation. On the other, the question of the empirical existence of the paranormal may be seen as a matter for consumers to decide on their own, *caveat emptor*, with the law stepping in only where claims made by traders are ‘sufficiently’ misleading or in breach of contract. Moreover, in situations where the paranormal is presented through the medium of a dramatic performance, as in the case of a stage magician, one might ask whether the law should intervene at all, or if that performance should be treated as theatrical entertainment, comparable to other entertainment services available in the market. By contrast, one might inquire whether sincere beliefs in, and related claims about, the paranormal should in fact be conceptualised as ‘religious’ in character,

¹ Recent research suggests that around 40% of British adults believe they have had paranormal experiences: Madeleine Castro, Roger Burrows, and Robin Wooffitt, ‘The Paranormal is (Still) Normal: The Sociological Implications of a Survey of Paranormal Experiences in Great Britain’ (2014) 19(3) Sociological Research Online 16.

² See Richard Wiseman and Robert Morris, ‘Modelling the Stratagems of Psychic Fraud’ (1994) 10 European Journal of Parapsychology 31-44.

³ For examples of these debates, see Steve Greenfield, Guy Osborn, and Stephanie Roberts, ‘From Beyond the Grave: The Legal Regulation of Mediumship’ (2012) 8(1) International Journal of Law in Context 97-114; Luke Clements and Rachel Morris, ‘Fraudulent and Incompetent Mediums’ (1996) 146(6766) New Law Journal 1574-1576; and Blewett Lee, ‘Spiritualism and Crime’ (1922) 22(5) Columbia Law Review 439-449.

and thus attract the same human rights protections (and qualifications) as any other religious belief.

Reflecting these lasting tensions, an array of statutes purporting to regulate paranormal practices have been introduced throughout English legal history, crossing a wide spectrum of legal fields and frameworks. The most recent instance of this is consumer protection law. The Consumer Protection from Unfair Trading Regulations 2008 ('CPR 2008') may be deployed to adjudicate issues related to the sale of paranormal services, with the central question at the core of the consumer-protection approach being whether the paranormal trader engaged in 'misleading practices' in the sale of their services. Prior to these Regulations, the Fraudulent Mediums Act 1951 ('FMA 1951') was used to prosecute paranormal practitioners as frauds save in certain exceptional instances.

The FMA 1951 was preceded by s 4 Vagrancy Act 1824 ('VA 1824'), which provided that fortune-telling was a form of (criminal) vagrancy. The VA 1824 operated alongside the Witchcraft Act 1736 ('WA 1736', sometimes dated to 1735), which had repealed the anti-witchcraft statutes underpinning the infamous witch-trials of the 16th and 17th centuries, replacing them with a novel offence criminalising the *pretence* of witchcraft. Furthermore, before the Witchcraft Acts of 1542, 1563, and 1604, the crime of witchcraft had been an ecclesiastical offence.⁴ Thus, the legal regulation of paranormal claims, practices, and services has oscillated between several juridical frameworks, calling into issue which is best placed to handle claims made about communing with spirits, foretelling the future, and so on.⁵

More critically for this thesis, there remains the question of *why* the law should regulate paranormal services in the first place, and how, and why, did legal discourse and reasoning

⁴ Landmark examinations of these statutes and their impact include George Kittredge, *Witchcraft in Old and New England* (Harvard University Press, 1929); C L'Estrange Ewen, *Witchcraft and Demonianism* (Heath Cranton, 1933); Wallace Notestein, *A History of Witchcraft in England from 1558 to 1718* (Project Gutenberg, 2010); and James Sharpe, *Instruments of Darkness: Witchcraft in Early Modern England* (Reprint ed, University of Pennsylvania Press, 1997).

⁵ It is critical to note that the term 'paranormal,' which Chapter Two expounds upon, is not historically reconstructive when applied to the witch-trials and their conceptualisation of witchcraft; it is a modern imposition on early modern practices. The 'para-' suffix of 'paranormality' implies the relevant practices are cognitively positioned in contrast, or opposition, to normative epistemologies, but witchcraft was a 'recognised' phenomenon within early modern cultural, religious, and social reality. In this thesis, conceptualising witchcraft as an example of the paranormal is a term of theoretical convenience, allowing us to recognise the historical connection between early modern anti-witchcraft laws and modern laws regulating practices like fortune-telling and spiritual mediumship, which might more properly be termed 'paranormal' in the sense used here.

come to conceptualise these practices as outlined above. As this thesis argues, underpinning the debates are implicit quandaries about how the juridical subject, and the state's protection of that subject, ought to be constituted, as well as the question of what practices should be considered 'exploitative,' and, indeed, what such 'exploitation' even means. These queries then draw on broader debates about the rights, freedoms, and equalities that inhere in legal actors, as private citizens and consumers of services.

This makes engagement with these concepts, and their historical formation, vital for understanding the emergence of modern legal debates and constructions regarding the paranormal. Crucially, it is important to recognise how these issues are also contingent on an epistemological point, namely, implicit presuppositions regarding the empirical non-existence, or unprovability, of the paranormal. Perhaps this is unsurprising: such an epistemological perspective reproduces the observations of natural science, which is frequently assigned a position of prestige within capitalism and, by extension, capitalist legal discourse. Indeed, these questions may, initially, seem moot, or to have obvious, even self-evident, answers. The paranormal may appear self-evidently impossible, for example, while private property rights may seem self-evidently worthy of protection from the actions of frauds who might pretend to have false powers to deceive the grieving or ignorant.

Yet, it is the implicit ontology giving rise to the appearance of these values as 'self-evident' that this thesis seeks to investigate. The epistemic framing of the paranormal as empirically impossible, or unprovable, in law is historically recent, as is the normative goal of protecting the private property of consumers from such supposed charlatans, with the paranormal only coming to be constructed as a form of fraud in 1736. A paradigm only established within the last few centuries perhaps cannot be said to be so self-evident. Before this evolution, the law had conceptualised the paranormal through the lens of witchcraft, citing evidence of accused witches placing curses or conjuring spirits as justification for imposing often lethal sanctions. That is, the law had in some sense reified witchcraft, or what a modern perspective might identify as the paranormal, as an 'empirical' phenomenon, at least within the space of the courtroom.

Stemming from these observations, this thesis asks, what 'happened' to the law in 1736 that allowed legal authorities to reconfigure the paranormal as 'fraud'? Was it that scholars working during the 'Enlightenment', or 'Scientific Revolution', provided sufficient evidence debunking

the empirical existence of the paranormal? Was it the contingent decline of religious authority that led to the law excising all traces of superstition and spirituality? Or did this shift imply that the practice of imposing certain natural-scientific assumptions about the nature of reality on to legal subjects was dependent on some *structural* phenomenon, or set of phenomena, embedded deeply within the fabric of the law itself, that emerged, or began to emerge, at some point around the 18th century? What are these conditions, and what can unearthing them – using paranormal practices as a case-study – tell us about legal reasoning in general?

As Chapter Two will explore, these underlying conditions constitute what is understood throughout this thesis as law's 'rationality' – a force with significant influence in shaping legal discourse, and yet one that is rarely exposed or even acknowledged. That is, law has been characterised as a 'rational science,' one where 'no very clear distinction exists between saying that a particular solution to a problem is in accordance with the law, and saying that it is the rational, or fair, or just solution.'⁶ At times, these characterisations align the law with some ontologically prior 'natural reason', implicitly or explicitly, collapsing legal values perceived as normatively desirable into descriptive statements about the law's nature. But, using the regulation of paranormal practices as a jumping-off point, this thesis investigates the dynamics of this 'logic' or 'rationality' from a systemic point of view, along with its functions, origins, and effects.

With a view to addressing these issues, the thesis asks, how, if at all, does this rationality affect the construction, expression, and application of legal concepts, as illustrated by its construction of paranormality?⁷ To what extent does this rationality qualify, for instance, efforts made towards legal reform when dealing with behaviours and practices – like those associated with the paranormal – that the law tends to position as irrational, unreasonable, misleading, and so on? Why are natural-scientific observations about the nature of reality compatible with, or even desirable in, legal reasoning? Assuming the empirical non-existence of paranormal phenomena, why is it that the question of how best to regulate the paranormal in law chiefly orbits around private property rights, freedom of contract, and the protection of vulnerable consumers? In other words, what conditions – what form of logic – must be in place for these

⁶ A W B Simpson, *Legal Theory and Legal History: Essays on the Common Law* (Hambledon Press, 1987) 361.

⁷ Legal concepts are 'specialised terms used in legal reasoning' with 'distinctive legal meanings, which are separate from the senses ascribed to them in everyday usage and in the social sciences in general.' Simon Deakin, 'Juridical Ontology: The Evolution of Legal Form' (2015) 40(1) *Historical Social Research* 170-184, 170.

debates to emerge as they have, and to what extent does this postulated logic of the law establish a paradigm at once constructing *and* constraining the legal imagination at large?

The paranormal offers a powerful prism through which one can perceive these issues because its construction challenges the boundaries of logic and reason; it allows us to infer the operation of law's *rationality* by way of what it conceives of as *irrationality*, its *normality* through its conception of *paranormality*, and to determine the implications of such a construction. In this light, and to return to the debates regarding how to regulate paranormal practices discussed at the outset of this introduction, a significant issue with which this thesis grapples is the question of why, specifically, paranormal practices often seem to present some form of threat to the stability and reproducibility of capitalist social relations, leading to their legal characterisation as 'fraudulent' or 'misleading'. From this analysis, the thesis will argue that an exploration of how law has constructed paranormal practices throughout history provides a springboard for critical reflections on how many legal concepts develop, and what this implies for legal actors seeking to deploy the law to deal with practices often characterised as involving 'unreasonableness' or 'irrationality' from a juridical point of view.

To engage with these issues, the thesis develops a genealogy tracing the evolution of the legal construction of the paranormal throughout English legal history, proceeding as follows. Chapter Two explores the concept of the paranormal, and how paranormal services are exchanged, while devising and justifying a genealogical methodology for the thesis. Chapter Three begins the genealogy of legal conceptions of paranormal practices by examining how, and why, law constructed 'witchcraft' through a reifying lens from the years 1542-1736. Chapter Four then evaluates the reformulation of the paranormal as 'fraud' between 1736-1951. Chapter Five examines how exceptions to the construction of the paranormal as 'fraud' emerged in the years 1951-2008, and the repositioning of the paranormal into the ambit of EU-derived consumer protection law. Chapter Six reflects on the genealogy and explains its significance for understanding the logic of the law, and the implications of that logic for both legal theory and practical reform.

The remaining sections of this chapter situate the thesis against a wider backdrop of research about witchcraft and the paranormal in general. Section 1.2 articulates more directly the contributions and originality of this thesis, introducing three key points that will be developed as the thesis progresses. Section 1.3 will then survey the literature regarding witchcraft – which

serves as the principal focus of much scholarship concerning the paranormal in England, and in English law – and clarifies how this thesis differs from most other research on the subject.

1.2 Goals and Contributions

To reiterate, while this thesis concerns itself with witchcraft, and paranormal practices more generally, it uses those phenomena as a prism, or case-study, through which to make observations about law's position within, and relationship with, capitalism. Paranormal practices are rarely thought of in legal terms, nor indeed in relation to how they may help shed light on the linkages between law and capitalist social relations. In this way, the thesis is both theoretical and historical, providing an empirical example that contextualises, and fortifies, theoretical premises regarding the connections between law and capitalism. The thesis makes three key observations in this regard: (1) it connects changing legal constructions of the paranormal to law's emergence as a formal, capitalistic system, developing the notion of 'contra-legality' – meaning practices that struggle to be reified, articulated, and applied using (capitalistic) legal concepts – to do so; (2) it then builds on this notion to link certain legal concepts, like causation, to law's role within capitalism by examining how those concepts limit the system's capacity to reify phenomena like witchcraft; and (3) it finally positions these changing constructions of the paranormal in relation to dynamics *within* capitalist law, namely, its tendency towards increasing commodification. Let us consider these in turn.

Firstly, this thesis uses the example of witchcraft, and the evolution of its juridical constructions, to demonstrate how law became differentiated from the 'economy' as a *formal* 'system' within capitalism. To accomplish this, the thesis shows how the development of various axioms, principles, and functionalities that are definitional of how capitalist law operates can be seen in how legal approaches to the paranormal developed from one driven by theological conceptions of witchcraft to one infused with capitalistic notions of fraud, vagrancy, and the protection of property. These principles include, but are not limited to, those of private property rights, contractual obligations, the legal subject, and more. Through this analysis, the thesis's genealogy of legal constructions of the paranormal will show the crystallisation of law's *autopoiesis* – its tendency to self-reference, and the role this plays within capitalist society – as exhibited by how law ceased to be a 'hospitable' environment to paranormal beliefs and concepts.

Luhmann explored autopoiesis and self-reference extensively, and indeed Luhmann's systems theory will be of central relevance to the theoretical framework developed in Chapter Two.⁸ Yet, Luhmann's approach was primarily theoretical. He did not provide historical evidence of the emergence of law's self-referential tendencies in practice, instead emphasising the role autopoiesis plays in the modern system of law.⁹ By contrast, this thesis argues that the emergence of law as a formally differentiated, capitalistic system was reflected in how changing social formations conditioned the ways through which law conceptualised paranormal practices. At first, law reified the paranormal; then, law treated the paranormal as inherently fraudulent; finally, law integrated the paranormal into the abstract, commodifying logic of consumer protection law. This thesis argues that the emergence of law *as a system*, and what its fundamental axioms both presuppose and impose, was of material significance to, and thus is demonstrated by, the genealogy articulated in Chapters Three-Five.

To analyse this evolution and its relationship with law's constitutive role within capitalism more generally, the thesis develops a unique concept that has not been directly referenced as such in the literature. This is the concept of contra-legality, which will be elaborated on in Chapter Four. The notion of contra-legality posits that there are certain phenomena that law lacks the conceptual tools to construct and reify as empirically 'real' or 'reasonable'. This is because those phenomena struggle to be reconciled with the axioms central to law's logic – rules concerning private property rights and the legal subject, as mentioned, for instance. The example of witchcraft and paranormality is valuable in this respect because, as Chapter Four argues, these practices represent contra-legal phenomena in themselves. Capitalist law tends to struggle to reify the paranormal as, for example, witchcraft because the legal system has encoded certain presuppositions that make such a construction challenging: for instance, fundamental assumptions about life and death, linear time and causation, the efficacy of spellcasting and the agency of human actors, and so on, that derive from law's highly abstract norms regarding property and so forth.

In the context of these arguments, this thesis will also explore the connections between law and natural science, particularly by reference to how those connections are expressed through law's

⁸ As Chapter Two will explain, this thesis draws on, but does not limit itself to, the frameworks developed by systems-theoretical legal scholars. For a central text in which Luhmann advances his views, see Niklas Luhmann, *Social Systems* (John Bcdarnz Jr (trans), Stanford University Press, 1995).

⁹ Andreas Philippopoulos-Mihalopoulos, 'Towards a Critical Environmental Law' in Andreas Philippopoulos-Mihalopoulos (ed), *Law and Ecology: New Environmental Foundations* (Routledge, 2011) 18-38, 25.

constructions of paranormal practices. Indeed, it will note that the binary between the ‘normal’ and the ‘paranormal’ is specific to capitalism, and will use the evolution of legal constructions of the paranormal to show the emergence of this outcome in law. In so doing, it will argue that a key reason why capitalistic law tends to treat the paranormal as a form of fraudulent activity is not *per se* because of some tension between the paranormal and natural-scientific inquiry, but rather more directly because of a tension between paranormal practices and the imperatives of *capitalism* (which are reflected, partially, in the imperatives of modern science and law). After all, the natural sciences may call into question the empirical efficacy of paranormal practices, yet, this thesis argues, it was the emergence of certain underlying preconditions related to private property and contract that then gave that question a juridical edge by repositioning paranormal practices, specifically, as *fraud*.

Secondly, and relatedly, this thesis notes how certain aspects of legal thinking – generally not considered through the lens of capitalist critique – reflect law’s market-constitutive role and contribute to the positioning of some phenomena as contra-legal. These, it argues, are observable in the evolution of legal constructions of the paranormal from witchcraft onwards. While notions like private property and the legal subject have been discussed extensively throughout the literature, and indeed this thesis will show how they are relevant in the case of the paranormal and its relationship to legal rationality, the thesis will also explore other doctrines have not been so directly covered, such as law’s concept of causation, its binary conception of life and death, and law’s understanding of linear time in Chapter Four.

For example, with regard to causation, and the probabilistic worldview it entails, along with its presupposition of a legal subject to whose agency an empirical event can be causally ascribed, as Chapter Three will argue, the absence of doctrinal tests of causation in early modern law was integral to the law’s reification of witchcraft. By contrast, the emergence of doctrinal causation tests would tend to obstruct the reification of the paranormal within capitalist law. Indeed, the empirical probabilism that underscores legal conceptions of causation was not a component of early modern law, nor was the individuated subject to whom fault could be attached. This is no coincidence; Chapter Three contends that causation tests derive from the proprietary logic of capitalism and reflect law’s role within capitalism.

Another example of this developed in Chapter Three is the way harm is, and was, understood, and its relationship to the meta-rule of precedent. That chapter will explore how witchcraft

operated as an offence composed of a multiplicity of different ‘harms’, many of which would go on to be recognised as forms of nuisance, trespass, and so forth. To explain how a legal concept as capacious as witchcraft could be developed in the courtroom, that chapter, and those that follow, will reference the emergence of the doctrine of precedent in English law to show how it both stabilises the law and enables it to ‘learn’ from, and then resolve, social disputes. The prism of witchcraft will therefore be valuable because it will be used to show how law went from allowing amorphous local beliefs to dictate, or at least heavily guide, legal decision-making about whether a party had been ‘harmed’ to a far more ordered approach centred primarily around threats to the preservation of private property relations.

Thirdly, building on the above, Chapters Five and Six will use the genealogy developed in this thesis to suggest at least some evidence of an unfolding dynamic that occurs not only during the (non-linear) ‘transition’ from feudalism to capitalism, but within capitalism itself. Again, the genealogy of law’s conception of paranormality will show how law progressed from reifying the paranormal to integrating it into the rubric of commodification. This, perhaps, may be seen as reflecting a wider tendency towards ever increasing commodification within capitalist social relations, in part brought about by the role law plays within capitalist society: even that which generally runs against law’s central premises, like the paranormal, it may be said, can be *partially* dismantled and reconstituted along the abstractive tendencies of commodity exchange. This is not to suggest capitalism is characterised by any preordained teleology or set of inevitable ‘phases’, but rather, that long-term trends can be observed throughout its history. As such, this thesis offers a new viewpoint for theorising about the dynamics within capitalist law, and thus also contributes to literature on the ‘periodisation’ of capitalism.

To further articulate the originality of these contributions, Section 1.3 will now compare the approach in this thesis to the viewpoints adopted in other forms of scholarship about witchcraft, and paranormality more generally, especially insofar as they relate to law and capitalism.

1.3 Research Context

Scholarship regarding the paranormal in English law tends to focus, firstly, on the early modern witch-trials, rather than mediums, astrologers, and fortune-tellers operating in the second half of the 18th century and beyond. Discussions of the latter that do exist generally explore the

cultural emergence of mesmerism, mediumship, and the Spiritualist movement in the 19th century, but rarely engage directly with the trials faced by Spiritualists and psychics, nor the legislation that underpinned those trials.¹⁰ Secondly, the literature on the English witch-trials primarily considers them as cultural, political, or religious phenomena, acknowledging that they involved the participation of judges and juries while not expressly engaging with the legal aspects that made those trials possible. These tendencies contrast directly with the approach of this thesis, which seeks to understand not only the juridical components of the witch-trials, but also those of their legal progeny, which evolved over the 18th century to the present day, and what the legal construction of the paranormal reveals about the conditions underpinning legal reasoning in general.

That said, this section investigates the prominent currents of scholarship on paranormality in English law, examining how other approaches tend to observe and interpret the witch-trials. While this section does not attempt to document every dimension of how witchcraft has been theorised throughout the literature, it highlights some perspectives that are similar, yet nevertheless distinct, to that of this thesis to clarify its own viewpoint. This survey includes those of political, religious, feminist, folkloric, and history-of-ideas historical approaches, all of which speak in some way to how the law constructed the witch and established the initial parameters of how law conceptualises the paranormal, while nevertheless refraining from a full engagement with the axioms of legal reasoning that made such constructions possible *a priori*.

To provide a general summary of this discussion, of which the following subsections will provide concrete examples, this thesis makes two key points of departure from other studies of the witch-trials. As a first point, conventional historical approaches to witchcraft do not generally engage with questions of how and why certain structural features of the law itself conditioned, and continue to condition, the legal construction of the paranormal, represented by the figure of the witch, in different ways over time. That is, other approaches seldom contemplate the implications of the witch-trials for understanding law's rationality, and vice-versa, nor the wider question of how that rationality facilitates, and limits, the construction of legal concepts in general and, by extension, efforts for legal reform.

¹⁰ Though, of course, there are many exceptions. See, for instance, Owen Davies, 'Newspapers and the Popular Belief in Witchcraft and Magic in the Modern Period' (1998) 37(2) *Journal of British Studies* 139-165; Thomas Waters, 'Magic and the British Middle Classes, 1750-1900' (2015) 54(3) *Journal of British Studies* 632-653; and Janet Oppenheim, *The Other World: Spiritualism and Psychical Research in England 1850-1914* (Cambridge University Press, 1984).

Instead, other forms of witchcraft scholarship tend to focus on the extra-legal aspects of the trials, such as the economic, cultural, or religious ‘causes’ of witch accusations, and their decline. As this section demonstrates, many explorations of the witch-trials adopt a perspective that treats legality as secondary to whatever ‘force’ motivated witch-hunting in the first place. In this way, the legal aspect of witch-hunting is reduced to the policy goals behind the promulgation of the early modern Witchcraft Acts, thereby overlooking the significance of the ‘technology’ or ‘mechanism’ – i.e., law – through which those policies were pursued. Even works of legal history, as Section 1.3.6 explores, generally work towards documenting the norms directly governing the witch-trials, rather than the underlying structural conditions that facilitated the emergence of those norms.

As a second point of departure, as mentioned, this thesis begins with the juridical construction of the early modern ‘witch,’ but then uses that construction as a foundation, or a first ‘stage,’ for tracing the legal evolution that followed the repeal of the anti-witchcraft statutes. In particular, this thesis places great emphasis on the transition from criminalising witchcraft *per se* to criminalising the *pretence* of witchcraft in 1736, a transition which provides a crucial opportunity for understanding how the law’s conceptualisations of social phenomena change, and how these changes relate to wider shifts in the manifestation of capitalist social relations. In this respect, the unique context of English capitalism is important: England’s status as the cradle of agrarian capitalism¹¹ is a key reason behind its selection as the jurisdictional subject-matter of this thesis, as opposed to other regions where witch-trials were (or still are) prevalent, like Continental Europe,¹² North America,¹³ Africa,¹⁴ and so on. By contrast, research in this field rarely engages with the historical connections between modern fraud and consumer protection law regulating psychic scams and fraudulent mediums, and early modern anti-witchcraft legislation, staying focussed on the witch-trials themselves rather than their legal

¹¹ This thesis does not engage with debates over the thesis advanced in Robert Brenner, ‘Agrarian Class Structure and Economic Development in Pre-Industrial Europe’ (1976) 70 *Past and Present* 30-75. For an overview, see Ellen Meiksins Wood, *The Origins of Capitalism: A Longer View* (Verso, 2017).

¹² A classic analysis of the Continental witch-trials can be found in Hugh Trevor-Roper, *The European Witch-Craze of the Sixteenth and Seventeenth Centuries and Other Essays* (Reprint ed, Harper Collins, 1969). A modern exposition is Brian Levack, *The Witch-Hunt in Early Modern Europe* (Routledge, 2006).

¹³ For a study at the role of property rights and forfeiture in the Salem witch-trials, see David Brown, ‘The Forfeitures at Salem, 1692’ (1993) 50(1) *Law and Society in Early America* 85-111.

¹⁴ For example, see Geschiere’s work on witchcraft law in Cameroon in Peter Geschiere and Cyprian Fisiy, ‘Domesticating Personal Violence: Witchcraft, Courts and Confessions in Cameroon’ (1994) 64(3) *Journal of the International African Institute* 323-341.

descendants.¹⁵ But for this thesis, the first three Witchcraft Acts offer *examples* of law's construction of paranormality, instead of serving as the primary focus of the argument.

As a final remark before engaging with other forms of scholarship on paranormality, this thesis does not, of course, position itself as an exhaustive prism through which to evaluate the significance – legal, socio-historical, or otherwise – of the witch-hunts. Fully understanding a phenomenon as complex as the witch-trials requires a diverse range of perspectives, since witchcraft emerged from a comprehensively distinct social reality to that of modern capitalist society. Theorising the various dimensions of that reality thus demands several synergetic, interdisciplinary approaches operating in tandem. In this respect, this thesis does not seek to challenge existing accounts, but to complement them by providing a novel, additional perspective. With that in mind, this section explores these other approaches with a view to contextualising in more depth the distinctiveness of the objectives and methodology adopted in this thesis, the latter to be elaborated in Chapter Two.

1.3.1 Political-Historical Approaches

There are a range of political-historical accounts of the witch-trials, which often seek to understand their subject by reference to how certain groups and hierarchies were organised in the early modern period. These perspectives may view the witch-trials as political campaigns of one form or another, at varying levels of society, driven by, *inter alia*, ruling class ambition or tensions amongst the common folk. Political perspectives on the witch-trials take a number of forms, but some can be (non-exhaustively) identified as: (1) those that take a 'transhistorical' perspective on 'human nature', perceiving the trials as a manifestation of a 'scapegoating' impulse ubiquitous to human societies; (2) those that focus on the ruling classes, and the events that coalesce pursuant to their desire to retain or acquire power, as drivers of the witch-trials; and (3) those that examine the witch-trials as the result of tensions amongst the common people. There are also political perspectives that concentrate on the religious aspects of the trials, but they will be examined in Section 1.3.2, while those that centre the patriarchal politics that fed into the trials will be looked at in Section 1.3.3.

¹⁵ Again, there are exceptions: see, for instance, Owen Davies, *Witchcraft, Magic, and Culture, 1736-1951* (Manchester University Press, 1999).

Regardless of their focus, political-historical perspectives tend to view law as an instrument, as a tool through which royal policy or individual malice was expressed – neglecting mention of how law, and the legal form, may have played a role in how witchcraft accusations were shaped, constructed, and prosecuted. Indeed, herein lies their distinction from this thesis, which instead treats law as a system with distinctive qualities irreducible to the motives of specific actors. The rest of this section evaluates some of these perspectives, clarifying the distinctiveness between them and the approach of this thesis at large.

To begin with perspectives on the trials that emphasise the supposedly ‘transhistorical’ aspects of witchcraft – those that reference ‘human nature’, for example – the ostracization of the witch has been associated with social fears and anxieties claimed to be ‘inherent’ to human social relations, fears that emerge largely irrespective of society’s mode of production. Briggs, for example, proposes that a fear of some form of practice called ‘witchcraft’¹⁶ manifests in a myriad of cultures across historical periods, and therefore posits that such a fear may be a ‘psychic potential we cannot help carrying around within ourselves as part of our long-term inheritance.’¹⁷ Hutton builds on this by suggesting accusations of witchcraft may be a political response by communities who have no means of understanding their environment, and wish to attribute human agency – a pseudo-‘rational’ explanation – to the incidence of misfortune.¹⁸

Indeed, Geschiere further suggests that concerns over witchcraft may ‘reflect a struggle with problems common to all human societies.’¹⁹ Specifically, Geschiere refers to the challenge of existing in a natural reality that is often unpredictable on the surface, wherein individuals endeavour to attribute their fates to human agency rather than accept suffering – be it fire, disease, poor harvests, and so on – as a random, inexplicable outcome prior to certain discoveries made by natural scientists using the scientific method.²⁰ Further, Koning proposes

¹⁶ Note that this perspective could be critiqued for its reductive conclusion: the cross-cultural phenomena that Briggs and other writers cluster under the label ‘witchcraft’ were, and are, often conceptualised in deeply distinct ways to one another. Thus, conflating them risks over-simplification. For current purposes, however, it is the methodological dimensions of Briggs and others’ approaches that is being distinguished from this thesis, rather than any analytical faults *per se*.

¹⁷ Robin Briggs, *Witches and Neighbours: The Social and Cultural Context of European Witchcraft* (Penguin, 1998) 394.

¹⁸ Ronald Hutton, *The Witch: A History of Fear, From Ancient Times to the Present* (Yale University Press, 2017) 10.

¹⁹ Peter Geschiere, *The Modernity of Witchcraft: Politics and the Occult in Postcolonial Africa* (Janet Roitman (trans), University of Virginia Press, 1997) viii. See Hutton’s discussion in Ronald Hutton, ‘Anthropological and Historical Approaches to Witchcraft: Potential for a New Collaboration?’ (2004) 47(2) *The Historical Journal* 413-434.

²⁰ Hutton (n 18).

that the development of the nation state and modern civilisation may have replaced, or supplemented, individual anxieties with ‘collectivist forms of paranoia’ which find subconscious expression in practices like witchcraft accusations.²¹

This thesis differs significantly from these viewpoints in that it emphasises the historically specific nature of how paranormal practices were, and are, constructed. As Chapter Two will explain when developing its theoretical framework, this thesis maintains that it is crucial to identify how social relations, and their underlying structures, condition the formulation of concepts like witchcraft, fraudulent mediumship, and so on. Such a recognition of the dialectical unfolding of social relations may have space to accept the existence of ‘latent’ drives motivating humans across periods and cultures – those that may be positioned by modern natural sciences as rooted in humanity’s genetic constitution, for instance – but it nevertheless maintains that the way those drives are *expressed* and *understood* within a social reality is fundamentally shaped by the interplay of emergent, and historically contingent, structures and practices.

Moving on to approaches that emphasise the role of the ruling classes in driving witchcraft, and the witch-trials, as a social phenomenon, several political-histories emphasise the role of royal and parliamentary authority. In some sense, this dovetails well with the legal-historical aspects of this thesis: the witch-trials were underpinned by certain statutes that presupposed the participation of the Crown and/or Parliament in their ratification, implying interest on behalf of aristocrats in the prosecution of witches. As Chapter Three will discuss, for example, these approaches might question why Henry VIII passed the Witchcraft Act 1542, and whether it had any relation to the break with Rome and the desire of the Crown to seize authority over ecclesiastical matters – as witchcraft had previously constituted – from the church. As another example, as Chapter Three will also explore, such a politically minded approach might question if there was a connection between Parliament’s promulgation of the Witchcraft Act 1604 and the accession of James I – who had a notorious interest in witches during his time as King of Scotland – in 1603.

Yet, this thesis does not limit its scope to how royal policy might have influenced the motivations behind the anti-witchcraft statutes, as certain political-historical viewpoints do, nor

²¹ Niek Koning, ‘Witchcraft Beliefs and Witch Hunts’ (2013) 24(2) Human Nature 158-181, 158.

does it accept that the goals and projects of the ruling classes offer sufficient explanation for the complexity of how witchcraft was positioned as a juridical concept. For instance, Elmer discusses how Charles I's reign and 'early Stuart absolutism' produced a temporary 'hibernation' of witch-trials prior to the Civil War.²² Here, royal policy is considered a critical driver of, and constraint on, witch-hunting, because of the way the Crown's appetite, or lack of an appetite, for witch-trials could cascade across social institutions, affecting the interest in witchcraft held by magistrates and other judicial figures.

Meanwhile, to offer another example concentrating on the role played by the ruling classes in the witch-trials, Harris's cultural-materialist account identifies witchcraft as a mechanism through which nobility and clergymen seized positions of social authority.²³ In these cases, it is the aspirational efforts of hierarchical social climbers that are seen as the principal motivators of witchcraft accusations. However, this thesis will use these discussions simply to provide context for how the relevant statutes came to be passed. In this sense, that context will be instrumental, allowing the thesis to make observations about the relationship between law's construction of paranormal practices and legal rationality itself, rather than serving as its own end.

Other approaches have aimed their scopes closer to the ground, with accounts of village micro-politics casting the witch as a figure of scapegoating, a target against whom communities would attribute inexplicable hardships out of insecurity, ignorance, envy, or general contempt. For example, Thomas and Macfarlane place interpersonal, neighbourly conflicts against broader class tensions to explain the emergence of the witch-trials.²⁴ Under their framework, sometimes called the 'charity-refused' model of witchcraft accusations, the English witch-trials are largely seen as products of the land enclosures, particularly in Essex. Under this paradigm, the witch was typically an elderly widow deprived of access to means of subsistence due to the privatisation of the commons. Resulting from her lack of resources, she would visit neighbours, begging for alms. In cases where neighbours refused to help, the 'witch' would vocalise her disappointment through insults and curses. In the following days, if the neighbour suffered

²² Peter Elmer, *Witchcraft, Witch-Hunting, and Politics in Early Modern England* (Oxford University Press, 2016) 69-138.

²³ Marvin Harris, *Cows, Pigs, Wars, and Witches: The Riddles of Culture* (Reissue ed, Random House, 1989) 225-260.

²⁴ Keith Thomas, *Religion and the Decline of Magic* (New ed, Penguin, 2003) 670-676; Alan Macfarlane, *Witchcraft in Tudor and Stuart England: A Regional and Comparative Study* (Routledge, 1970).

some adversity like an inexplicable illness or poor crop yield, they might attribute their difficulties to the muttered words of the old woman, leading them to accuse her of witchcraft.

The charity-refused model of witchcraft has been critiqued and refined over the years. Geertz, for instance, critiques Thomas's use of the term 'primitive' as a synonym for 'magical,' along with his attempt to cleanly divide magic and religion; she also attacks his failure to adequately situate witchcraft within early modern cultural-structural conditions.²⁵ In empirical terms, as Gaskill posits, many counties on the Home Circuit were comparably constituted to Essex in terms of religious and socio-economic conditions, yet they did not see similar patterns in their witch-trials.²⁶ Meanwhile, Herrup argues that witchcraft trials in Sussex do not follow the trends observed by Macfarlane and Thomas, contending that Sussex cases frequently saw parity in class status between accuser and accused, with the motivating factor being some form of social 'competition,' e.g. over land boundaries, rather than failure to pay charity.²⁷

In terms of these perspectives' relevance to this thesis, the ways in which social relations – including the relations between legal actors – became increasingly defined by institutionalised property rights undoubtedly had a strong impact on the evolution of juridical conceptions of paranormal practices, particularly in their later stages. Nevertheless, micro-political perspectives like those of Thomas and Macfarlane, on the one hand, and more transhistorical appeals to 'human nature' as expressed by Briggs and Hutton on the other, have similar methodological focuses to one another that are distinct to that of this thesis. While seeking to 'explain' why witchcraft accusations were, and are, made, these positions rarely engage with the texture of the law, with its specific construction of the witch and how that might relate to deeper, structural elements of the law itself. Though these scholars do often examine the social conditions of the interpersonal conflicts they identify, the law is nevertheless implicitly downplayed as simply instrumental to that conflict, rather than shaping the realisation of that conflict through the imposition of structural boundaries.

²⁵ Hildred Geertz, 'An Anthropology of Religion and Magic, I' (1975) 6 *Journal of Interdisciplinary History* 71–89.

²⁶ Malcolm Gaskill, 'Witchcraft Trials in England' in Brian Levack (ed), *The Oxford Handbook of Witchcraft in Early Modern Europe and Colonial America* (Oxford University Press, 2013) 283-299, 287.

²⁷ Cynthia Herrup, *The Common Peace: Participation and the Criminal Law in Seventeenth-Century England* (Cambridge University Press, 1987) 33.

Thus, analyses like those of Thomas, Macfarlane, Geschiere, and other political-historical perspectives are often centred on the question of what drove the initial accusation, or on the motives fuelling accusers, judges, and aristocratic authorities. Law, once again, is reduced to a transmitter of policy or interpersonal tensions. These politically orientated approaches therefore tend not to engage with why witchcraft was legally constructed and designed in the form that it was, how it was constrained and influenced by the legal framework in which it manifested, and how it transformed after the abolition of witchcraft as a crime. Indeed, these authors rarely address the critical question of the legal legacy of the witchcraft laws – visible in the fraud, vagrancy, and consumer protection statutes of the 18th-21st centuries. Yet, the evolution of the anti-witchcraft legislation beyond the repeal of witchcraft as a crime forms a key issue examined by this thesis. With that said, let us turn to religious-historical accounts, with which similar methodological distinctions can be drawn with this thesis.

1.3.2 Religious-Historical Approaches

A swathe of literature on the history of English witchcraft concerns its theological and religious dimensions, and their wider political consequences. In this sense, the approaches assessed in this section can be seen as perhaps a subcategory, or extension, of those in the former. Some religious-historical perspectives on the witch-trials conceptualise the clash between Protestantism and Catholicism, and the fallout from the Reformation, in terms of how it influenced the decision-making of the ruling classes. For example, as Chapter Three will examine, anxieties about Catholic insurgency, or a desire to retrieve authority over spiritual matters from the church, may have motivated Henry VIII and Elizabeth I in passing the Witchcraft Acts of 1542 and 1563 respectively. As a context establishing point, this is valuable. However, for the same reasons articulated in Section 1.3.1, this thesis does not focus primarily on the motivations of legislators, but rather, on how the relevant legislation was conceived, deployed, and understood within a juridical framework, and how it subsequently evolved following the abolition of witchcraft as a crime.

Other religious-historical approaches adopt a wider lens, seeing the witch-trials as part of broader efforts on behalf of the church to reinforce its power within post-Reformation social conditions. For instance, Ben-Yehuda argues that witch-hunting was a mechanism invoked by the church to ‘redefine its moral boundaries’ in an era where the formal structures of feudalism were experiencing instability and decay, given the increasing differentiation and autonomy

achieved by institutions more generally.²⁸ Further, Leeson and Russ contend that European witch-hunting ‘reflected non-price competition between Catholic and Protestant churches for religious market shares in confessionally contested’ areas of the Continent.²⁹ Confessional contestation referred to the competitive religious ‘market’ emerging in the wake of the Reformation, in which churches attempted to attract parishioners from local populations wherein joining one church was often mutually exclusive from the other.

Without sufficient flocks, churches would be liable to lose their legitimacy, funding, protection against violence, and social power more generally. Given that almost all recorded witch-trials in England happened after 1563, and the entrenchment of Protestantism, Leeson and Russ propose that English ‘confessional battles’ occurred not between Catholics and Protestants, but rather, between competing Protestant churches – particularly Anglicans and Scottish Presbyterians.³⁰ On this model, the witch-trials are likened to marketing tools for extolling the strength of local churches in staving off demonic threats, empowering those churches to attract worshippers. As supportive evidence, the authors posit that witch-trials declined significantly after the Peace of Westphalia ended the Thirty Years’ War in 1648, wherein boundaries between Catholic and Protestant territories were sharply drawn and, thus, conflict between them abated.³¹

Indeed, on the Continent, witchcraft was often deployed as a similar offence to heresy, locating it squarely within the framework of theological conflicts. However, this does not offer a comprehensive explanation of the nature of the witch-trials as they manifested in England, which saw less overt involvement from religious authorities and were largely administered by centralised secular judicial authorities. Thus, understanding the ways through which witchcraft was conceptualised in England requires a broader engagement with various aspects of early modern English law. This is because, as Chapter Three will articulate, the approach taken by English legal institutions to witchcraft diverged in many ways from those taken on the Continent, for reasons at least partially attributable to the structural conditions of English law. For example, as mentioned, witchcraft in England was not, generally, prosecuted by any authority comparable to the Catholic inquisition – this, some have argued, was related to the

²⁸ Nachman Ben-Yehuda, ‘The European Witch Craze of the 14th to 17th Centuries: A Sociologist’s Perspective’ (1980) 86(1) *American Journal of Sociology* 1-31.

²⁹ Peter Leeson and Jacob Russ, ‘Witch Trials’ (2017) 128(613) *The Economic Journal* 2066-2105, 2066.

³⁰ *Ibid* 2077.

³¹ *Ibid* 2071-2072.

fact English law was itself not inquisitorial, but accusatorial, meaning that claims of witchcraft had to come from ‘below’ rather than from vertical enforcers.³²

As such, given that a great deal of the witch-trials in England did not involve ecclesiastical authority, the focus must shift towards the legal infrastructure within which witchcraft was conceptualised and prosecuted. More specifically for the purposes of this thesis, to fully grasp how the witch was constructed, one must go beyond the anti-witchcraft statutes and engage with the depth and complexity of the structures that *facilitated* those statutes, and their resulting trials. In other words, one must reckon with the emerging *rationality* of the law, with the mechanisms through which meaning was produced, to comprehend how and why the legal system could sustain a concept like ‘witchcraft’ without relying primarily on religious authority to do so. Further, to isolate the significance of these mechanisms – of this rationality – one must examine how this contrasts with later juridical conceptions of the paranormal, and in turn, the rationalities fuelling those conceptions.

Indeed, the legislation underpinning the witch-trials, informed by religious conflicts as it may have been, does not provide all the answers as to how witchcraft was constructed. As Goodare argues in reference to the Scottish Witchcraft Act 1563, while the drafters of the legislation may have intended anti-witchcraft statutes as parts of broader programmes aimed at purging the vestiges of Catholicism’s influence, the Witchcraft Acts were most likely not targeted at Catholics *per se*.³³ He writes that the Scottish Witchcraft Act ‘was not routinely used as an anti-Catholic weapon, if by this is meant the suppression of orthodox Catholic practices; other acts were available for that purpose. Nevertheless, the “superstitioun” of the common people was the target, with the aim being to inculcate a more theologically correct version of Christian belief and practice.’³⁴

Similar arguments could be made regarding the Witchcraft Acts of 1542, 1563, and 1604 enacted in England. But, more critically, a model founded on theological conflicts does not get us particularly far in understanding witchcraft as a legal phenomenon with a distinctive

³² Elliott Currie, ‘Crimes Without Criminals: Witchcraft and its Control in Renaissance Europe’ (1968) 3(1) Law and Society Review 7-32.

³³ Julian Goodare, ‘The Scottish Witchcraft Act’ (2005) 74(1) Church History 39-67.

³⁴ Ibid 66. ‘Superstition’, in the context of the Witchcraft Acts, referred to false religious beliefs, rather than ‘irrational’ beliefs as it might today. That is, labelling witchcraft ‘superstition’ under the Scottish Witchcraft Act 1563 did not imply the statute was conceptualising witchcraft as ‘fraud’, as later statutes, like the Witchcraft Act 1736, would.

juridical expression. While there was an undeniable connection between the Witchcraft Acts and broader conflicts between Christian denominations, religion is, one might say, only a single piece of the puzzle, one that might contextualise the legal-historical evolution of the early witchcraft laws but nevertheless does not help us appreciate their specific form and expression. Certainly, the institutional connections between the church and the early modern state *did* yield some contributions to the legal construction of the witch, especially with regards to the cognitive framework within which certain cultural practices were problematised as witchcraft by reference to Biblical and other sources of Christian theology (e.g., possession of specific instruments used for black magic, the notion of diabolic pacts, and so on, as Chapter Three discusses). However, treating the law as an otherwise empty tool of the church and state would leave little room for comprehending the evidentiary and procedural components of the offence, among other distinctly legal aspects (as Chapter Three shall also explore).

As such, religious (and, as in Section 1.3.4, folkloric) ideas about the paranormal were critical in the construction of witchcraft. Yet, the key issue for the purpose of this thesis is the law's specific conceptualisation and application of those ideas, and what the process of converting religious and folkloric ideas into legal norms reveals about law's emerging rationality. To quote Goodare once again, the drafters of the (Scottish) Witchcraft Act 'might have recognised [the average convicted witch] if he had met her, but when he drafted his deadly legislation, he did not actually have her in mind.'³⁵ Indeed, the social significance of legal norms requires us to ask questions not exclusively of their architects, nor of the individual qualities of legal actors, but of the frameworks that conditioned their practices. A closer political perspective to that of this thesis would be that of Dillinger, who explores the role of witch-hunting in supporting the emergence of the centralised state.³⁶ Even so, however, Dillinger limits his analysis to that of the relationship between the state and witch-hunting, rather than investigating the deep-level *systemic* aspects of law that cause it to exhibit a force one might identify as its 'rationality,' and that how that rationality later became tied to law's role within capitalism.

³⁵ Ibid 67.

³⁶ Johannes Dillinger, 'Politics, State-building, and Witch-Hunting' in Brian Levack (ed), *The Oxford Handbook of Early Modern Witchcraft in Early Modern Europe and Colonial America* (Oxford University Press, 2015) 528-547. On the inverse relationship between witchcraft allegations and the rise of legal institutions, see Alfred Soman, 'Decriminalizing Witchcraft: Does the French Experience Furnish a European Model?' (1989) 10 *Criminal Justice History* 1-22; and Noel Johnson and Mark Koyama, 'Taxes, Lawyers, and the Decline of Witch Trials in France' (2014) 57(1) *Journal of Law and Economics* 77-112.

Indeed, as posited earlier, an investigation into the juridical construction of paranormal practices throughout English legal history cannot constrain itself to an analysis of 16th and 17th confessional conflict if it wishes to illuminate on the precise form of the WA 1736 and the legislation that followed. That is, an analysis of paranormal practices in law throughout history must necessarily go beyond the Witchcraft Acts, and any religious explanations that explain those Acts' functionalities. A confessional-conflictual perspective might attempt to argue that the abolition of witchcraft as a crime *per se* in 1736 may – for instance – be attributable to a decline of competition between churches and parishes. Yet, if this is the conclusion, the analysis is forced to stop when the apposite questions have only begun to be properly raised. The 1736 Act, after all, did not simply repeal witchcraft as a crime. It replaced it with a form of fraud and was itself repealed and replaced by further subsequent legislation such as the FMA 1951 and then the CPR 2008. These are not necessary outcomes, but rather, ones that are contingent on the forces of history and the shifting nature and function of the law itself. In other words, the anti-witchcraft legislation could have been repealed, and replaced with nothing; the reasons why this was not the case merit evaluation.

Finally, while some studies have explored the later religious emergence of the Spiritualist movement, and its contributions to the repeal of the WA 1736 and its replacement with the FMA 1951, once again they tend to focus on the *motivations* behind the reforms, rather than what the outcome of those reforms *signify*.³⁷ These perspectives will be valuable in Chapters Four and Five in providing legal-historical context. But this thesis will then go beyond that context-establishing exercise to investigate how the results of the reforms were understood and processed within the rubric of capitalist law, and what those reforms reveal about capitalist legal rationality in general.

In conclusion, then, a perspective that concentrates purely on the religious objectives of the parties who drafted the Witchcraft Acts, or indeed the Acts concerning mediums and paranormal traders that followed, would be forced to make premature and incomplete conclusions with regards to the questions of this thesis. A confessional-conflictual perspective, like political-historical accounts in general, are ill-equipped to examine the *structuring*

³⁷ Studies of the history of Spiritualism in England include Logie Barrow, *Independent Spirits: Spiritualism and English Plebeians, 1850-1910* (Routledge, 1986); Geoffrey K Nelson, *Spiritualism and Society* (Routledge, 1969); and Alex Owen, *The Darkened Room: Women, Power, and Spiritualism in Late Victorian England* (2nd ed, University of Chicago Press, 2004).

influence of the legal system, and what this influence *means*. Feminist-historical perspectives on the witch-trials often fall into a similar trap of reducing law to an instrument of policy, as Section 1.3.3 explores.

1.3.3 Feminist Approaches

Several feminist perspectives have, aptly, taken the witch-trials for their subject. Sharpe estimates that around 90% of individuals indicted for witchcraft on the Home Circuit assizes between 1563-1736 were women, suggesting significant patriarchal dimensions to the persecutions.³⁸ On the Continent in particular, anti-witch ire was directly and explicitly concentrated against women in popular demonological treatises that eventually diffused into England, such as the French jurist Jean Bodin and Heinrich Kramer's infamous witch-hunting text *Malleus Maleficarum* ('*The Hammer of the Witches*'). For these reasons, feminist approaches to the witch-trials are as indispensable as they are multifaceted and diverse, and so must be considered when engaging in any analysis of how paranormal practices have been conceptualised throughout history.³⁹

An early and influential feminist work on the witch-trials is that of Margaret Murray, who claimed the witches of Europe were participants in pre-Christian religious ceremonies that had survived in fragmented forms.⁴⁰ Lacking historical support outside sensationalist pamphlets, this witch-cult thesis has been dismissed. However, the thrust at the core of the approach has endured, and provides opportunities for methodological refinements. What has survived is the view of witchcraft as a mechanism of direct patriarchal control aimed at breaking the power of women, with the witch-trials representing a protracted, and intentionally designed, campaign of 'gynocide'.⁴¹

This form of feminist approach is unsuitable for the objectives this thesis pursues. The shortcoming of any perspective that perceives the witch-trials of England as a calculated campaign is that they commit the same fallacy discussed in previous sections. That is, such an

³⁸ Jim Sharpe, 'Women, Witchcraft, and the Legal Process' in Jenny Kermode and Garthine Walker (eds), *Women, Crime and the Courts in Early Modern England* (Routledge, 1994) 125-141.

³⁹ Alison Rowlands, 'Witchcraft and Gender in Early Modern Europe' in Brian Levack (ed), *The Oxford Handbook of Witchcraft in Early Modern Europe and Colonial America* (Oxford University Press, 2013) 449-467, 450-451.

⁴⁰ Margaret Murray, *The Witch-Cult in Western Europe* (Clarendon Press, 1921).

⁴¹ Andrea Dworkin, 'Gynocide: The Witches' in Andrea Dworkin, *Woman Hating* (Dutton, 1974) 136.

approach risks reducing the law to a neutral instrument that ‘happened’ to be used to apply misogynistic anti-witch policies, a methodological mistake that is at odds with the orientation of this thesis. Even structurally informed feminist approaches, like the Marxian-inspired approach of Silvia Federici, tend to commit the error of conceptualising the law exclusively as an instrument of violence rather than a complex system with its own rationality.

Influenced by Murray, Federici contends that the witch-trials of Europe represented an intersection of oppressive social relations: the disciplining brutality of patriarchy fused with the mechanising impact of capitalism, which, drawing on Weberian conceptions of ‘disenchantment’, was said to have violently purged all traces of superstition and ‘magic’ from social reality.⁴² There are problems with understanding capitalism as a system in which ‘magic’ cannot subsist – one need only point to continuing modern interests in astrology, Spiritualism, and paranormality more generally to see this – and with the idea that legislators were ‘intentionally’ trying to target paranormality because it was disruptive to capitalism *in a pre-capitalist society*. But that said, and as Chapters Two and Five will develop, this thesis draws inspiration from Federici’s core notion that there are at least some tensions between capitalism and paranormality, and that paranormality must adopt certain forms to be reconciled with the commodity form.

Nevertheless, perspectives like those of Federici and others often overlook the legal rules of evidence and procedure, *inter alia*, that played a critical role in shaping the legal construction of the witch. These may well have been baked with patriarchal dynamics and assumptions, but were nevertheless irreducible in this case to the straightforward designs of legislators, clerics, or vengeful villagers seeking to dominate or brutalise women. This form of approach also fails to reconcile with the considerable proportion of men who were accused and convicted. This objection reflects those made in previous sections.

Nevertheless, other feminist views on the witch-trials offer a crucial starting point for questioning how the legal construction of the witch came to be in other respects, and how that legal construction helped to reinforce gender relations within a system designed, enforced, and reproduced by men. As Larner’s aphorism maintains, ‘witchcraft was not sex-specific, but it

⁴² See Silvia Federici, *Caliban and the Witch: Women, the Body, and Primitive Accumulation* (2nd ed, Autonomedia, 2014), especially 173-234.

was sex-related.⁴³ Further, Rowlands posits that the witch-trials required patriarchal organisation of power as a *precondition* to the precise form that witch-hunting adopted.⁴⁴ For instance, the way the law denied women access to certain legal rights and disempowered them through doctrines like *couverture* undoubtedly increased their vulnerability to legal persecution through witchcraft accusations.

Meanwhile, women in the trials never held positions of institutional authority, save for, as an example, serving as examiners of bodies for ‘witch’s marks’: legal assumptions, along with wider social restrictions, ensured that women were not judges, nor were they JPs, nor were they allowed to be members of juries.⁴⁵ These were deeply entrenched norms, and characterising the witch-trials as a calculated weapon, imposed from above, deployed for the co-ordinated disciplining of women over two centuries in response to an identifiable ‘threat’ to the established social order offers a simplistic explanation that gravely overlooks the complexities and insidiousness of early modern patriarchal relations.

While this thesis will not explore these specific points directly, it nevertheless draws on the notion that patriarchal structural arrangements concentrated economic, religious, social, and biopolitical power in the male sphere, and institutionalised conceptions of normative male and female bodies and social roles.⁴⁶ For instance, Willis explores how conceptions of witchcraft in early modern England often revolved around forms of ‘failed’ womanhood – the witch as a woman who suckled demons on blood, rather than human babies on milk, was one such stereotype – and the prosecution of witchcraft in the courtroom often reified these conceptions.⁴⁷ In this sense, the mechanisms and social practices that constitute the patriarchal relations between genders frequently interact with the mechanisms and social practices that constitute the law’s rationality – this will be discussed when exploring the overrepresentation of certain demographics in the witch-trials in Chapter Three. Identifying the underlying conditions embedded within the law that enabled patriarchal preconceptions like those discussed above to achieve legal expression forms the basis of this thesis.

⁴³ Christina Lerner, *Enemies of God: The Witch-hunt in Scotland* (Johns Hopkins University Press, 1981) 92. Since the gendered aspects of the witch-trials primarily revolved around gender roles rather than biological sex, the term ‘gender’ will be generally used here rather than ‘sex’.

⁴⁴ Rowlands (n 39) 453.

⁴⁵ Sharpe (n 38).

⁴⁶ Ibid.

⁴⁷ See Deborah Willis, *Malevolent Nurture: Witch-Hunting and Maternal Power in Early Modern England* (Cornell University Press, 1995).

Thus, a feminist perspective can be extremely useful for understanding the construction of the witch in law, though they often do not trace the evolution of the anti-witchcraft statutes into the fraud and consumer protection legislation that emerged over the centuries following the repeal of witchcraft as a crime. Indeed, to conclude, this thesis avoids conflating the form and content of the law with the goals of its draftsmen, because such an approach would leave open the question of how stereotypes and patriarchal expectations were fundamentally *able* to achieve legal expression. Further, while this thesis does not focus extensively on the patriarchal aspects of how the witch was constructed, what can be drawn from this is, once again, that the construction of witchcraft must be recognised as drawing on a wider web of juridical principles and demands more complex analysis of the structural nature of law and the legal form than a relatively reductive view of the early modern witch-trials as political ‘tools’ can accommodate.

1.3.4 Folkloric Approaches

Moving on from political perspectives to those that analyse social constructions of the paranormal through a cultural-historical prism, Continental scholarship has directed much attention to the folkloric aspects of witchcraft, sometimes developing folkloric genealogies. Writers like Ginzburg,⁴⁸ Henningsen,⁴⁹ Pócs,⁵⁰ and Behringer⁵¹ situate witchcraft in a history of folk tales, mythologies, and religious syncretism. These works offer a lens to understand the context and significance of some allegations that constituted – and often led to a conviction for – witchcraft. For example, a folkloric approach might analyse the emergence of the concept of a ‘familiar spirit’, the animal companion that was sometimes used as evidence of a defendant’s witchcraft, by tracing local legends and religious documents, explaining how the cultural concept of the familiar formed – its origins, meaning, and so on. However, while both this thesis and folkloric studies take the construction of the paranormal as their object of inquiry, and do so using genealogical methodologies, this thesis does not seek to explain the cultural forms that underpinned the witch-trials. Rather, it looks at how notions of the paranormal were

⁴⁸ Carlo Ginzburg, *The Night Battles: Witchcraft and Agrarian Cults in the Sixteenth and Seventeenth Centuries* (John and Anna Teschi (trans), Johns Hopkins University Press, 1966).

⁴⁹ Gustav Henningsen, ‘The Witches’ Flying and the Spanish Inquisitors, or How to Explain (Away) the Impossible’ (2009) 120 *Folklore* 57-74.

⁵⁰ Éva Pócs, *Between the Living and the Dead: A Perspective on Witches and Seers in the Early Modern Age* (Szilvia Rédey and Michael Webb (trans), Central European University Press, 1999).

⁵¹ Wolfgang Behringer, *Shaman of Oberstdorf: Chonrad Stoecklin and the Phantoms of the Night* (H C Erik Midelfort (trans), University of Virginia Press, 1998).

(and are) legally realised, and how the law ‘adapts’ those beliefs to its purposes. In other words, it examines the mechanics of the legal system rather than the texture of the cultural beliefs to which the law gave juridical life.

As in Section 1.3.2’s discussion of religious conceptions of witchcraft, therefore, cultural understandings of witchcraft are relevant because the process by which the law converted those broader cultural constructions into legal rules and concepts of witchcraft may help reveal the legal rationality that was emerging contemporaneously with the witch-trials. But that does not mean the thesis will devote much space to elaborating on the complexity of the mythologies underpinning, for example, beliefs in witches, fairies, and demons; they are only relevant for current purposes insofar as they also happened to achieve legal expression.

Thus, a purely folkloric approach is insufficient for the purposes of this thesis, since this approach, once more, requires a legal perspective: the Witchcraft Acts, the trials, and the fraud, vagrancy, and consumer protection legislation that followed were not reducible to cultural notions (or, as in the next section, rationalistic ‘ideas’) about witchcraft. This thesis instead argues that rules of evidence, procedure, causation, property, and so on played a critical role in shaping their legal construction. It identifies the position of witchcraft and its genealogical progeny within a legal nexus, interrogating witchcraft and its descendants as distinctly legal phenomena, while uncovering the structural conditions that made those constructions possible, and their wider ramifications over time.

1.3.5 History-of-Ideas Approaches

Relatedly, despite some loosely overlapping interest in the notion of ‘rationality,’ this thesis is distinct from some conventional understandings of witchcraft that might be labelled as ‘history-of-ideas’ perspectives. Such approaches might frame the repeal of the anti-witchcraft statutes and their replacement with a law forbidding the pretence of witchcraft in 1736 as an outcome of post-Enlightenment, natural-scientific ‘rationality’ triumphing over the ‘superstition’ or ‘ignorance’ of earlier historical periods. Emblematic of this view, Voltaire labelled the French witch-trials as ‘legal murders committed by indolence, stupidity, and superstition,’⁵²

⁵² Voltaire, *The Works of Voltaire, A Contemporary Version, vol VII* (William Fleming (trans), Critique and Biography by John Morley, notes by Tobias Smollett, E R DuMont, 1901) 191.

performed by magistrates who ‘should have been more understanding than the vulgar.’⁵³ Unsworth contextualises this in a legal framework, pointing to the increased scepticism of judges as ‘a cardinal factor in the decline of witch-hunt.’⁵⁴

A great deal of value can be gleaned from a history-of-ideas approach to witchcraft. Indeed, as Unsworth contends, it is surely true that sceptical judges would have helped to restrain juries and reduce the number of witchcraft convictions. However, treating witchcraft as a defective, aberrant ‘idea’ that stood in contrast to the rationality and logic of the natural sciences is ahistorical and reductive. The same can be said for language that treats the trials as a ‘craze’ or ‘hysteria’, neglecting their intricate and complex intellectual roots and legal infrastructure.⁵⁵ Clark’s landmark work, for instance, has shown how witchcraft emerged from a social reality that was categorically different from modern capitalist society and yet was nevertheless internally consistent and complete, with research into both magic and subjects today seen as part of natural science often sharing common logic and objectives.⁵⁶ As Gaskill writes, ‘the Scientific Revolution influenced the decline of witch-trials less than is sometimes imagined, not least because few historians of science regard this gradual, branched and ambiguous process as a revolution at all.’⁵⁷ As Elmer posits, the process according to which witchcraft became viewed as non-scientific and empirically impossible was a process of fragmentation, division, and differentiation rather than direct condemnation and hostility.⁵⁸

On this matter, Clark argues that early modern discourse contained within itself ‘logical relationships of opposition, metaphors of inversion, schemes of classification, taxonomies, rhetorical strategies, and the like’ which helped maintain the stability of beliefs in witchcraft for so long.⁵⁹ Clark further notes that experiments in areas like pneumatics were being carried out from the as late as the 1670s, attempting to analyse magical phenomena with the same

⁵³ Ibid, vol VI, 192.

⁵⁴ C R Unsworth, ‘Witchcraft Beliefs and Criminal Procedure in Early Modern England’ in Thomas G Watkin (ed), *Legal Record and Historical Reality: Proceedings of the Eighth British Legal History Conference, Cardiff, 1987* (Hambledon Press, 1989) 71-98, 72.

⁵⁵ These terms are usually problematised in academic discourse, but are sometimes employed uncritically. Midelfort reviews and critiques such usage in H C Erik Midelfort, ‘Witch Craze?: Beyond the Legends of Panic’ (2011) 6(1) *Magic, Ritual and Witchcraft* 11-33.

⁵⁶ Stuart Clark, *Thinking with Demons: The Idea of Witchcraft in Early Modern Europe* (Oxford University Press, 1999) 683-686.

⁵⁷ Malcolm Gaskill, ‘Witchcraft and Evidence in Early Modern England’ (2008) 198 *Past and Present* 33-70, 62.

⁵⁸ Peter Elmer, ‘Science and Witchcraft’ in Brian Levack (ed), *The Oxford Handbook of Witchcraft in Early Modern Europe and Colonial America* (Oxford University Press, 2013) 548-560.

⁵⁹ Clark (n 56) 8.

rigour and curiosity as those in fields that still command academic respect in modernity, like mathematics and chemistry.⁶⁰ Indeed, as Sharpe argues, those who wrote, discussed, and prosecuted witchcraft ‘were bound by a different set of intellectual assumptions, but... simply to write those assumptions off as “ignorance” or “superstition” does not seem helpful... I would find it difficult to argue that Reginald Scot was more intelligent, or at least more intellectually complex, than William Perkins, or John Webster than Joseph Glanvill.’⁶¹ Moreover, those who spoke against such strains of thought often did so not out of concern for their empirical validity, but out of political or theological anxieties related to the anti-theistic aspects of belief in witchcraft.⁶²

With specific regard to those who participated in the witch-trials, Gaskill posits that ‘in epistemological terms, the witchfinders were caught between two systems of reasoning: a priori, where the meaning of effects was deduced from causes established by tradition; and a posteriori, a more experimental, inductive procedure by which causes were arrived at from the accumulation of evidence.’⁶³ That is, their methods greatly reflected those that would come to characterise natural science itself, calling into question the stability of any binary that would divorce one cleanly from the other. As phenomena, said Ginzburg, demonology and witchcraft ‘could be studied in a rational, but not rationalistic key.’⁶⁴ Thomas goes even further than the above, arguing that efforts to systematically and methodically detail hermetic magical research ‘created an intellectual environment favourable to experiment and induction – a break with characteristic medieval attitude of contemplative resignation.’⁶⁵ Darr corroborates these suggestions from a legal point of view, showing how the legal construction of witchcraft relied on the use of methodical, quasi-rational, and carefully constructed procedures employed in the discovery of facts, involving evidence delivered by learned individuals like physicians and clerics.⁶⁶

Beyond the instability inherent in an approach that posits a dichotomy between paranormal beliefs and rationalistic natural science, the legal construction of the witch was clearly

⁶⁰ Ibid 302.

⁶¹ Sharpe (n 4) 301.

⁶² Ibid. See e.g., John Webster, *Displaying of Supposed Witchcraft* (Forgotten Books, 2018), where Webster militated against the existence of witches based primarily on religious, not natural-historical concerns.

⁶³ Gaskill (n 57) 67.

⁶⁴ Carlo Ginzburg, *Clues, Myths, and the Historical Method* (Johns Hopkins University Press, 1989) viii.

⁶⁵ Thomas (n 24) 643.

⁶⁶ Orna Alyagon Darr, *Marks of an Absolute Witch: Evidentiary Dilemmas in Early Modern England* (Routledge, 2011) 24.

influenced, but not determined, by its surrounding intellectual conditions. As mentioned, the goal of this thesis is to examine the evolution of how paranormal practices have been legally conceptualised, and whether this reveals anything about changing approaches to, or conditions constraining, legal discourse in general. Investigating the legal construction of the witch therefore seems better served by an approach that focuses on the juridical structures underpinning the trials and how they in turn affected the construction of witchcraft, rather than one that reduces that construction to ‘superstition’ or faulty ideas about empirical reality.

Thus, a key obstacle to a history-of-ideas approach is that it is ill-suited to explain how general cultural concepts of witchcraft were converted into legal concepts, irreducible to the initial ideas that propagated them. Consider the WA 1736, which was not merely a case of repeal, but also of replacement: history-of-ideas approaches might explain why the paranormal was repositioned as ‘impossible,’ in 1736, perhaps by reference to ‘discoveries’ in the natural sciences that made the existence of witches and curses appear impossible to legislators. Yet, as earlier mentioned, this would not explain why or how witchcraft, and paranormal practices more generally, were reconceptualised as forms of *fraud*. Something being deemed empirically impossible is generally an insufficient condition for fraud; if this were not the case, one might expect religious authorities, for instance, to face routine criminal prosecution. Accordingly, this thesis asks, what conditions of possibility must have been in place for these practices to be designated as fraudulent? What social and legal-systemic changes were synchronously underway that made this outcome feasible?

That being said, it is essential to explore the interconnections between witchcraft and the natural sciences within law, and the legal foundations that gave that interconnection juridical expression, which serves as the focus of Chapter Two, and beyond. As such, a history-of-ideas account can, at times, enrich and dovetail with the perspective of this thesis when handled with caution. For instance, the division between natural science and more magical conceptions of reality was occurring alongside the emergence of legal conceptions of evidence, related to the co-emergence of a rights-bearing defendant. As Shapiro argues, the development of notions of probabilistic and deterministic proof were the result of a continual back-and-forth between scientific, theological, philosophical, and legal actors (many of whom belonged to more than

one of those groups).⁶⁷ However, to rely on a pure history-of-ideas account alone of this transition could risk treating these forces as unrelated – or worse, as existing in isolated vacuums. It may omit an analysis of the structurally arranged power relations that made it possible for witchcraft to be transformed into a new form of offence, one rooted in pretence and deception, failing to engage why such ‘pretence’ would constitute (or be interpreted as constituting) a social threat *a priori*.

To summarise the current discussion, looking merely at the evolution of ideas beyond the legal system would risk overlooking juridical nuance, reducing law, once more, to a hollow device, to a neutral conduit of cultural and scientific ideas, an approach Chapter Two challenges. The way law’s underlying features and tendencies always play a role in how those ideas, as with political policies, are shaped and deployed within legal reasoning would be neglected. Therefore, focussing on the *legal* structures that affected the *legal* evolution of witchcraft is the most suitable option for the goals of this thesis. That said, not all legal-historical perspectives align with the methodology of this thesis, as Section 1.3.6 explains.

1.3.6 Legal Approaches

While previous sections have focussed on differentiating a distinctly legal approach from other approaches to the witch-trials, this section distinguishes this thesis’s perspective from other studies that have examined the legal aspects of witchcraft, and indeed the paranormal at large. As mentioned earlier, modern legal debates concerning the proper regulation of paranormal practices have asked, generally, how law should construct a practice which, implicitly, legal decision-makers tend to agree is empirically non-existent. Should the paranormal be treated as fraud, a form of religious belief, a consumer protection issue, or some other alternative? Such a normative analysis is beyond the scope, or purpose, of this thesis; options for legal reform in the regulation of psychic scams, for instance, will not be advanced. Indeed, what other analyses generally do not attempt is to connect the laws regulating psychic scams and fraudulent mediums to the laws underpinning the witch-trials, and those that do tend to overlook the significance of that link from a legal-evolutionary perspective. By contrast, this thesis argues,

⁶⁷ Barbara Shapiro, “*Beyond Reasonable Doubt*” and “*Probable Cause*”: *Historical Perspectives on the Anglo-American Law of Evidence* (University of California Press, 1991) 2-21.

exploring that link offers an opportunity to examine the emerging capitalist rationality of the law, and what that rationality means for both legal theory and practical reform in general.

In terms of witchcraft itself, many legal-historical approaches to the witch-trials investigate and document the specific norms that facilitated accusations of witchcraft. That is, such approaches generally, though not universally, do not proceed to trace the evolutionary thread binding the anti-witchcraft statutes to modern juridical conceptions of the paranormal. Further, they tend not to consider the witch-trials from the perspective of what conditions they might presuppose from a structural perspective, and what these conditions might imply for legal discourse more widely. Even so, these approaches often *do* acknowledge, and engage with, the reality that the witch-trials were in fact legal phenomena.

Indeed, once again, while often conceptualised as violent paroxysms of social disdain for specific members of communities, the crime of witchcraft rested on a complex architecture of legal norms and procedures; it was, wrote the scholar William Perkins, ‘a matter Judiciall as is also the discoverie of a theefe and a murderer, and belongeth not to every man, but is to be done Judicially by the Magistrate, according to the forme and order of Law.’⁶⁸ Levack, meanwhile, refers to early modern witchcraft prosecution as ‘one very large judicial operation.’⁶⁹ As Gaskill posits, the ‘expanding legal culture’ was as significant in the witch-trials as the ‘endemic witch beliefs’ that pervaded them, along with transitions in demographics, the Reformation, shortages in labour, community nucleation, and spikes of puritanism.⁷⁰ Indeed, as Soman writes, ‘prolonged witch-hunting is as good a barometer as any for measuring weakness in a state.’⁷¹

For this reason, it is unsurprising that several legal-historical scholars have examined the law of witchcraft, often taking an approach inspired by conventional doctrinal analysis. For example, Durston offers a valuable examination and detailed listing of the legal principles governing witchcraft in England, though he does not consider their significance from a social-

⁶⁸ William Perkins, *A Discourse of the Damned Art of Witchcraft* (Cantrel Legge, 1608) available at Cornell University Library Digital Collections: <https://digital.library.cornell.edu/catalog/witchcraft075> (accessed 19/04/2023) 642.

⁶⁹ Levack (n 12) 1.

⁷⁰ Malcolm Gaskill, ‘Witchcraft Trials in England’ in Brian Levack (ed), *The Oxford Handbook of Early Modern Witchcraft in Early Modern Europe and Colonial America* (Oxford University Press, 2015) 283-299, 290-291.

⁷¹ Soman (n 36) 17.

ontological perspective.⁷² Others like Unsworth, concentrate on the role of judges and JPs, and how changing levels in judicial scepticism may have contributed to oscillating rates of witch-trials during the operation of the underpinning legislation.⁷³

However, legal approaches like these often focus on the characteristics of individual legal actors and rules rather than the broader conditions that shaped their behaviour and facilitated their positions of authority. Indeed, while many acknowledge how the administrative processes in English law affected how witchcraft manifested, legal historians often do not explicitly engage with the wider ramifications for modern legal thinking implied by the possibility that certain features of the law itself may have helped to sculpt witchcraft in public, and legal, consciousness. Legal-historical approaches featuring doctrinal analysis are, of course, of critical importance insofar as they help explain the functionality of certain legal norms regarding witchcraft based on early modern sources. But this thesis aims to use the relevant legal developments as a case-study for theorising about law at its structural level. Doctrinal approaches (in a narrow, legal-dogmatic sense) are generally ill-equipped to recognise, and interrogate, juridical change over a long period, or to question the wider conditions that made change possible *a priori*. Therefore, the method must be broader in scope – it must be structurally focussed – and, critically, draw on legal-evolutionary perspectives. Chapter Two presents this methodology, informed by a range of theoretical perspectives.

An example of a more holistic approach to the legal evolution of the witch-trials is the work of Orna Alyagon Darr, who contextualises the evidentiary components of witchcraft within the broader history of criminal procedure and evidence.⁷⁴ As she argues, early modern norms around evidence were ‘weak’, allowing for the admission of a wide range of evidence to secure the conviction of a witch, which was often circumstantial in nature or related to the witch’s bad character. This thesis argues that factors like this, along with early modern law’s approach to causation, contracts, the rights of the defendant, and so forth were key to the legal construction of the witch and the project of ‘proving’ witchcraft. An approach that seeks to understand the evolving construction of the paranormal, especially *qua* witchcraft, without addressing these wider issues would be lacking context for the goals this thesis pursues.

⁷² Gregory Durston, *Crimen Exceptum: The English Witch Prosecution in Context* (Waterside Press, 2019).

⁷³ While Unsworth appears to fall into this category, his observation that courts operated as ‘workshops’ for the ‘production’ of knowledge related to witchcraft is a salient one in this regard. See Unsworth (n 54).

⁷⁴ See generally Darr (n 66).

1.4 Conclusion

In conclusion, this chapter has introduced the central questions of this thesis while locating it against a broader range of scholarship concerning the paranormal in English law. It has explained that the thesis develops a genealogy tracing the emergence of modern legislation regulating psychic scams and fraudulent mediums to anti-witchcraft statutes of the 16th century. By evaluating how English law has constructed these ‘paranormal practices’ throughout history, the thesis will glean evidence of the underlying ‘rationality’ of the law – that is, the framework or paradigm within which legal concepts are constructed, interpreted, and applied, particularly by reference to practices conceived of as ‘irrational’, ‘fraudulent’, or ‘misleading’ within legal reasoning. Drawing on the observations of the genealogy, the thesis will argue that this rationality, and, by extension, modern law’s conceptualisation of paranormal practices, can only be understood by placing the legal system within the context of capitalism, and law’s ‘constitutive’ role therein. The significance of this argument is the purview of Chapter Two, which develops the methodology and theoretical foundations of the rest of the thesis.

2. Law, Capitalism, and Paranormal Practices: Developing a Methodology

2.1 Introduction

This chapter develops the methodological and theoretical framework that this thesis uses to address the research questions established in Chapter One. To that end, this chapter argues that a genealogical lens – a method that involves tracing the evolution of a given concept – can help us perceive how, and why, the modern juridical paradigm for regulating paranormal services emerged. In so doing, the chapter offers further explanation as to why tracing legal constructions of paranormal practices can shed light on the historically contingent nature of legal reasoning in general.

To contextualise this discussion, Section 2.2 develops a theoretical framework for examining how the modern legal conception of paranormal practices emerged. The framework constructed therein draws inspiration from, while offering a unique synthesis of, critical realism,¹ Marxian-inspired legal theory,² and systems-theoretical approaches,³ which together provide analytical tools for understanding the social-ontological aspects of these issues. Section 2.3 builds on the earlier sections by explaining how this theoretical framework supports the use of genealogical method to trace the historical emergence of the modern legal construction of paranormal

¹ While consisting of a diversity of perspectives, broadly speaking, critical realism is concerned with ontology, or the study of being. It positions itself as an alternative to social-scientific positivism and postmodern interpretivism by maintaining that statements about the *nature* of the world, or ontological claims, must not be conflated with statements about *knowledge* of the world, or epistemological claims. Further, critical realism asserts that social reality is ‘stratified’ in the sense that surface-level phenomena are structured and produced by deep-level, underlying mechanisms. For central texts, see Roy Bhaskar, *A Realist Theory of Science* (Verso, 1997); Roy Bhaskar, *Enlightened Common Sense: The Philosophy of Critical Realism* (Routledge, 2016); and Margaret Archer, Roy Bhaskar, Andrew Collier, Tony Lawson, and Alan Norrie, *Critical Realism: Essential Readings* (Routledge, 1998).

² As with critical realism, Marxist approaches to law are multifarious and should not be conflated. This chapter engages with the ideas of Pashukanis, as interpreted by critical legal scholars like Zoe Adams, China Miéville, and Robert Knox, to present a view of (modern) law as an integral element of universalised commodity exchange. See Evgeny Pashukanis, *The General Theory of Law and Marxism* (Barbara Einhorn (trans), Transaction Publishers, 2003). For modern discussions of Pashukanis, see Zoe Adams, *Labour and the Wage: A Critical Perspective* (Oxford University Press, 2020) 43-56; China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Pluto Press, 2006); and Robert Knox, ‘Marxism, International Law, and Political Strategy’ (2009) 22(3) *Leiden Journal of International Law* 413-436.

³ Systems theory studies how communicative systems encode information, how they interact with each other, and how they evolve. Writers who apply systems theory to law include Niklas Luhmann, ‘The Autopoiesis of Social Systems’ in F Geyer and J Van d. Zeeuwen (eds), *Sociocybernetic Paradoxes: Observation, Control and Evolution of Self-Steering Systems* (Sage, 1986); Gunther Teubner, *Law as an Autopoietic System* (Blackwell Publishers, 1993); and Simon Deakin, ‘Legal Evolution: Integrating Economic and Systemic Approaches’ (2011) University of Cambridge Legal Studies Research Paper Series No 424.

practices, and how that evolution can be used to explore wider shifts in, and functions of, the legal system. Section 2.4 concludes.

2.2 The Paradigm of Paranormality: A Question of Social Ontology

2.2.1 Structures and Practices

To begin examining how, and why, modern legal discourse conceptualises paranormal practices in the way that it does, a key starting point is the nature of, and the relations between, the actors involved. This is because, when discussing the appropriate juridical framework through which to regulate the sale of paranormal services, the debates around this subject, and the viewpoints that constitute them, are always underpinned by some implicit conception of normality and rationality, of how the world works, and how human actors relate to it and, crucially, to each other. However, debates about regulating psychic scams and fraudulent mediums often take these considerations for granted, given the (presumed) empirical non-existence, or at least unprovability, of the paranormal, and the legal consequences generally associated with an individual making ‘false’ or ‘misleading’ claims. But what are the frameworks that lead legal actors to conceptualise paranormal practices in such a way? What are their structural preconditions, and how can they be excavated? In this regard, one inevitably finds that one must use an approach that integrates *social-ontological questions*, or questions about the nature of being, into its analysis.

As Chapter One suggested, discussions about regulating the market activity of those who claim to be mediums and psychics often implicitly focus on a tension between protecting the ‘vulnerable consumer’ on the one hand, and the various rights of the sincere ‘trader’ or ‘practitioner’ on the other. Arguments concerning psychic scams and fraudulent mediums thus tend to assume that the relation between the client and the practitioner is transactional in character – that it involves an exchange of services. By extension, such a transactional exchange of services implicitly presupposes a *consumer* and a *service-provider*.⁴ Therefore, it is crucial to identify what these terms mean, what form the relation between them takes, and what enables participants to that relation to assume their respective positions – and, critically, what underlying generative mechanisms are necessary (and/or sufficient) for that form to arise *a priori*.

⁴ A ‘consumer’ can also be a consumer of *goods*, but the analysis here focuses on consumers of *services*.

At the simplest level, the first observation to emphasise with regards to the positions of consumer and service-provider is that they are necessarily relational and cannot be disentangled. It is impossible for the social position of ‘consumer’ to exist without a ‘service-provider’ (or ‘seller,’ in the case of exchange of goods rather than services), and vice-versa. One generally cannot ‘consume’ until something consumable has been transferred, often through a purchase. Likewise, a provider, of course, needs a service to sell, but also, someone to sell *to*. As such, the positions of consumer and provider cannot be extricated from one another, in the same way that, for example, the idea of an ‘employer’ only makes sense alongside the idea of an ‘employee/worker’, or the position of ‘parent’ presupposes a ‘child’.⁵ Further, the abstract positions of ‘consumer’ and ‘provider’ exist independently of the specific individuals who assume them. Person X might *become* a consumer by entering into a certain relationship with person Y. However, the positions of consumer and provider are simply reproduced by X and Y entering into that relation; they assume a relational form that has already been ‘provided’ for them, and shapes the nature of their interactions.

Moreover, X and Y must engage in certain practices socially recognised as inserting them into the social positions, and relational form, of consumer and service-provider. For instance, Y might make an offer to X to provide the paranormal service in question, perhaps proposing to speak with the spirit of a deceased loved one, or to offer information about the future – or, in the case of provision of goods, by offering to sell X Tarot cards, healing crystals, and so on. In response, X must accept this offer and pay a fee in return for the paranormal services rendered by Y. Given the interpersonal dimension of this exchange, the practices that facilitate X and Y’s consumer-provider relation can be understood as social in character. Much like the positions that they adopt within their relationship, the practices that allow them to take those positions are mutually dependent; one requires the reciprocal activities of the other to operate.⁶ Therefore, these ‘social practices’ can be distinguished from individual actions because they involve mutual interactions between agents. More widely, the practices are performed within a shared cognitive framework of meaning that indicates the significance and consequences of those practices, and typically consist of a specific, generally pre-ordained action sequence.⁷

⁵ This logic draws on the critical realist view of social reality as a ‘web of relationships between (internally related) social positions’: Adams (n 2) 25. See also Berth Danermark, Mats Ekström, and Jan Ch Karlsson, *Explaining Society: Critical Realism in the Social Sciences* (2nd ed, Routledge, 2019) 71-95.

⁶ Sally Haslanger, ‘What is a Social Practice?’ (2018) 82 *Royal Institute of Philosophy Supplements* 231-247.

⁷ Rahel Jaeggi, *Critique of Forms of Life* (Ciaran Cronin (trans), Harvard University Press, 2018) 56.

What is this cognitive framework and from where does it emerge? Beginning with the basic notion of the ‘cognitive,’ and the correlative ‘material’, these practices involve two key constitutive elements that can be analytically distinguished, even if in ‘reality’ they are integrally enmeshed. There are the tangible components to those practices, such as the physical location in which paranormal services are performed, the placement of Tarot cards and astrological charts, and the exchange of money in return for those services. These activities therefore have clear *material* dimensions. They also have *cognitive* dimensions; they are conceptualised in various ways – as implying certain forms of meaning that arise within human thought – and are assigned varying degrees of significance. For example, in a Tarot reading, certain cards will be put down on a table. The imagery on the card, and the card itself, constitutes its material aspects. However, such imagery could be interpreted, understood, and evaluated in distinctive ways; the same card could be allocated distinct meanings by different paranormal practitioners, regardless of whether the card’s physical existence remains constant. Thus, in terms of X and Y’s more abstract consumer-provider relationship, their relation involves the *material* practices of a service being performed and money being handed over in exchange, and in turn, this relationship is *conceptualised* and recognised as ‘transactional’ or ‘consumptive’.

As such, social practices like the exchange of paranormal services incorporate material and cognitive elements, which are interdependent.⁸ While a full discussion of these terms exceeds the scope of this thesis,⁹ by way of clarification, the ‘cognitive’ will be used to refer to conceptualised phenomena that emerge from the intersubjective relations between social agents, and which are directly contingent on human mental activity. The ‘material,’ by contrast, refers here to phenomena that exist, in principle, regardless of specific agents’ direct awareness and ideational conceptualisations of them.

To offer wider legal examples, law’s cognitive dimensions consist of legal concepts like ‘trusts,’ ‘damages,’ ‘employees,’ and so forth, while its material components lie in, for example, the state’s tangible use of force to enact punishment. Of course, these distinctions are primarily heuristic – the application of a legal concept like ‘employee,’ for instance, has material consequences for those to whom it is administered. Meanwhile, the cognitive cannot

⁸ Rebecca Kukla and Mark Lance, ‘Intersubjectivity and Receptive Experience’ (2014) 52(1) The Southern Journal of Philosophy 22-42; Adams (n 2) 26-27.

⁹ This thesis uses these terms to explore the interrelationship between law and capitalism. It does not engage with similar debates found in e.g., the Philosophy of Mind.

operate purely in the abstract, but rather must emerge from, and be reproduced by, interactions occurring in the material world.¹⁰ Yet, while these two dimensions of reality are inseparable, interwoven, and mutually constitutive in practice, it is nonetheless useful to distinguish them as *components* of social phenomena for current analytical purposes.¹¹ As such, the viewpoint in this thesis differs from perspectives, as in (certain) post-modernist accounts, that emphasise cognition over materiality, ontologically centring subjective experience over the notion that some ‘objective’ material reality exists independently of our epistemological conceptions.¹²

This brings us to the framework that grants concepts their meaning. Through discursive engagement between social actors, concepts like ‘consumer,’ ‘medium,’ ‘fraud,’ and ‘service-provider’ emerge, expressing the practice’s cognitive significance and meaning, or ‘commonly accepted modes of interpretation.’¹³ In terms of their wider function, these concepts abstract information about material objects and facilitate informational storage and transmission, co-constituting social reality in a way that is knowable to human actors.¹⁴ The material elements of social practices ‘precede’ the cognitive to the extent that concepts presuppose interactions between (material) human agents who produce those concepts as well as, generally speaking, the existence of the material phenomena that they describe. However, the physical properties of a material object in turn require a cognitive foundation to accrue social significance and perform their social function; material objects are effectively ‘meaningless,’ in a social sense, before they are conceptualised by agents and located within a network of social practices.¹⁵ The cognitive and material therefore must engage in a continuous, dynamic, and emergent co-evolution.

More deeply, the generative structures that produce human experiences of empirical phenomena may be understood as emerging from a constellation of deeply embedded and tightly, mutually interlocked social practices that in turn condition future social practices that occur within that nexus. That is, if social practices are co-constitutive and interdependent, then

¹⁰ It should also be noted that ‘cognitive’ phenomena can be said to be specific instances of material ones, in that human consciousness is an emergent property of the chemical processes occurring within the brain.

¹¹ Adams (n 2) 24-30; Douglas Porpora, ‘Tony Lawson from a Sociological Point of View’ (2017) 41 Cambridge Journal of Economics 1525-1537, 1536.

¹² Ibid. Though this debate exceeds the scope of this thesis, it features extensively in critical realist discourse, from which the theoretical foundations of the thesis draw.

¹³ Simon Deakin, ‘Legal Evolution: Integrating Economic and Systemic Approaches’ (2011) Centre for Business Research, University of Cambridge, Working Paper No 424 15.

¹⁴ Alasdair Macintyre, ‘Epistemological Crises, Dramatic Narrative, and the Philosophy of Science’ (1977) 60(4) *Monist* 453-472, 454.

¹⁵ Adams (n 2) 28-30.

practices over time give meaning to, and are reciprocally given meaning by, their positioning within a broader matrix of social relations and practices.¹⁶ These structures (non-exhaustively) condition the activities, beliefs, and practices of human actors by distributing resources, embedding meaning, assigning powers and duties, establishing norms, and so on. In terms of the cognitive dimensions of structures, certain highly abstract concepts create the parameters within which more specific concepts, applicable with greater precision to concrete interactions, derive their differentiated meaning. Therefore, in summary, a specific paranormal practice like Tarot card reading always presupposes, and is imbued meaning by, a certain cognitive framework or set of social relations that allows it to be interpreted and signified.

Thus, the *meaning* of a phenomenon, like ‘paranormal practitioner,’ is not inherent, but rather is a product of how the material circumstances of that phenomenon shape its conceptualisation, and how that conceptualisation fits into a wider conceptual web. This is detectable in how similar material practices – an individual claiming to speak with spirits, for instance – can be granted distinct cognitive significance throughout history: as witchcraft, then as fraud, and then as consumable services. What, then, is the nature and origin of these *shifting* cognitive frameworks? Simply put, practices are given their meaning through historical context, and as such, change as history changes. A given practice, such as selling paranormal services, presupposes a host of ontological preconditions that are rarely made explicit, but it is these preconditions that this thesis seeks to uncover.

Drawing on these observations, to return to the modern legal paradigm of paranormal practices, the paranormal practitioner and their client are today regulated under the Consumer Protection from Unfair Trading Regulations 2008 (‘CPR 2008’), conceptualised therein as assuming the roles of consumer and ‘trader’; it is the law, *inter alia*, which imprints that meaning on those practices. But how did the law reach this point? Why does the law imprint meaning as such? How does it construct such cognitive scaffolding? In terms of psychic scams and fraudulent mediumship, changing approaches to the conceptualisation of the paranormal must be rooted in wider (material and conceptual) conditions of possibility. Changes to those deep-level conditions were, and are, ‘responsible’ for producing the surface-level change in how the paranormal was legally conceptualised.

¹⁶ Jaeggi (n 7) 41-42.

In the most abstract sense, this thesis understands the relationship between practices and the deeper-level structures that contextualise them as assuming the following dialectical connection: practices comprise the constitutive elements of structures, while larger structures in turn condition how those practices are performed and their wider significance. Structures form when practices become ‘knitted’ together, formally or informally. Some might object to this depiction of the relationship between practices and structures by commenting that no place for ‘agency’ has yet been identified. Indeed, within capitalist society, the transactional relation between X and Y is not generally treated as an essentially mutual relationship, but rather as an expression of the autonomous ‘agency’ of X and Y, unbridled by any historical specificity or structural conditioning.

More broadly, the social agent is often conceived of through an atomising lens within social discourse – the choices and actions of the individual are assigned primary ontological importance, a viewpoint sometimes labelled ‘methodological individualism’. As above, however, the ‘agent’ always, and necessarily, operates in a way that is conditioned by their relations with other ‘agents’. To repeat earlier examples, the individual may be the ‘parent’ of a ‘child’ or the ‘employer’ of an ‘employee’, and their agency inevitably draws on these relations, among others. This contrasts with the ‘social ontology underlying many contemporary theories of justice’ which positions, as stated above, the individual agent as ‘ontologically prior to the social’ under its ‘methodologically individualist or atomist’ point of view.¹⁷ Yet, Young continues, ‘conceiving the subject in this fashion implies conceiving consciousness as outside of and prior to language and the context of social interaction, which the subject enters.’¹⁸

Within this thesis, agency itself is understood as being constructed through social practices, ultimately being a socially conceptualised practice of its own. Specifically, agency is constituted by social practices that lead to a positioning of the agent’s identity – and, the power that comes with that identity – at the nexus of various nodes in the ‘web’ of material and cognitive phenomena that composes social reality.¹⁹ For example, under capitalism, it is often

¹⁷ Iris Marion Young, ‘Five Faces of Oppression’ in Lisa Heldke and Peg O’Connor (eds), *Oppression, Privilege, and Resistance* (McGraw Hill, 2004) 9.

¹⁸ Ibid 10.

¹⁹ This can be compared with Bourdieu’s notion of the *habitus*, which maintains that the tendencies, dispositions, values, and habits of agents are derivative from the structures that condition their behaviour: Pierre Bourdieu, *Outline of a Theory of Practice* (Richard Nice (trans), Cambridge University Press, 1977); Pierre Bourdieu, *The Logic of Practice* (Richard Nice (trans), Polity Press, 1990).

the agent's position within labour relations and their consumptive habits that entrenches their identities, their capacities, and their senses of self.²⁰ Indeed, in spite of its surface-level individualism, even the concept of agency presupposes a relation: along with the fundamental point made above that an agent's acts will tend to draw on their relationally constructed identity, any act of agency also presumes that the agent is acting *upon* something or someone else, generating, and coming to depend on, new social relations.

This perspective differs from some critical realist views of agency that suggest that structure and agency have 'qualitatively different characteristics... structures are viewed as laying down conditions for people's lives, while agency provides the effective causes for what happens in society – only human beings can act.'²¹ While it may be true that only human beings can act, it is only because the practice of agency is conceptualised as such within modern social relations. Further, this alone does not imply an ontological difference between the two. If conceptualised otherwise, it seems possible to envisage social discourse within which structures are said to 'act' *via* the vector of human agency – the dialectical interconnections between structures and agency, and their shared origins in social practices, means that they cannot be qualitatively disentangled (even if an 'analytical distinction between structure and agency' remains possible, and even necessary, 'in order to study the interaction between them over time').²²

This matter is raised to clarify that human agency is *not* viewed, in this thesis, as qualitatively different from the structures that condition it, but rather, the two are seen as expressions of the same axiom: that all social relations are constituted, at differing levels of complexity, cohesion, and entrenchment, by social practices. This is not to suggest that agency is socially determined – human agency still emerges from our 'internal' biological processes, drives, and instincts over the passage of time – but rather that what agency means, and implies, is socially produced; the *biological* impulse is given *social* form and function by structures and agential practices. As LaFrance puts it, 'Just as a person cannot control her motions in a state of weightlessness and can only decide how to move in space by engaging with gravitational forces, meaningful

²⁰ Philip Cushman, 'Why the Self is Empty: Toward a Historically Situated Psychology' (1990) 45(5) *American Psychologist* 599-611. See also Barad's work on agential realism: Karen Barad, *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter and Meaning* (Duke University Press, 2007) 333-338.

²¹ Danermark et al (n 5) 14.

²² Ibid 15.

social action and agency always imply at least a modicum of knowledge and understanding by the agent of the given structural context in which their action takes place.’²³

Following the logic outlined above, agency is structured, while structures are produced and reproduced by agency. This creates an apparent circularity insofar as the agency of human actors is defined, and given form, by the structures those actors inhabit.²⁴ Yet, structures themselves are constructed and, at times, transformed through the reproduction of their constitutive social practices by that very agency. Clarifying this paradox can help us to perceive the historicity of structures and practices – and, by extension, legal concepts like fraud, consumer protection, and so forth. The first issue is one of infinite regress: i.e., if agency constitutes the structure, what accounts for agency (with the same point applying to structure, if that is seen as prior to agency)? Conceiving agency and structure as *co-evolutionary* escapes this infinite regress, while potentially leading to a closed-loop problem: structure causes agency, which causes structure, and so on, thus placing the theory at risk of circular logic.

Factoring in time, and particularly the notion of emergence, helps to resolve this issue, and points to the importance of a historical perspective for understanding any social structure or practice, including law, and the laws regulating paranormal practices. Emergence occurs where and when a number of phenomena or practices come to be connected within a set of social relations, giving rise to a higher level phenomenon with a form and function irreducible to its components.²⁵ Structure and agency (and practices more generally) are causally connected and mutually constitutive, but do not evolve synchronously nor necessarily with ‘any deliberate pursuit of coherence’.²⁶ In some cases, human agents cause structural change, positioning and/or repositioning old/new phenomena within the social web of meaning, while in others, deeper-level structural shifts alter the parameters of agency. What ultimately matters, therefore, is their dialectical and emergent unfolding throughout history. Again, isolated actions and practices may appear, alone, to have little significance, but when perceived from a macroscopic perspective, they intersect with other practices to co-produce an outcome that is irreducible to

²³ Xavier Lafrance, ‘The Vacuity of Structurelessness: Situating Agency and Structure in Exploitative and Alienated Social Relations’ (2021) 29(3) *Historical Materialism* 84-106, 102.

²⁴ Ann Swidler, ‘Culture in Action: Symbols and Strategies’ (1986) 51 *American Sociological Review* 273-286.

²⁵ Tony Lawson, ‘Social Positioning Theory’ (2021) *Cambridge Journal of Economics* 1-39, 3.

²⁶ Pierre Bourdieu, *Distinction: A Social Critique of the Judgement of Taste* (Richard Nice (trans), Routledge, 1984) 170.

any practice individually. Thus, the evolution of a single practice can provide a gateway to gleaning deeper insights to the social conditions from which it emerged.

Social reality, in this light, can be seen as the collective outcome of the kaleidoscopic interplay of polycentric, multi-scalar structures, as well as the actions and interrelationships of socially positioned agents acting within, and through, them.²⁷ In that sense, all structures and practices (and, by extension, agents) must be located within their specific historical moment. It is the historicity of structures and practices, and their resultant rationalities, that establishes the parameters of all forms of social discourse – including debates revolving around the best legal approach to regulating paranormal practices.

Moving to a higher level of emergence, many structures are viewed in this thesis as consisting not merely of simple practices, but rather, of a network of contingent sub-structures. These structures with significant internal complexity are conceptualised as macro-structures, composed of, and in turn composing, lower-level structures and interpersonal practices.²⁸ While some structures may ‘overlap’ and mutually interact through the actions of social actors, other structures can subsume elements of lower-scale structures while integrating them into their own architecture. In the case of paranormal practices, then, the practices that X and Y engage in allow them to assume positions of exchange that are defined by certain structures, like law and the market, which are themselves structured by something more fundamental.

To illustrate, the relation between X and Y, the positions they assume, and the practices that compose those positions and that relation, are at least defined by law: the arrangement between them is legally conceptualised as a contract, the parties to that contract are assigned forms of legal personhood, and so on. As another example, their relation is defined by the wider market, which – through the co-ordinating mechanism of pricing – assigns an exchange value to the transaction. However, treating structures like the law and the market as distinct sources of definition for the practitioner-client relation fails to explain how, and why, the two operate in tandem. In practice, it is impossible to disentangle the market value of the services, and the market activity of the consumer and provider, from the property rights and contract that stabilise and underpin them. That is, the sale of paranormal services does not ‘make sense’

²⁷ Sean Creaven, ‘The Pulse of Freedom: Bhaskar’s Dialectic and Marxism’ (2002) 10(2) *Historical Materialism* 77-141.

²⁸ Jaeggi (n 7) 35-83.

without factoring the legal *and* the economic aspects of the exchange. This begs the question of what ‘enables’ them to operate coherently. It appears that the market and the law, along with other structures, are themselves conditioned by a broader macro-structure with a cohesive logic that tethers these sub-structures together.

Thus, it becomes important to ask what prevailing macro-structure asserts the ‘logic’ that gives the paranormal service exchange relation its meaning, and conditions of possibility, at a deeper level, expressed through sub-structures like law and the market. That macro-structure is understood throughout this thesis as capitalism. Capitalism, as such, is seen as the underlying formation establishing and co-ordinating the parameters of modern legal reasoning around paranormal practices. The nature of capitalism in this respect is frequently misunderstood, or ‘underestimated’, in terms of the scope of its influence on social reality. At times, capitalism is conceptualised in political, legal, or general social discourse as a purely economic phenomenon; capitalism, on this naturalising view, ‘means’ free markets, or market economies, and not much more. But as the macro-structure characterising social reality, capitalism must be perceived as a social formation that inheres in most, if not all, social practices and structures in the social realities within which it has fully emerged, giving those practices and structures their shape and meaning while in turn those practices and structures reproduce, and give life to, capitalism itself. In that sense, social practices and structures cannot be interpreted, analysed, and contextualised unless historicised within the rubric of capitalism as a macro-structure, as a mode of production.

Typically, capitalism is identifiable as a specific set of relations between production, consumption, and exchange, in which production is mediated by markets (that is, through the marketized allocation of both productive *inputs* like labour, land, and money on the one hand, and productive *outputs* like social surpluses on the other) within the rubric of private ownership of the means of production as safeguarded by the state’s legal monopoly on violence.²⁹ In this set of relations, a class division is instituted between owners of the means of production (capital) and social producers (labour) as a result of historically specific, violent accumulations and dispossessions achieved through expropriative land enclosures, crushing of revolts, exploitation of racialised colonial subjects, and so forth, all of which is engineered *inter alia* through law as an institutionalised technology of power. Privatisation of property co-emerges

²⁹ Nancy Fraser and Rahel Jaeggi, *Capitalism: A Conversation in Critical Theory* (Polity Press, 2018) 61-72.

with the entrenchment of markets as the central mechanism through which resources are allocated, leading to a drive, or social imperative, towards capital accumulation.³⁰ This is because, as Nancy Fraser writes, under capitalism, ‘not to expand is to die, to fall prey to competitors.’³¹

While capital feels this compulsion towards expansion, producers experience the coercion of market forces ‘incentivising’ the sale of their labour power. That is, the dispossession of workers from the means of production leads to their reliance on labour markets in which they, as legally free and equal market actors, must sell their labour power to capital to access the means of subsistence through wage payments. These relations, however, cannot be maintained in a vacuum; the apparently autonomous ‘economic’ sphere is necessarily reliant on other social institutions and formations. Certain conditions of possibility enabling these relations include the socially reproductive spheres of the family, the community, and other affective connections, which create the space in which production may proceed by offering care and ‘replenishment’ to workers. Another condition is the division between the human and the non-human, or between the social and the natural-environmental, understood in legal terms as a division between persons and things that enables the natural world to be perceived, and treated, as an endlessly extractable source of wealth. A third condition implied by a society predicated on private ownership and contracts is, as already alluded to, the market-constitutive system of law itself, as Section 2.2.3 explores.³²

In this light, it becomes easier to perceive how capitalism fundamentally provides the ‘bedrock’ for all practices and structures in those social realities for which it operates as the mode of production, and the way those practices and structures are given significance by how they manifest within capitalist social relations (and, in turn, how those practices and structures constitute the macro-structure of capitalism). Practices that are central to human existence – like ‘having a job’, ‘going to school’, ‘buying food’ – would, at least, assume radically different forms if the underlying institutions and relations that constitute capitalism shifted, if markets ceased to be the central means through which subsistence was received and production was performed. At the very least, it can be readily seen how capitalism defines the very nature of the individual (as atomised, free, and equal), how the individual relates to others (as holders of

³⁰ Ellen Meiksins Wood, *The Origin of Capitalism: A Longer View* (Verso, 2017) 6-7.

³¹ Fraser and Jaeggi (n 29) 18.

³² Ibid 28-47.

property), and, thus, how their agency is expressed. How, then, could any social practice – comprising of individuals interacting and collaborating – be understood *without* some understanding of how capitalism provides the background conditions for, without determining, their behaviour, their actions?

Indeed, this question takes the analysis to a deeper level of complexity because capitalism both defines agency at its atomic level, while also defining the structures within which that agency is expressed and inscribed with significance. The structures upon which capitalism is reliant for its continued existence, and the social positions that comprise those structures, only make ‘sense’ when their capitalist framing is recognised. By extension, capitalism may only operate insofar as those structures provide it with its foundations. These include the state, the economy, the law, the education system, and so on, which have all been said to be expressive *and* constitutive of capitalism, and yet they present themselves as differentiated and distinct in terms of form and function.

Further, all the above give rise to distinct cognitive frameworks of shared social meaning that allow behaviours to be interpreted and understood by other agents when occurring within their context. What is ‘meaningful’ in an ‘economic’ scenario may not carry *precisely* the same social significance in a legal, or educational, or political one. That is, these various structures for which capitalism is integral, and which are reciprocally integral to capitalism, exhibit nevertheless distinct forms of logic, social significance, and self-justification, which bear on practices by imbuing them with meaning. For instance, the education system can be said to be ‘about’ improving the reasoning skills, or expanding the knowledge, of, say, students; the economy can be said to be ‘about’ competitive allocation of resources in the market; the law can be said to be ‘about’ delivering justice, among other things. But how can it be that their respective logics – their internal ‘rationalities’ – are differentiated from each other and yet are nevertheless consistent with capitalism, if it is simultaneously true that these sub-structures are ‘defined’ by capitalism?

To return this issue to the central focus of this thesis, how can the logic underpinning the legal regulation of paranormal practices be both distinct from the logic of, for instance, the economy, and yet remain unintelligible without the economy (*inter alia*), and capitalism more generally, as a context? Answering this requires us to develop a sense of what ‘rationality’, or ‘logic’,

entails in the context of structures, practices, and agency, and to question how this concept of rationality manifests within the legal system as a fundamental sub-structure of capitalism.

2.2.2 Systems and Rationalities

The term ‘rationality’ is polysemic and vague, warranting myriad interpretations. A common use of the term refers to ‘practical’ rationality or means/ends rationality, a pragmatic, everyday understanding of rationality wherein a social actor pursues objectives that cohere with the norms of the structural context in which he or she is acting.³³ The actor then adopts a course of action to realise this objective, and the rationality of their activity is judged by the capacity of those means to successfully achieve the given goals, akin to Habermas’s notion of ‘cognitive-instrumental rationality’.³⁴

This model of rationality cannot form a ‘meta-concept’ of rationality for this thesis’s purposes because it is both individualistic – it struggles to account for the rationalities *of structures* – and suffers from a problem of infinite regress.³⁵ Ends can be continually recast as means to some other objective. Given the potentially endless spiralling this can produce, the rationality of an action is understood in this thesis as manifesting within a differentiated, bounded, and co-emergent structural context as opposed to the atomised view of social actors behaving in relative isolation. That is, the term ‘rationality’ is used throughout this thesis to refer to a structural quality that emerges gradually through the co-evolution of the practices and structures that constitute the macro-structure of capitalism and its social conditions, leading to the characterisation of rationality as a historically conditioned phenomenon.³⁶

For this thesis, rationality is taken to consist of structurally derived norms that produce and define the validity conditions of epistemological assertions internal to the given structure.³⁷

³³ Richard Jenkins, ‘Disenchantment, Enchantment and Re-Enchantment: Max Weber at the Millennium’ (2000) 1(1) *Max Weber Studies* 11-32, 12.

³⁴ Jürgen Habermas, *The Theory of Communicative Action* (Thomas McCarthy (trans), Beacon Press, 1984) 10-11.

³⁵ Morton A Kaplan, ‘Means/End Rationality’ (1976) 81(1) *Ethics* 61-65.

³⁶ This conception of rationality derives from a systems-theoretical viewpoint as developed in Gunther Teubner and Andreas Fischer-Lescano, ‘Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’ (2004) 25(4) *Michigan Journal of International Law* 999-1046. For a scholar who applies this perspective to a specific area of law, see Grosse Ruse-Khan’s analysis of conflicting rationalities in international intellectual property law in Henning Grosse Ruse-Khan, *The Protection of Intellectual Property in International Law* (Oxford University Press, 2016) 15-30.

³⁷ See also Jaeggi (n 7) 238-240.

Rationality, in short, is the phenomenon that allows for shared frameworks of meaning to emerge and imprint practices and structures with interpretive significance, and ‘drive’. As a legal example of this in motion, a juridical claim of the form ‘*there is a contract on these facts*’ requires certain implicit validity conditions to be satisfied, e.g., the contractual parties must be autonomous legal subjects capable of disposing property, there must be consideration, etc. Further, the rationality of a claim ‘*there is a contract*’ implies that there are ‘good’ reasons for determining whether a contract exists, that the issue is worthy of pursuit and should continue to be pursued; a rationality is thus self-maximising.

This notion of a ‘rationality’ is central to the related idea of a ‘system’. A ‘system’ in this thesis refers to a formally differentiated structure – that is, a ‘unit’ with a delineated boundary and internal environment. Systems like law exhibit characteristics that enable them to store, encode, and transmit knowledge and information. Rationality norms in this context are emergent phenomena dictating the boundaries of a system, flowing from, and adjudicating, the mechanisms by which the system gathers and encodes knowledge. They enforce the parameters within which the system manifests itself, and the biases and tendencies according to which the system behaves. For instance, one can perceive this boundary-adjudication function in action by considering the juridical practice wherein judges often strive to determine whether a given issue is ‘legal,’ or better left to political decision-makers. This concept of a system is inspired by Luhmann’s systems theory (as discussed below), yet in this thesis, systems are not seen as *exclusively* cognitive objects, but rather, are structural frameworks within which cognitive *and* material elements interact to produce that system’s rationality.

The macro-structure of capitalism is comprised by an array, or network, of these systems operating in conjunction with one another, their rationalities formally differentiated by the boundaries constructed by those systems, and yet, when those systems interact, they produce an emergent ‘macro-rationality’ – that is, the rationality of capitalism, of generalised market exchange. As above, in that sense, capitalism is both constituted by sub-systems, while constituting those sub-systems, as the result of a historically contingent evolution. The most pertinent example of such a sub-system, for this thesis, is the legal system. That is, understanding the emergence of the modern legal paradigm regulating paranormal practices necessarily challenges us to reckon with law as a capitalist system, with a capitalistic rationality, and how this influences the way law conditions, and constructs, practices.

2.2.3 Law and Capitalism

Law is fundamental to the capitalistic social relations thus far discussed, entrenching the state as the apparatus through which private proprietary and contractual relations are preserved, along with the practices that occur within their rubric. Yet, as a sub-system, the law exhibits, or appears to exhibit, some degree of ‘autonomy’ within capitalism. This is achieved through *inter alia* formal differentiation from other sub-systems, like the economy, co-generating the socially ‘disembedded’ quality Polanyi contends is a characteristic of the economic institutions of capitalist society.³⁸ Such (relative) autonomy is partly constitutive of capitalism, allowing sub-systems to act *as if* they were independent while remaining nonetheless interconnected. Indeed, while it is integral to the legitimacy of the legal system that it appears to be substantively disengaged from other social formations, overly emphasising the continuity of ‘autonomous’ legal evolution obscures both ‘the extent of conflict within the legal system and the degree to which legal forms are stretched in order to ‘adapt’ to new substantive values’, along with the legal system’s reliance on a flow of conflictual information from ‘external’ systems.³⁹ In any case, law’s formal differentiation permits it both to ‘enclose’ itself while also facilitating its capacity to interact with other sub-systems like the market and thus co-constitute the complex aggregate of social practices, and structures, that are integral to capitalist social relations.

A critical feature of these interactions is law’s distinct rationality, a rationality that is partially constitutive of, and expressed through, the social practices of agents whose behaviour is conditioned by the structural parameters established for them by the law. Rationality in this thesis, once again, is taken to mean the determinants of validity and meaning a system establishes for itself, and in law’s case, this rationality can be analytically comprehended by examining it at three levels: the level of how law ‘gathers’ and ‘encodes’ external information; the level of how law ‘assembles’ that information in legally coded form, that is, as concepts with social meaning; and the level of how law derives its ‘values’ from the nexus of those concepts.

³⁸ Karl Polanyi, ‘The Economy as Instituted Process’ in Karl Polanyi, Conrad M Arensberg, and Harry W Pearson (eds), *Trade and Market in the Early Empires: Economies in History and Theory* (Free Press, 1957) 243-270.

³⁹ Judy Fudge, ‘Labour as a ‘Fictive Commodity’: Radically Reconceptualizing Labour Law’ in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press, 2011) 120-136, 128.

2.2.3.1 Legal Rationality

The first level of law's rationality concerns the system's boundaries, involving how the legal system excludes, and receives, information from other capitalist sub-systems through the social practices of adjudication, legislation, and so on, as reproduced, and internalised, by legal actors themselves. This level can be understood as law's 'epistemic' rationality and refers to the logic of how law, by setting the conditions guiding the agency of legal actors, can be said to 'gather' knowledge and reduce informational complexity via abstraction. This requires us to engage with the associated validity conditions of law's internalisation of external information. This level is the 'door' demonstrating how law is 'operationally closed but cognitively open', in systems-theoretical terms; it has a 'membrane' that allows certain information 'in' while preventing its own concepts from 'leaking' out.⁴⁰

External information is transmitted to the legal system via juridical channels, such as the legislature or the courts. This information emerges from other systems within social reality, and so is necessarily structured prior to its observation by law in accordance with capitalist social relations, themselves legally constituted in turn. The information is detected by the courts and legislature, then designated as legal data and received as such; legal epistemic rationality emerges from, and enforces, law's abstractive mode of evolution, operated by meta-norms like the technical doctrine of precedent.⁴¹ This layer of rationality is, however, 'thin' in the sense that it does not prompt legal actors to thresh out anything according to a robust metric of 'logic' or 'justice'. It responds to, and is compacted by, external positive feedback and is reproduced by law's internal mechanisms. In short, this rationality is defined by the simple proposition that the mechanism of precedent allows law as a system to 'learn' over time through the practices legal actors engage in, i.e., through the information they recognise in practice as 'legal', by reference to precedent or statute, and not external. Critically, this information-gathering function also allows law to interface and evolve with formally 'external' social systems.

The interaction of law's evolutionary components, guided and enforced by this epistemic rationality, with other social systems generates a second level of rationality, namely law's

⁴⁰ Niklas Luhmann, 'The World Society as a Social System' (1982) 8(3) *International Journal of General Systems* 131-138.

⁴¹ This model of law's rationality is informed by Niklas Luhmann, *Law as a Social System* (Klaus Ziegert (trans), Oxford University Press, 2004).

formal rationality. Weber conceptualised the formal rationality of law as the means by which legal actors draw on a juridical logic to conduct the ‘analysis of meaning’⁴² on a catalogue of norms legitimately ratified by the organs of the body politic.⁴³ Legal actors operate according to law’s formal rationality when they encode, interpret, and apply legal norms following the emergent, recursive logic guiding and enforcing how the legal-conceptual network is to be applied in concrete cases, themselves encoded by law’s epistemic rationality. This involves actors drawing on *inter alia*: validity-norms adjudicating consistent application of legal principles to concrete facts; legal certainty and consistency; the division of private and public law; the general methodological individualism represented by e.g., freedom of contract and the legal subject’s freedom and equality to own and dispose of property; and so on.

It is by these rationality-norms that the law coheres as a web of linguistic constructs that condition and give meaning to one another. By passing through juridical channels, the information is abstracted and encoded in legal terms. This enables the resultant legal concept to apply to a myriad of concrete factual matrices, e.g., as the *ratio decidendi* of a given case, disengaged from its original context.⁴⁴ Thus, legal practice proceeds through repeated, recursive encoding (abstraction of detailed social facts into an abstract concept like ‘employee’) and decoding (application, and reification, of that concept to e.g., workers in the gig economy). In this sense, law is self-referential, or proceeds through autopoiesis.⁴⁵

Moving beyond Weber’s insights, one can see how this formal rationality – emergent from the norms inducted into law according to its epistemic rationality – ultimately qualifies future legal developments by reference to pre-existing norms. That is, if following law’s epistemic rationality is how legal actors, and by extension the legal system, gather knowledge, formal rationality is how that knowledge crystallises into a system of recursively defined meaning that can be drawn upon in future juridical practices.

⁴² Max Weber, *Max Weber on Law in Economy and Society* (Max Rheinstein (ed), Max Rheinstein and Edward Shils (trans), Free Press, 1954) 62.

⁴³ Duncan Kennedy, ‘The Disenchantment of Logically Formal Legal Rationality, or Max Weber’s Sociology in the Genealogy of Contemporary Mode of Western Legal Thought’ (2004) 55(5) *Hastings Law Journal* 1031-1076, 1046.

⁴⁴ Simon Deakin, ‘Evolution for Our Time: A Theory of Legal Memetics’ (2002) ESRC Centre for Business Research, University of Cambridge Working Paper No 242.

⁴⁵ See Niklas Luhmann, *Essays on Self-Reference* (Columbia University Press, 1990) 227-245.

As previously mentioned, the legal norms that comprise the formal rationality, or web of meaning, of law are embedded as legal concepts. Legal concepts provide the ‘bridge’ between the *empirical input* of ‘facts’ into the legal system and the law’s *normative output*.⁴⁶ Determining how this bridge is constructed requires us to isolate the process and location of translation of external information into legal concepts, the connective point between ‘external’ social and ‘internal’ legal. Because legal actors have previously received and encoded empirical information on ‘behalf’ of the law, and the law has accordingly received positive feedback that entrenched that information in a wider web, the information the system receives and encodes in the present must go through a ‘filter’, a specific conversion site wherein juridical meaning is synthesised and organised by legal actors, their practices regulated, conditioned, and given meaning by law’s internal rationality, by its frame of reference as applied to new information.

One can identify the processes of legislation and litigation as engendering such sites, but much conversion of meaning can be implicit and piecemeal. For instance, the legal subject was not directly legislated into being but rather manifested over centuries of ‘transition’ between feudal and capitalist law in which incremental changes received external positive feedback, were entrenched by internal mechanisms, and therefore compounded and accelerated future (capitalist) legal developments. This is not to suggest that law has ‘agency’ in a strictly anthropomorphised sense. Rather, while judicial decisions, and thus the agency of judges, are the vectors through which law operates, it is nevertheless possible to speak of law *as if* it has ‘agency’ because the aggregation of these structurally conditioned decisions produces emergent systemic outcomes; in this sense, law can be said to ‘think’, to ‘reason’, to ‘act’.⁴⁷

Indeed, one should not limit one’s conception of how the law’s conceptual architecture frames the behaviour of legal actors to one of ‘coercion’ in any narrow sense. As Ruth Dukes writes, the law operates not merely as a ‘simple external constraint on social action’, but also embeds itself, becoming ‘internal to situated behaviour and social interactions’.⁴⁸ Law’s formal rationality shapes the legal imagination of those participating in the juridical sphere, conditioning how they perceive themselves and others, according to how they fit within a

⁴⁶ Simon Deakin, ‘Juridical Ontology: The Evolution of Legal Form’ (2015) 40(1) *Historical Social Research* 170-184.

⁴⁷ See also Gunther Teubner, ‘How the Law Thinks: Toward a Constructivist Epistemology of Law’ (1989) 23(5) *Law and Society Review* 727-758.

⁴⁸ Ruth Dukes, ‘The Economic Sociology of Labour Law’ (2019) 46(3) *Journal of Law and Society* 396-422, 416.

broader, non-neutral, conceptual matrix. With that said, let us turn to the form law has in fact assumed under capitalism, and the way that form and associated rationality sets the parameters for legal actors engaging in juridical reasoning and the construction of legal concepts.

2.2.3.2 Law as a Capitalistic System

The conception of law's formal rationality articulated in Section 2.2.3.1 provides us with the conceptual tools to perceive the relationship between law as a sub-system within the macro-structural system of capitalism, and how that rationality conditions and defines the practices undertaken by agents operating as legal actors (while, in turn, being reciprocally conditioned and defined by those practices itself). This section examines more closely how the capitalistic dimensions of the legal system frame, and give meaning to, social practices, with a view to seeing how paranormal practices are constructed within a capitalist legal rationality. That is, for this thesis, appreciating the relationship between law and capitalism lets us begin to perceive the structural conditions of possibility that led paranormal practitioners and their clients to assume the relation of consumer and trader within modern English consumer protection law.

The (capitalist) legal system, operating through the gradual gathering and encoding of knowledge over decades and centuries of legal interactions, emerged piece-by-piece following positive feedback from external social systems while continuing to help structure and coordinate the general emergence of capitalist exchange.⁴⁹ That is, the emergence of the capitalist legal form was like an avalanche: slow at first, but gradually compounding and accelerating with every additional, mutually-reinforcing norm that induced positive feedback from external social reality.⁵⁰ As a result, in terms of the institutional basis for the positions of consumer and provider, the law offers the architecture and machinery within which those positions, and the obligations voluntarily adopted by X and Y vis-à-vis their positional relationship with one another, are defined and enforced. In brief, law *codifies assets and services as commodities* and *constructs legal personhood*, facilitating the ownership and exchange of those commodities. Accordingly, the debates over paranormal practices, and the

⁴⁹ Harold Berman, *Law and Revolution Vol II: The Impact of the Protestant Reformation on the Western Legal Tradition* (New ed, Harvard University Press, 2006) 270-305.

⁵⁰ On the historical emergence of capitalist institutions, see Fernand Braudel, *Civilization and Capitalism, 15th-18th century* (Siân Reynold (trans), University of California Press, 1992).

proper approach to their legal regulation, are at least partly defined by the logic of the market *and* the logic of the law – which are, as explained, emanations of the same logic, that of capitalism, even if the precise manifestation of this logic is always mediated by socio-political contingencies and is thus historically specific.

As mentioned earlier in this chapter, the exchange of paranormal services is facilitated *inter alia* by two readily observable legal principles. Firstly, the exchange relation between consumer and service-provider presupposes that both parties are equal in their capacity to own and dispose of *property*. Secondly, and relatedly, it presupposes that those parties are formally free in the sense of having capacity to voluntarily assume certain rights, obligations, privileges, duties, and so on, with regards to each other; in other words, both X and Y can establish *contractual relations*.

Beginning with the former, law functions to codify assets through the assignment of property rights. Law converts objects into ‘property’, an exclusionary relation between one legal subject and others as mediated through a *rem* that should not be viewed as axiomatic, but rather, as a product of historical circumstance. This relation connotes a bundle of rights, including ‘the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuary’.⁵¹ While this set of rights can be encoded within different systems in different ways, such a bundle cannot be said to have existed in feudalistic systems wherein, for instance, these claims ‘were so divided between lord and tenant that the position of neither presented a sufficient analogy with the paradigm case of owning a thing’.⁵²

This form of ownership is crucial to generalised market exchange. As Pistor contends, the existence of an asset alone is insufficient to coordinate market actors, as the asset also must be made alienable, definable, and defensible by legal coding.⁵³ To illustrate, in intellectual property law, the relevant asset underlying the exchange is a product of creative labour, an inherently intangible asset, the usage of which is non-excludable and non-rivalrous. Legal

⁵¹ Anthony M Honoré, ‘Ownership’ in Anthony Gordon Guest (ed), *Oxford Essays in Jurisprudence* (Oxford University Press, 1961) 107-147, 109.

⁵² Ibid 113.

⁵³ Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press, 2019).

coding via assignment of a property right constructs the asset as something with boundaries, capable of alienation, therefore facilitating exchange over the immaterial essence of artistic works, trade marks, patented inventions, and so on.

Further, it is implicit in law's capacity to facilitate commodification by converting an asset into property that transactions presuppose a set of conditions relating to the agents who engage in the exchange relation. It assumes that agents, who become recognised as (atomised) subjects within a legal framework, are the ones who own property, not merely that an object is capable of being codified as such. It also assumes that those subjects can engage in a contract with each other within which both are equally 'free' to dispose their property and transfer ownership of that property to one another irrespective of a constraint based on 'status' as under feudal law. That is, law emerges as a matrix of social relations, structuring the relationships between those who act within its boundaries, assigning correlative rights, duties, powers, and liabilities, while constructing the meaning of those relations and the practices that can occur within them.⁵⁴ This is not merely a set of relations between horizontal actors, but also one between those actors and the state, between actors and the judiciary, and so on. To de-naturalise assumptions about agents under capitalism, and the agents involved in paranormal practices, one must question how law constructs that legal subject, and what is the subject's function within capitalism: what role does this legal subjectification play within the broader macro-structural nexus of capitalist society, and why?

As suggested in the Marxist legal scholar Pashukanis's commodity form theory of law, there are many ways in which the legal relationship between subjects is homologous to the structure of commodity exchange.⁵⁵ Just as commodities, under capitalism, lose their concrete qualities to enter into a relationship of equivalence for the purposes of market transactions, so too do legal subjects lose their concrete qualities.⁵⁶ The legal relation, along with the social practices made possible within it, only has meaning in the light of commodity exchange, engendering

⁵⁴ This assertion reflects Hohfeld's modelling of the relations between legal subjects as interconnected, consisting of 'jural correlatives' like rights and duties, powers and liabilities, or privileges and no-rights, and so forth: Wesley Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23(16) Yale Law Journal 28-59.

⁵⁵ Pashukanis (n 2) 109-134.

⁵⁶ To clarify, the commodity form theory of law does not suggest that the structure of law *directly derives* from the structure of commodity exchange, but, rather, from the structure of the society that is characterised by the production and exchange of commodities – such that exchange becomes inseparable from the distinct social relation between capital and labour.

the following dynamic: each legal subject is ‘free and equal’ *specifically* in his or her formal capacity to own and alienate property rights.⁵⁷

This formal notion of freedom and equality *appears* to be purely ideological. After all, the capacity to exchange property does not automatically entail economic, gender, or racial equality. Nonetheless, it reflects the specific meaning of freedom and equality under (capitalist) juridical rationality. The legal concepts of freedom and equality are not ‘shams’, but rather are, in their specific meaning as identified by Pashukanis, ‘principles by which bourgeois society operates’.⁵⁸ That is, socio-economic circumstances do not determine the legal status of subjects in any unilinear sense. Rather, their position as market actors both characterises, and is characterised by, their legal capacities and practices undertaken in light of those capacities, implying a dynamic, non-linear, and cumulative process: a co-evolution between market and legal practices.

This specific conception of ‘freedom and equality’ vis-à-vis property ownership and exchange is underpinned and safeguarded by the state. The state, with its monopoly on the legitimate use of violence, has the requisite force necessitated for its law-enforcing functionality.⁵⁹ To go back to the modern consumer protection regime regulating paranormal services, this framework presupposes that the state not only exists but also is empowered to intervene in otherwise free contracting when necessary to preserve the smooth, efficient exchange of commodities by stabilising subjects’ expectations regarding each other’s obligations.⁶⁰ The rule of law, meanwhile, guarantees that the legal status of subjects cannot be arbitrarily or capriciously abrogated, and this too is enshrined by the state via the organs of the body politic. Through historical processes of conflict and emergence, this conception of the fundamental relation between legal subjects co-constitutively develops alongside the social formations immanent to capitalism, like the market-based economy, with the two mutually interacting and gradually producing and reproducing one another. Contract and exchange of property therefore became

⁵⁷ Christopher Tomlins, ‘Marxist Legal History’ in Markus Dubber and Christopher Tomlins (eds), *The Oxford Handbook of Legal History* (Oxford University Press, 2017) 515-539.

⁵⁸ Nancy Anderson and David Greenberg, ‘From Substance to Form: The Legal Theories of Pashukanis and Edelman’ (1983) 7 *Social Text* 69-84.

⁵⁹ Max Weber, ‘Politics as a Vocation’ in H H Gerth and C Wright Mills (eds), *From Max Weber: Essays in Sociology* (Oxford University Press, 1946) 77-128.

⁶⁰ This argument draws on evolutionary game-theoretical analyses of law. See: H Peyton Young, *Individual Strategy and Social Structure: An Evolutionary Theory of Institutions* (Princeton University Press, 1998) 3-4.

the entrenched legal abstractions within which other juridical norms necessarily crystallise and are structured within capitalism.

However, these legal rules should not be seen as ‘designed’ to support markets, but rather as historically co-emergent with those markets, with the law as constitutive of capitalism in the same sense that capitalism is constitutive of the law. The non-linear, gradual succession of historical events saw the dynamic interaction of the structures that became the law, the economy, and other social systems that support, and at times detract, from the evolution of the others, and, more widely, capitalism itself, cannibalised from the rubble of feudal social relations. In this way, as Aoki contends, legal norms can be said to emerge endogenously from, while mutually constituting, the market and other social institutions; they can be analysed as emerging reflexively alongside burgeoning market activity and pressures, just as market activity is a reciprocal ‘response’ from the economy to those legal developments.⁶¹ Hence, formal juridical rationality is inextricably coordinated according to the configurations of capitalist social relations, and so fully understanding why the modern framework around paranormal services assumes the form that it does would not be possible but for an appreciation of this principle.⁶² That is, the nature of agents acting *qua* legal actors, and the social practices thereby available to them, is bounded and conditioned by the fundamental nature of law as a capitalistic system structured around the ownership and voluntary exchange of private property rights.

These arguments can be illustrated through the example of the contract of employment. An agent assuming the social role of ‘worker’ lacks direct access to the means of production and thus cannot access subsistence without selling his or her labour power to capital. This produces a substantive asymmetry of social power, yet the contract of employment assumes the formal ‘freedom and equality’ of those who are a party to it, reinforcing the power relations that allow for the extraction of surplus value via the exploitation of those dispossessed workers.⁶³ At times, judicial discourse around labour laws have recognised ‘inequality of bargaining power’ as the basis for its reasoning, though never the entrenched resource and power differential

⁶¹ Masahiko Aoki, ‘Endogenizing Institutions and Institutional Change’ (2007) 3 *Journal of Institutional Economics* 1-31.

⁶² Lauren B Edelman, ‘Rivers of Law and Contested Terrain: A Law and Society Approach to Economic Rationality’ (2004) 38(2) *Law and Society Review* 181-198.

⁶³ For this reason, Renner maintains the concepts of ‘property’ and legal agreements like contracts assume new forms and functions under capitalism as opposed to, say, Roman law, submerging structural imbalances of power. Karl Renner, *The Institutions of Private Law* (Agnes Schwarschild (trans), Routledge, 1949) 293, 296-298.

between the *classes* of the parties to that contract. That is, legal decision-makers may recognise the surface-level effects of inequality, but rarely the underlying structural causes, because the nature of a capitalist legal rationality is to treat agents as if they were equal *in legal terms*. Thus, the legal form creates a space within which capitalistic productive relations appear compatible with the assumptions of ‘free’ commodity exchange, making it possible to realise the surplus extracted from the labour of producers in the form of market profits.⁶⁴

Because the fundamental nature of a capitalist legal rationality qualifies all social practices, identities, and relations that occur within a juridical rubric, its influence extends to areas of law that appear entirely divorced from the market. This can be seen through the lens of criminal law. As mentioned, law’s codification of assets as objects of exchange is the nucleus around which law is organised. Law’s conception of legal personhood is critical here, constituting the individual agent in such a way as to make ownership and exchange of private property possible. Therefore, with some limited exceptions, law *primarily* conceptualises people as discrete agents, rather than as members of a class or group, or even as part of a set of interconnected, interpersonal relations. Criminal law also, therefore, assumes the atomisation of subjects and obscures criminogenic systems of power, like economic inequality,⁶⁵ choosing instead to assign ‘blame’ or ‘fault’ to individuals and to conceptualise causation purely in terms of the connection between an individual and their ‘freely’ chosen actions. This point is developed further in Chapter Three.

For now, in this sense, capitalist law differs from (for example) feudal law as a result a set of core, categorical dissimilarities – with feudalism conceived here as a different, historically antecedent macro-structure to capitalism.⁶⁶ While capitalist law is orientated around the legal subject, and their capacity to hold property rights good against the world and to engage in voluntary legal relations, feudal law was fundamentally focussed on the formal hierarchical

⁶⁴ Zoe Adams, ‘Labour Law, Capitalism and the Juridical Form: Taking a Critical Approach to Questions of Labour Law Reform’ (2021) 50(3) *Industrial Law Journal* 434-466, particularly 444-448.

⁶⁵ For a classical economic, rational choice-based analysis of the relationship between inequality and criminal activity, see Isaac Ehrlich, ‘Participation in Illegitimate Activities: A Theoretical and Empirical Investigation’ (1973) 81(3) *Journal of Political Economy* 521-565. This model has been refined substantially over the years, e.g., in W Henry Chiu and Paul Madden, ‘Burglary and Income Inequality’ (1998) 69(1) *Journal of Public Economics* 123-141.

⁶⁶ It follows from the ontology developed in earlier sections that feudalism and capitalism are seen in this thesis as macro-structures that gradually evolved, or transitioned, from one to the other, with an array of social practices, structures, and relations emerging in non-linear fashion to ultimately, and dialectically, constitute macro-structural change.

status into which one was born, e.g., as lord, peasant, monarch, etc.⁶⁷ All land was held absolutely by the monarch, and his lords held that land on condition of swearing fealty. Lords would grant peasants rights to occupy and work parts of the land, giving them direct access in return for labour. Meanwhile, many other rights related to land were held in common, such as pasturage, turbary, and pannage, relations which would be ‘drastically curtailed’ by the land enclosures and the privatisation of the commons.⁶⁸

Further, labour relations could not be freely entered into via contract in the modern sense. Feudal workers faced significant institutional limitations fixing their social positions. The Statute of Labourers 1351, enacted after the Black Death to regulate the rising power of labour, institutionalised wage controls, making it illegal to receive wages exceeding statutory limits. The Statute of Artificers 1563 would reproduce, and elaborate upon, the Statute of Labourers, structuring the sale of labour throughout two hundred years of witch-trials and beyond. It held back the emergence of a ‘true’ labour market by not only extending wage controls to account for inflation, but also provided that seven-year apprenticeships were required before an individual could be employed in a trade.⁶⁹

Contracts existed, but breach was principally a matter of ‘oath breaking’ and personal conscience rather than the disruption of voluntarily agreed legal rights and duties; legal identity was, again, primarily a matter of formal status. As discussed in more detail in Chapter Three, the action of *assumpsit*, for breach of a promise, was available in the sixteenth and seventeenth centuries especially after *Slade’s Case*, yet it remained reliant *inter alia* on proof of service. Nor, indeed, did private property rights exist in the sense of being rights good against the world, owned by formally free and equal subjects capable of voluntarily assuming legal obligations.⁷⁰ Rather, as Holdsworth writes, property simply entailed ‘the better right of a plaintiff as against the defendant to possession.’⁷¹

⁶⁷ See S Milsom, *The Legal Framework of English Feudalism* (Cambridge University Press, 1976).

⁶⁸ Jane Humphries, ‘Enclosures, Common Rights, and Women: The Proletarianization of Families in the Late Eighteenth and Early Nineteenth Centuries’ (1990) 50(1) *Journal of Economic History* 17-42, 20.

⁶⁹ Adams (n 2) 93.

⁷⁰ See David Seipp, ‘The Concept of Property in the Early Common Law’ (1994) 12(1) *Law and History Review* 29-91; John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press, 2000) 41; John Baker, *Introduction to English Legal History* (5th ed, Oxford University Press, 2019) 241-257, 338-349, 403-426; and G E Aylmer, ‘The Meaning and Definition of “Property” in Seventeenth-Century England’ (1980) 86 *Past and Present* 87-97.

⁷¹ William Holdsworth, *A History of English Law*, vol 7 (2nd ed, Sweet and Maxwell, 1937) 458.

Given these axiomatic distinctions between ‘capitalist’ and ‘feudal’ law, the ways through which social practices and relations were constructed, qualified, and conditioned were fundamentally distinct. Throughout this thesis, these distinctions prove critical, reinforcing the proposition that if one wishes to understand how, and why, a given social phenomenon is legally conceptualised in the manner that it is, or was, one must factor in an analysis of capitalism, its relationship with law, and the specific rationality that the legal system resultantly expresses and ‘imposes’ on those who act and think within its boundaries.

2.2.3.3 Law, Natural Science, and Capitalism

With the previous sections having established the first two levels of law’s rationality, this section discusses the third level of the law’s rationality, and how it offers an insight into the relevance of natural-scientific conceptions of reality in legal disputes about paranormal practices. This third level of rationality can be termed law’s ‘substantive’ rationality, that is, the logic of law’s values and self-justifications.

Weber’s notion of the substantive rationality of law inheres in those situations wherein law is used to enact a political, or ‘external’, objective, a functionality he likened to the goals of the natural law school.⁷² Yet, law’s ‘substantive’ rationality, in the Weberian sense, is a mirage if it is taken to be disengaged from law’s formal rationality. Given that law can only be *formally rational* when legal norms – gathered and encoded according to law’s *epistemic rationality* – are applied systematically and consistently, *prima facie*, the possibility of ‘truly’ discretionary application or reform of law in pursuit of an apparently extra-legal goal seems incongruous. If the law were applied without reference to pre-existing legal norms, even implicit ones, it seems unlikely that it would be recognised as juridical *a priori*. Thus, the application of law tailored to satisfy metrics of ‘morality’ or ‘justice’ must be (at least implicitly) recognised by the system’s formal rationality to have effect, rendering a distinctively Weberian substantive rationality somewhat chimerical.

Rather, one might consider an alternative vision of law’s ‘substantive’ rationality, and it is this that frequently leads to limitations in legal discourse and decision-making – e.g., in normative

⁷² Joyce S Sterling and Wilbert E Moore, ‘Weber’s Analysis of Legal Rationalisation: Critique and Constructive Modification’ (1987) 2(1) Sociological Forum 67-89.

discussions about what the law ‘should’ be doing, about what ‘justice’ might look like. This conception of law’s substantive rationality is detectable in modern legal debates about fraudulent mediumship and psychic scams: ‘justice’, under a consumer protection framework, may be seen as that which properly balances the ‘liberty’ of traders, on the one hand, with protecting ‘vulnerable’ consumers from ‘deception’, on the other, but also in other ways related to natural science discussed below. These are assumed to be valuable, even universal, goals, and yet, when one looks beneath the surface, the specific liberty under discussion is the *legal* freedom to engage in contracts, and the action being protected against is a threat to the consumer’s *property* (e.g., their money). Such legal principles are specific not to highly abstract, ‘transhistorical’ concepts of liberty or the protection of the vulnerable, but rather to the distinctive form of relations between production, consumption, and exchange that constitute capitalism, and capitalist law.

This notion of law’s substantive rationality suggests that abstract norms, defined at a high conceptual level like ‘liberty’, *can* be encoded into the law, but they axiomatically do so as a derivative expression of the law’s formal rationality. By virtue of their enactment and application by various juridical entities, they will tend to be conditioned by other norms constituting the framework through which legal decisions are operationalised, or else they would lack a juridical character. That is, they tend to be structured by the legal form itself. Therefore, while law comes through legal discourse to have justifications, goals, objectives, etc, these are always conditioned by what Koskenniemi terms the system’s ‘structural biases.’⁷³

Thus, the law may present itself as having elements of substantive rationality. Yet, to the extent such substantive rationality exists at all, it is constrained, defined by, and emergent from the nexus of norms codified and enforced via the operation of the legal system’s foundational epistemic and ‘mid-level’ formal rationalities. Whatever instrumental objectives are assigned to legal norms, law *tends to* reproduce the cognitive and material conditions of its own mode of operation. In practical terms, this means legal decision-makers can only achieve given aims (e.g., ‘social justice’) within the confines of parameters like the public-private divide, the individual legal subject, and so on; the nature of these parameters may be continually reshaped according to the outcomes of socio-political conflicts that occur within their limits, but

⁷³ Martti Koskenniemi, ‘Constitutionalism as Mindset: Reflections on Kantian Themes about Internal Law and Globalization’ (2007) 8 *Theoretical Inquiries in Law* 9-36, 17.

regardless of their *precise* form at any given time within the legal system's evolution, they generally appear to be integral to capitalist law, continually conditioning, to some extent, norms, values, and concepts defined within their limits. Indeed, this force, this rationality, defines the modern debate around paranormal practices and, as Section 2.3 argues, tracing the legal evolution of law's conceptualisation of those practices enables us to see its emergence in action.

This brings us to a specific value implicit in legal discourse regarding paranormal practices, and its origins in law's formal rationality – the assumption of the paranormal's empirical impossibility, and why such an assumption exerts normative force in law. That is, legal decision-makers and scholars, at times, reveal an assumption that paranormal practices are empirically impossible, or unprovable, when they either conceptualise these practices as fundamentally fraudulent or fraudulent insofar as the practitioner's belief in the efficacy of those practices is insincere. When one posits that the paranormal practitioner is a fraud, one presupposes that his actions are somehow deceptive – that he cannot *really* do as he claims. In this sense, natural-scientific provability is implicitly designated as a desirable value. But this assumption, along with the consequences of that assumption, is conditioned, not axiomatic based on some transhistorical concept of natural-scientific rationality. Thus, one might ask, what is the meaning or significance of a practice being empirically impossible for the purposes of legal debate, and why?

The rationality of natural science, which frames capitalistic epistemologies that equate empiricism to 'true' knowledge, can be generally summarised as follows. If a phenomenon cannot be readily observed, classified, repeated, reproduced, and so on, it is generally treated as lacking a scientific basis.⁷⁴ Claims as to that phenomenon's existence may not be necessarily rejected as impossible, but rather as 'unproven' or 'unprovable'. Natural science, in this way, invokes principles of deduction and induction to develop abstract concepts that structure theoretical models and systems of logical reasoning. The resulting models produced by natural science work to encode knowledge and reduce informational complexity – analogous to how legal concepts themselves operate. Accordingly, 'the controlling end of the scientific enterprise is the prediction and control of experience.'⁷⁵

⁷⁴ Sean Carroll and David Goodstein, 'Defining the Scientific Method' (2009) 6(4) *Nature Methods* 237.

⁷⁵ Peter Railton, 'Marx and the Objectivity of Science' in *PSA: Proceedings of the Biennial Meeting of the Philosophy of Science Association, 1984* (Cambridge University Press, 1984) 813-826, 816.

Yet, this positivistic conception of scientific rationality can, if misused, risk designating natural reality as potentially knowable and vulnerable to classification in some sense that appears transhistorical. For instance, treating surface-level empirical data as exhaustive evidence of the nature of reality may fail to recognise the distinctions between epistemology and ontology, and the limits of natural-scientific reason. Particularly as conceptualised throughout political discourse, natural-scientific rationality is often presented, or perceived, as offering processes of discovery and conclusive identification, rather than epistemological contingency. In this way, the observations of natural science tend to be fetishized within capitalist society as ‘objective’ and stable, their anthropocentric specificities obscured. This is not least because of the commercial value scientific and technological insights offer capital insofar as those insights can be relied upon in the processes of accumulation and commodification.⁷⁶ As such, natural science – or at least, how natural science is often deployed politically – can risk *naturalising* rather than *historicising*.

Indeed, one can differentiate between the constructions and models of science produced within, and framed by, capitalistic social relations and the phenomena they attempt to observe and document, much as one can distinguish between scientific observations developed in societies framed by a capitalistic logic and scientific observations arrived at in societies in which that logic does not hold. Natural science, like law, is an internally referential system of knowledge expressed through linguistically communicated hierarchical concepts; it must therefore be anthropologised, its human dimension recognised. Conceptions of validity and falsity, frequently presented as a strict binary, dictate the stability of scientific principles. And yet, from where do its standards of validity and falsity derive? The answer lies in human history, by reference to a pool of pre-existing scientific knowledge. Claims of objectivity underpin those scientific assertions which are assumed to be the most unassailable, and yet objectivity often simply implies a *pluralised* but nevertheless human perspective, rather than an *atomised* (subjective) one. Thus, even that rationality of science – often fetishized as ‘unbiased’ – cannot be disengaged from the historically specific social reality in which it is constructed and which it, in turn, helps to construct.⁷⁷

⁷⁶ Ibid 820.

⁷⁷ See Thomas Kuhn, *The Structure of Scientific Revolutions* (University of Chicago Press, 1962).

The phenomenon of gender exemplifies this proposition. While *sexual characteristics* – chromosomes, reproductive organs, and so on – are considered the purvey of biology, *gender* is said to inhere in practices, in sets of relations between gendered groups and identities; in truth, the identification of certain characteristics as ‘sexual’ also constitutes a social practice, but for current purposes sex and gender shall be kept analytically distinct. As postmodern feminist Judith Butler argues, an individual’s biological components are treated as ‘cues’ to certain pathways of socialisation and interpellation.⁷⁸ An individual possessing male sexual characteristics signifies to other social actors that they should be positioned as a ‘man’ in a gendered relational nexus. In critiques of gender that reject biological essentialism, these characteristics are sometimes theorised as offering a signpost to ‘create’ a ‘man’ through socialising techniques, rather than one’s own metaphysical ‘manhood’ inducing the ‘appropriate’, reflexive social treatment.⁷⁹ In other words, natural-scientific observations about the world can be imbued with social significance that is irreducible to those initial observations.

This relational process of gendering is patriarchal in the sense that it tends to assign more social power and freedom to those in the constructed class of ‘men’. That process then interacts with capitalism – because, as a totalising macro-structure, capitalism interacts with all practices and structures that constitute social reality, including those pre-dating its emergence. For instance, the heteronormative gendering of social roles allows the care practices integral to social reproduction to be historically and generally assigned to the class of ‘women’, whose domestic labour can then be left unpaid and rendered exploitable.⁸⁰

Natural-scientific knowledge related to gender did not *per se* need to be socially conceptualised as instituting a binary between the classes of men and women. Yet, capitalist insistence on clarity and predictability, and on ensuring a *reproductive* complement to *productive* forces, in terms of social roles nevertheless made space for such logic to reinforce biological-essentialist divides, particularly when understood within the conditions of capitalist class relations.⁸¹ In

⁷⁸ For a discussion of how biological-essentialist accounts of gender draw on natural science, see Judith Butler, ‘Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory’ (1988) 40(4) *Theatre Journal* 519-531.

⁷⁹ Ahmed argues through the lens of affect theory that even emotions, designated ‘objectively’ as the outcome of hormonal patterns by endocrinologists, develop a social basis via cultural practices. See Sara Ahmed, *The Cultural Politics of Emotion* (Edinburgh University Press, 2004).

⁸⁰ See Margaret Benston, ‘The Political Economy of Women’s Liberation’ (1969) 21(4) *Monthly Review* 13-27; Nancy Fraser, *Fortunes of Feminism: From State-Managed Capitalism to Neoliberal Crisis* (Verso, 2013); and Silvia Federici, *Revolution at Point Zero: Housework, Reproduction, and Feminist Struggle* (PM Press, 2020).

⁸¹ Jules Joanne Gleeson and Elle O’Rourke, *Transgender Marxism* (Pluto Press, 2021) 26.

this sense, natural science appears neutral in these circumstances, yet as a result of how it is often invoked politically, particularly by those in power, biological observations about sexual characteristics can be used to shape social expectations with regards to gendered identities that are valuable to capitalism, e.g., through consumption of gendered products, via the division of social-reproductive responsibilities and sale of labour power to capital, and so on.

This discussion of gender under capitalism recognises how capitalistic social relations can reinforce, and exploit, a patriarchal gendering using natural-scientific observations, with capitalism, as mediated by political struggle, ‘thriving’ off the construction of relatively clear boundaries and categories of social organisation.⁸² Similarly, in law, a general preference for abstraction and predictability emerges, principally, though not exclusively, with regard to the designation of contractual responsibilities, the construction of individuated legal subjects, and the delineation of private property rights.⁸³ Natural-scientific perspectives on reality can play a role in the codification of property rights by revealing whether a ‘candidate’ for commodification meets the crucial criteria of being – to use the language above – observable, repeatable, consistent, and capable of classification.

This can be seen, for instance, in patent law. Natural-scientific observations are used to determine whether a postulated invention is novel, inventive, capable of industrial application, and so on. Scientific insights fuel the process of commodification, and repeatable exchange, but the prevailing logic of that process is not *exclusive* or *reducible to* the logic of natural science. Capitalist logic, by providing the appropriate incentives to the agents involved in patenting, is the engine of commodification for which natural science is merely instrumental towards the legal codification of a potential commodity. That is, natural science allows capitalism, and capitalistic law, to identify and delineate facets of natural reality, setting up capitalistic processes of extraction to abstract those facets into relations of exchange. In this way, ‘the rise of capitalism gives enormous impetus and scope to the pursuit of inquiry in ways that increase the possibility of receiving and responding to causal feedback from natural

⁸² Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press, 2020) 30-35.

⁸³ Many legal norms, of course, express some flexibility, but as a general tendency, particularly when property rights and contractual obligations are concerned, there is an observable juridical preference for certainty and clarity. Legal certainty, for example, is one of the eight legal desiderata Fuller extolls in Lon Fuller, *The Morality of Law* (Yale University Press, 1969) 63-65. ‘Clarity’, he writes, ‘represents one of the most essential ingredients of legality.’

phenomena.’⁸⁴ Through the combination of natural science and the law, capitalistic productive processes ‘map’ reality and expose its thereby fragmented components to commodification.⁸⁵ For instance, natural science may identify a given species, facilitating the capacity of capital to remove that species from its place within a network of interspecies dependencies and to reposition it as a component of market exchange – as meat, as the subject of genetic research, and so on.

Under this rubric, scientific observations become part of law when they are drawn upon in the legal conceptualisation of a given practice. Yet, one must recall, the process of conceptualising a phenomenon with clear, defined boundaries is not exclusive to natural science; it is also endemic to law in the construction of proprietary rights, contractual duties, and so on. As such, ‘natural-scientific’, probabilistic predictability can be understood as a sufficient, but not necessary, condition for ‘good law’; the connections between an empirical probabilism and the law will be explored more when Chapter Three discusses the relationship between legal doctrines of causation, capitalism, and the juridical reification of witchcraft. Indeed, to return to the example of paranormal practices themselves, the Fraudulent Mediums Act 1951 (‘FMA 1951’) maintained that if a paranormal practice was performed for ‘entertainment’ and made it clear as such, it was lawful. Simply by communicating to the consumer that the performance was an act of entertainment, and not a display of unprovable ‘abilities’, the paranormal practice became susceptible to stable commodification and therefore the law did not ‘need’ to problematise it.

Thus, as commodities, paranormal practices appear to be unique, but in fact their uniqueness is revealed to be, on closer inspection, contingent, as opposed to that uniqueness flowing from their ‘objective’ essence. Their impossibility or unprovability does not *per se* hinder their commodification. Natural-scientific objections with regards to their empirical possibility are only relevant to a point, and that point is the institutionalisation of capitalist social relations. It is more their potential *unpredictability*, *unrepeatability*, and *resistance to definition*, partially revealed by natural-scientific observations, that hinders their subjection to the demarcation of property rights.

⁸⁴ Railton (n 75) 820.

⁸⁵ The mechanisms by which natural science is deployed by capital to ‘map’ the environment and thus drive commodification are discussed in Jason W Moore, ‘The Capitalocene, Part I: On the Nature and Origins of Our Ecological Crisis’ (2017) 44(3) *Journal of Peasant Studies* 594-630.

To reiterate, law is integral to capitalism because it codifies assets and makes them capable of ownership and exchange, but the paranormal generally resists such codification. Any attempt to ‘trade’ the paranormal, therefore, will tend to be treated as axiomatically fraudulent. Such a transaction is, in legal terms, ‘impossible’ or cannot be ‘computed’ because the logic of law is not the amorphous logic of spirituality, of fortune-telling, or of psychic powers, but rather the logic of private property and voluntary contracting, with which the paranormal does not generally ‘fit’, as Chapter Four will elaborate in more detail. For law to cognitively encode a phenomenon or practice, that phenomenon or practice must have some (natural-scientifically identifiable) materiality. Thus, if paranormal practices are expressed and performed in certain ways that are consistent with general market exchange, then their commodification (or, at least, reconciliation with a system of law predicated on private property ownership and exchange) becomes possible, as Chapter Five will show.

Once again, natural science has relevance in this forum – its stabilising, boundary-imposing logic is often facilitative of capitalist exchange – and, as Foucault writes, natural science defining the capacities of human bodily agency ‘was without question an indispensable element in the development of capitalism’, not least because it facilitated ‘the controlled insertion of bodies into the machinery of production’.⁸⁶ But that relevance is often ‘incidental’ when it comes to determining whether a phenomenon can be treated as a commodity, or if it should be seen as a threat to market relations. Thus, natural science simply helps to reveal how paranormal practices are non-standardised and have unclear efficacy, unless boundaries are imposed upon them by the law. Ultimately, then, the criminalisation of paranormal practices *qua* fraud may be a result of how they resist classification and, therefore, undermine, or even render impossible, repeated proprietary transactions: paranormality struggles to be categorised and codified in a stable proprietary form, which is fundamental to ownership and exchange.

To summarise this section’s observations: law operates as the cognitive architecture of capitalist exchange and serves as a system of norms that helps to stabilise and reproduce the expectations and perceptions of actors within capitalist society. In this sense, law is integral to capitalistic exchange, much as capitalism is integral to law in its private-proprietary form. Paranormal practices may represent potential hindrances to repeat exchange and capital

⁸⁶ Michel Foucault, *The History of Sexuality Vol 1* (Robert Hurley (trans), Pantheon Books, 1978) 140-141.

accumulation because they struggle to be reconciled, *or even articulated*, within the logic of property rights, and other aspects of capitalist law. Until paranormal practices are given more certain form – by, for example, being expressed as forms of (non-disruptive)⁸⁷ entertainment – they present a problem for capitalist law that it addresses by legislating them (partially) out of the commercial sphere and into the criminal one. In other words, there exists an incompatibility between the *certainty* required for the designation of property rights and contractual obligations and the unclassifiable nature and empirical unprovability exhibited by paranormal practices, which means they tend to be conceptualised under the rubric of fraud, and, by extension, their associated beliefs are conceptualised as irrational.

Either way, the fundamental tension that leads to paranormal practices being classified as unlawful comes not from a direct tension between paranormal practices and *natural science*, but rather between paranormal practices and *capitalism* as mediated by natural-scientific objections to the empirical existence of the paranormal. Thus, paranormal practices are often positioned in capitalist legal discourse as potentially problematic and, as Section 2.3 argues, this can be perceived by tracing how those practices were conceptualised before capitalist social relations manifested ubiquitously throughout English society. This brings us back to the historicity of law in general, its relationship with broader social reality, and the value in tracing the evolution of legal concepts to perceive how and why they are constructed as they are.

2.3 Historicising the Paranormal in Law: Genealogy as a Methodology

2.3.1 Defining Genealogy

This section draws on the previous discussion to support the use of genealogy as the methodology of this thesis. It argues that genealogical method can be used to reveal how the modern consumer protection framework regulating paranormal practices emerged, and what that emergence suggests about the nature of law under capitalism. Once again, because the paranormal practitioner and his client operate within capitalism, their relation assumes the form

⁸⁷ As discussed in Chapter Five, when repositioned as ‘entertainment’ for the middle class, paranormal practices ceased to be problematised as disruptive (and therefore were seen as less demanding of strict regulation) within legal discourse. For more on how certain practices are entrenched by (capitalist) cultural hegemony while others are marginalised, see Nguyen’s notion of ‘value capture’ developed in C Thi Nguyen, ‘Gamification and Value Capture’ in C Thi Nguyen, *Games: Agency as Art* (Oxford University Press, 2020). See also Sara Ahmed, ‘Happy Objects’ in Melissa Gregg and Gregory J Seigworth (eds), *The Affect Theory Reader* (Duke University Press, 2010) 29-51.

of that between a provider of services and a consumer. As such, when processed through the law, this relation is conceptualised in terms of the free exchange of private property. The service being transacted, however, defies general principles for that exchange: often, it may be unclear precisely what the paranormal service is going to deliver (some abstract notion of prosperity, for example), and, perhaps more importantly, *how* the service is going to do so if the practices involved are deemed empirically impossible or unprovable.

Genealogical method, inspired by the work of Foucault and others, can help us perceive how the historical evolution of the law's treatment of paranormal practices reached this point, and, by extension, the shifting rationality of the law as it emerged over the gradual transition from the early modern period to capitalism.⁸⁸ Although Foucault's genealogical method lacked an explicit focus on social ontology, the methodology itself can nevertheless be adapted for current purposes.⁸⁹ A genealogy takes a specific concept, often one that has been overlooked, and traces its emergence and evolution throughout history. Genealogy functions as a method that 'levels its challenge by reading contingency into the past', tracking the contingent outcomes of political struggle within the more deeply embedded confines of structural conditions.⁹⁰

By contrast, conventional historical approaches often focus on specific events, controversies, and political actors, a valuable practice in its own right, whereas many genealogies adopt a longer view of history. For instance, a genealogy may be informed by Braudel's *longue durée* approach to the emergence of the institutions of industrial capitalism, examining the path dependencies and bricolages that led to the development of a given concept and placing those evolutionary developments within the context of the long-term 'transition' to capitalism.⁹¹ The value of genealogy lies in its capacity to reveal how the 'state of things' has not always been the 'state of things,' how modern assumptions emerge from certain historical contingencies and empirical conflicts, and are therefore vulnerable to creative re-consideration at the same time as they are limited by, and derivative from, their social conditions.

⁸⁸ See Michel Foucault, 'Nietzsche, Genealogy, History' in Donald F Bouchard (ed), *Language, Counter-Memory, Practice: Selected Essays and Interviews by Michel Foucault* (Cornell University Press, 1977) 139-164, 139-140.

⁸⁹ See also Nietzsche's own use of genealogy in Friedrich Nietzsche, *On the Genealogy of Morals* (Michael Scarpitti (trans), Penguin, 2013), especially 3, where Nietzsche writes, 'Under what conditions did men invent for themselves these value judgments good and evil? And what inherent value do they have? Have they hindered or fostered human well-being up to now?'

⁹⁰ Emiliios Christodoulidis, 'Labour Constitutionalism in a Genealogical Key' (2018) 9(2) *Jurisprudence* 413-417, 415.

⁹¹ Fernand Braudel, 'Histoire et sciences sociales: La longue durée' (1958) 13(4) *Année* 725-753.

Legal genealogies, in this light, seek to identify a juridical concept and trace its evolution from its inception, as in the work of Simon Deakin and Zoe Adams.⁹² In so doing, genealogies may go beyond the law ‘on the books’ and interrogate the wider social relations that facilitated that evolutionary history. Again, while individual social agents, and class conflicts, may give ‘life’ to legal practice, genealogies can nevertheless demonstrate the *aggregate* outcome of collective activity, and how law comes to exhibit an emergent logic. By combining genealogy with this chapter’s conception of social ontology, and the constitutive relationship between law and capitalism, one can understand not only the evolution of certain legal concepts, but one can use that identification of an evolution as a springboard for developing insights into the generative mechanisms forming the conditions of possibility for those concepts to exist and evolve as they have. That is, by connecting the steps in a legal concept’s evolution to shifting ontological conditions, a genealogy can reveal the relationship between law and other social systems. In this way, genealogies can challenge naturalistic accounts that might overlook the historical contingency of a legal concept. This allows us to identify the linkages enabling certain laws to survive, and consequently can highlight and expose the various, multifaceted, mutual interactions between law and other capitalist social institutions.⁹³

2.3.2 Using Paranormal Practices as a Genealogical Concept

By tracing evolving legal constructions of the paranormal with a genealogical method, it becomes possible to compare the different stages of the law’s evolution and bring into sharp relief the assumptions entailed by modern debates around them. Examining their evolution from the early modern period and into capitalism also allows us to perceive the influence of a capitalist rationality on that legal history, offering wider insights into the relationship between law and capitalism.

It should be reiterated that early modern law would not have conceptualised ‘paranormality’ in the sense described as follows. As referenced in Chapter One, the term ‘paranormal practices’ projects a modern, capitalistic lens backwards, and is used for analytical utility in

⁹² Adams traces the emergence of the wage in labour law in Adams (n 2). Deakin, meanwhile, traces the emergence of the contract of employment in Simon Deakin, ‘The Contract of Employment: A Study in Legal Evolution’ (2001) ESRC Centre for Business Research, University of Cambridge Working Paper No 203.

⁹³ Adams (n 2) 58-60.

demonstrating the connection between the early modern Witchcraft Acts and capitalist legislation regulating the paranormal through consumer protection law. The binary between normality and paranormality is a creature of capitalism, not the early modern period. Yet, nevertheless, the institutions that administered violence as a response to the paranormal practices that came to be regulated as such have a clear statutory continuity through the legal institutions of the English state. Thus, a pragmatic approach can be employed: the history being charted is the history of a series of relations connected by a formal link, within which a certain set of interrelated practices were, and are, constructed through transforming, yet historically tethered, approaches.

To address the nature of those practices more directly, paranormal practices, in this thesis, are taken to cover a cluster of cultural forms that can be generally summarised as exhibiting four characteristics when historically positioned against the private-proprietary logic of capitalism. The first characteristic is that these cultural practices are generally seen as emerging from an ‘occult’, ‘pagan’, or non-hegemonic spiritual or religious framework. While many paranormal practitioners may draw inspiration from Abrahamic religions, their core beliefs, and the practices that emanate from those beliefs, are generally treated as heterodox vis-à-vis mainstream religions, whether they are derivatives from those religions or operate entirely in parallel.⁹⁴ These include, at least within the jurisdictional boundaries of English law, beliefs in ghosts, witchcraft, fairies, the efficacy of magical rituals, astrology, mediumship, clairvoyance, and so on.

The second characteristic has already been referenced in this chapter – that these practices are considered empirically impossible, or unprovable, through a modern natural-scientific lens. As Clark writes, approaching the history of practices like these does not need to ‘transform impossibilities into possibilities, or mistakes into truths.’⁹⁵ Instead, by adopting a perspective that properly contextualises legal ‘facts’ as being manufactured by the system from which they originate, ‘these distinctions...become irrelevant; the idea of making them would no longer itself make historical sense.’⁹⁶ In other words, whether they are in fact empirically impossible

⁹⁴ This draws on Hutton’s definition of ‘magic’ in Ronald Hutton, *The Witch: A History of Fear, From Ancient Times to the Present* (Yale University Press, 2017) x.

⁹⁵ Stuart Clark, *Thinking with Demons: The Idea of Witchcraft in Early Modern Europe* (Oxford University Press, 1999) 6.

⁹⁶ Ibid.

is not the purview of this thesis. Rather, it is how they are perceived, and treated, as empirically impossible that is significant, as are the legal consequences of that perception and treatment.

The perceived empirical impossibility of paranormal practices leads to a third characteristic, which is the practitioner's (or, in the case of the witch-trials, their accuser's) insistence on the efficacy of their practices despite the claims of natural science. As Chapter Four explores, the 'sincerity' of this insistence serves as the core focus of many juridical debates regarding fortune-tellers and spiritualistic mediums, principally with regards to that sincerity's implications for the practitioner's *mens rea* when it comes to determining whether an offence has been committed. For this reason, performances of stage magic arguably do not satisfy this criterion, and indeed it is this that perhaps explains why those performances were afforded a safe harbour from liability under the FMA 1951. Nevertheless, even if they lack this element of more 'substantive' paranormal practices, stage magic remains adjacent to the paranormal and falls under the purview of the genealogy by virtue of its inclusion in the relevant legislation.

The final characteristic has also been alluded to previously, and that is the resistance exhibited by these practices to stable classification, often, though not exclusively, as a result of their empirical unprovability. One can point to an array of practices that could conceivably be treated as 'paranormal' – fortune-telling, speaking with spirits, astrology, and so on – yet finding a concrete definition that captures all these practices is challenging. Gaskill, for example, writes that witchcraft alone had a deep 'fluidity of meaning,'⁹⁷ that the practices that constitute the social phenomenon characterizable as 'paranormal' are only understandable as subversive, marginalised, chaotic, hostile to definition, and amorphous – and that these components are linked. Indeed, this thesis argues that this is the *key* aspect of paranormal practices that conditions their legal constructions: it is not merely that the paranormal is empirically impossible, or unprovable. It is that, for the purposes of this thesis, the paranormal includes that which struggles to, or even cannot, be defined using the conceptual architecture available within a capitalist legal rationality.⁹⁸ Already this chapter has presented some arguments as to why paranormal practices would manifest in some way that is 'against' law. Throughout the

⁹⁷ Malcolm Gaskill, 'Witchcraft, Emotion, and Imagination in the English Civil War' in John Newton and Jo Bath (eds), *Witchcraft and the Act of 1604* (Brill, 2008) 161- 178, 161.

⁹⁸ Again, it should be reiterated, the objective of this thesis concerns legal understandings of the paranormal – rather than the question of the paranormal's material existence.

genealogy this quality will be explored in depth, referred to as the ‘contra-legal’ aspect of paranormal practices, a term developed in Chapter Four.

Following the above observations regarding the hostility towards definition expressed by paranormal practices, this thesis does not attempt to impose any strict formal order on these practices; it simply takes them as they are, identifiable through a common legal lineage. The term ‘paranormal practices’ does not derive from the text of the statutes, but rather, serves as an analytical construct adopted for the purposes of developing a genealogy. For that reason, it is not necessary to enter the genealogy with a strictly pre-conceived notion of what the paranormal includes, though many have laboured at great effort to produce ‘universal’ conceptions of what magic and the paranormal might entail.⁹⁹ This would be a methodological fault: the social meanings of these terms have shifted dramatically, and continually shift through discourse and legal construction, thus the risk of reductive over-simplification would obscure the focus of this thesis on contingency and historical specificity.

2.4 Conclusion

To conclude, this chapter has explored the methodology and theoretical framework underpinning the thesis. It has argued that a genealogy of how law has constructed paranormal practices can help us perceive the implicit ontological preconditions that characterise English law, and legal reasoning, under capitalism. Indeed, tracing legal constructions of the paranormal can function as an indicator of the underpinning rationalities of the legal system as they developed over time, revealing how they contrast with one another and providing the opportunity to interrogate how, and why, those contrasts came to be. To this end, Chapter Three begins the genealogy at its roots with the Witchcraft Acts of 1542, 1563, and 1604. It examines how, and why, early modern law constructed what can now be understood as paranormal practices not as consumer products or expressions of fraud, but rather through the lens of witchcraft – reifying those practices as forms of tangible, yet mystical, harm.

⁹⁹ For instance, Thomas writes that ‘magic postulated occult forces of nature which the magician earned to control, whereas religion assumed the direction of the world by a conscious agent who could only be deflected from his purpose by prayer and supplication’: Keith Thomas, *Religion and the Decline of Magic* (New ed, Penguin, 2003) 46. Hutton explores several other definitions, concluding that magic amounts to ‘any formalized practices by human beings designed to achieve particular ends by the control, manipulation and direction of supernatural power or of spiritual power concealed within the natural world’: Hutton (n 94) x.

3. Paranormal Practices in Early Modern Law: Witchcraft and the English Legal System, 1542-1736

3.1 Introduction

This chapter begins the genealogy tracing how paranormal practices have been constructed throughout English legal history. In so doing, it locates the roots of the modern framework regulating psychic scams and fraudulent mediumship in the Witchcraft Acts of 1542, 1563, and 1604. Prior to 1542, the paranormal practice of ‘witchcraft’ exclusively fell under the jurisdiction of the ecclesiastical courts. However, following the ratification of the Witchcraft Act 1542, ‘performing’ witchcraft became a statutory offence; this brought witchcraft, and paranormal practices, within the ambit of secular law. Indeed, this legal-historical moment set the stage for future developments, culminating in the integration of paranormal practices into the consumer protection regime by the Consumer Protection from Unfair Trading Regulations 2008, the legislation regulating the exchange of paranormal services today.

In this light, the chapter goes beyond the legal history of witchcraft *per se*, exploring the structural conditions allowed the early modern legal system to reify witchcraft as a ‘tangible’ phenomenon. It raises the questions: in what sense were early modern legal conditions conducive to, or facilitative of, the ways through which witchcraft was constructed in early modern legislation and at trial? And why are the structural features often theorised as characteristic of law under capitalism not necessarily ‘favourable’ to conceptualising paranormal practices in the same manner? To reiterate the methodology described in Chapter Two, the following analysis is principally concerned with the preconditions that engendered the rise and decline of witchcraft as a *legal* concept, rather than empirical details about individual cases. This approach does not deny the (structurally conditioned) agency of the actors involved, but rather emphasises the changing structures within which they were operating.

Section 3.2 explores the socio-historical background of the English Witchcraft Acts. Section 3.3 then examines three features of the witch-trials that expose the structural bases of witchcraft’s legal conceptualisation, and its incompatibility with capitalist juridical rationality: (1) the legal-institutional foundations of witchcraft, specifically the role of the emerging state

in centralising, secularising, and administering the witch-trials; (2) the ‘substance’ or ‘harm’ embodied by the legal concept of witchcraft, and its relation to the accusatorial procedure along with the emergence of contract law, law’s formal autonomy as a system, and the technical doctrine of precedent; and (3) the forms of evidence admitted by courts that were relied on to ‘prove’ the commission of witchcraft, and their relation to the emergence of property rights, the rule of law, and the rights-bearing legal subject.

3.2 The English Witch-Trials in Context

Understandings of witchcraft in early modern Europe emerged from a historically specific set of intellectual, cultural, and political conditions: natural philosophy posited and supported the possibility of ‘natural magical theory’; historical accounts ‘espoused an apocalyptic and prophetic understanding of the past and the events of their own times’; religious authorities emphasised a conception of ‘deviance derived from a providential interpretation of misfortune’; and dominant political bodies were ‘built on a mystical and quasi-sacerdotal view of magistracy.’¹ A detailed evaluation of the intricacies of these cognitive frameworks, and how they, along with wider material conditions, constituted the structures in which discourse about witchcraft manifested exceeds the scope of this thesis. However, some elements of these frameworks will be referenced as this section explores the background to English witchcraft in the early modern period with a view to placing the legislation, and the trials, in their historical context.

3.2.1 The Witchcraft Laws of Europe

Various civilisations across the globe have, throughout history, formulated laws regarding practices analogous to ‘witchcraft’. Witchcraft and magic were subject to formal rules in Ancient Egypt,² Hammurabi’s Code,³ and Ancient Greece.⁴ Under Roman law, following the ban on *incantare* (‘incantations’) in the Eighth of the Twelve Tables, the Lex Cornelia 81 BC

¹ Stuart Clark, *Thinking with Demons: The Idea of Witchcraft in Early Modern Europe* (Oxford University Press, 1999) 689.

² On *heka* (‘magic’) and the trials of magicians in Ancient Egypt, see Friedhelm Hoffmann, ‘Ancient Egypt’ in David Collins (ed), *The Cambridge History of Magic and Witchcraft in the West* (Cambridge University Press, 2015) 52-82; and N J van Blerk, ‘The Emergence of Law in Ancient Egypt: The Role of *Maat*’ (2018) 24(1) *Fundamina* 69-88, 72.

³ George Vincent, ‘The Laws of Hammurabi’ (1904) 9(6) *American Journal of Sociology* 737-754.

⁴ Ronald Hutton, *The Witch: A History of Fear, From Ancient Times to the Present* (Yale University Press, 2017) 60-61.

explicitly banned covert forms of murder – including *veneficium*, which, like the Greek laws against *pharmakos*, consisted of murder via poison, often also referencing the use of magical spells.⁵ By the 3rd century, the Lex Cornelia was applied to love potions, *tabellae defixionum* ('curse tablets'),⁶ the possession of magical books, and other 'magical' practices.⁷ In the later Empire, Justinian dedicated a section of his Codes to *De maleficis et mathematicis et ceteris similibus* ('of magicians, astrologers, and all that is similar'), specifically targeting inflictors of *maleficium* (later conceptualised as 'magical harm', but initially referring simply to a 'wicked deed' or 'crime') and summoners of *daemones* ('spirits,' not to be confused with Biblical demons).⁸ The Roman law principles of *maleficium* and summoning *daemones* codified ideas about witchcraft that would inform early modern Continental and English laws in relation to witchcraft, particularly when witchcraft was repositioned as a heresy following the Christianisation of the Empire.⁹

Most laws in Europe dealing with witchcraft after the fall of Rome were 'barbarian' legal codes like the Salic Law in France in the 6th century AD, the Lombard Code of King Rothar in Italy in 643, Charlemagne's Capitulary for the Saxons in 789, the decree of Charles the Bald of France in 873, and so forth.¹⁰ Nevertheless, Roman legal ideas about witchcraft pervaded much of the law underpinning the early modern witch-trials. Over the 11th-13th centuries, following the Papal Revolution, 'there emerged for the first time strong central authorities, both ecclesiastical and secular, whose control reached down, through delegated officials.'¹¹ Contemporaneously, a class of professional lawyers was established, which helped codify a 'developing body of legal principles and procedures.'¹² Within these conditions, the seeds of the first institutionalised witch-hunts took root, syncretising Roman conceptual framing – of *maleficium* and entreating with *daemones* – in line with Catholic theology.

⁵ Clyde Pharr, 'The Interdiction of Magic in Roman Law' (1932) 63 Transactions and Proceedings of the American Philological Society 269-295, 281.

⁶ See Geoff Adams, 'The Social and Cultural Implications of Curse Tablets [*Defixiones*] in Britain and on the Continent' (2006) 7 *Studia Humaniora Tartuensia* 1-15.

⁷ Hutton (n 4) 61-62.

⁸ James B Rives, 'Magic in Roman Law: The Reconstruction of a Crime' (2003) 22(2) *Classical Antiquity* 313-339, 322.

⁹ Pharr (n 5) 294-295.

¹⁰ Norman Cohn, *Europe's Inner Demons: The Demonization of Christians in Medieval Christendom* (Pimlico, 1993) 164-165.

¹¹ Harold Berman, *Law and Revolution Vol I: The Formation of the Western Legal Tradition* (Harvard University Press, 1983) 85.

¹² *Ibid.*

The newly emerging medieval legal system offered the means through which the Catholic church could effect a series of spiritual policies. The Biblical ‘assimilation of magic with heresy’ was endorsed in a 1258 papal bull issued by Pope Alexander IV, supplemented by a number of influential works in the demonological tradition like the *Directorium Inquisitorium* (1376), *Formicarius* (1437), and the infamous *Malleus Maleficarum* (1487) by Dominican clergyman Heinrich Kramer, which instructed courts on prosecuting witches.¹³ In response to a request from Kramer, Pope Innocent VIII issued the papal bull *summis desiderantes affectibus* in 1484, authorising the Inquisition to pursue the destruction of witchcraft.¹⁴

In the wake of these policies, ten years before the first English Witchcraft Act, the *Constitutio Criminalis Carolina* of 1532 introduced sanctions for those convicted of *zauberei* (‘sorcery’) in the Holy Roman Empire.¹⁵ This was one of the first pieces of legislation related to witchcraft passed by a secular, centralised body.¹⁶ Against this backdrop, the first English Witchcraft Act was ratified under Henry VIII in 1542, no doubt partially inspired by the *Constitutio Criminalis Carolina*. This Act, however, was passed in the distinct magical culture of early modern England, and the English legal-historical context of ecclesiastical and secular conceptions of paranormal practices prior to the Witchcraft Act 1542, both of which are discussed in Section 3.2.2.

3.2.2 The Magical Landscape of Early Modern England

Despite its heterogeneity, it can be broadly said that the magical culture of early modern England was shaped in an intellectual environment in which much of the ‘natural’ world was explained through a rationality with little distinction cleaved between the theological and the natural-philosophical, between the religious and the mundane.¹⁷ In other words, ‘magic’ and ‘science’ were often, in principle, comrades, rather than opponents, notwithstanding religious intolerance of pagan magical practices. Within this framing of natural reality, the practice of

¹³ Brian Levack, ‘Witchcraft and the Law’ in Brian Levack (ed), *Oxford Handbook of Early Modern Witchcraft* (Oxford University Press, 2013) 468-483, 470.

¹⁴ Alan Kors and Edward Peters, *Witchcraft in Europe, 400-1700* (2nd ed, University of Pennsylvania Press, 2000) 177-180.

¹⁵ Johannes Dillinger, ‘Politics, State-building, and Witch-hunting’ in Brian Levack (ed), *The Oxford Handbook of Early Modern Witchcraft* (Oxford University Press, 2013) 528-547, 531; Wolfgang Behringer, ‘Climatic Change and Witch-Hunting: The Impact of the Little Ice Age on Mentalities’ (1999) 43 *Climatic Change* 335-351, 337.

¹⁶ Gregory Durston, *Crimen Exceptum: The English Witch Prosecution in Context* (Waterside Press, 2019) 92-93.

¹⁷ Clark (n 1) 151-159, 437-444.

the occult was fragmented and polycentric, informed by a diversity of intellectual and theological traditions. While ‘grimoires’ (or ‘spell books’) did exist to encode ‘magical’ knowledge, there was no ‘standardised’ magical tradition, as opposed to mainstream religious institutions.

Many historical approaches to early modern magical practices differentiate between ‘witches’ and ‘cunning folk’,¹⁸ casting a distinction between witches who inflicted *harm* by magic and the cunning folk who offered more benign services, like healing or protection from thieves.¹⁹ In general, however, there is no reason why a cunning man or woman could not also be a witch – it was simply a matter of which occult practices they were willing to perform. Cunning folk may have been common throughout the kingdom, functioning as service-providers like any other. Writing in 1621, the clergyman Robert Burton (1577-1640) suggested there were ‘cunning men, wizards, and white witches, as they call them, in every village, which, if they be sought unto, will help almost all infirmities of body and mind.’²⁰ Despite comments like these, it remains challenging to know how prevalent cunning folk really were in early modern England.²¹

Magic was not exclusively the purview of the lower classes; it also enjoyed some respect amongst the social elite. Astrology, for example, was treated in some quarters as a respected field of study, charting the relationship between the orientation of sublunary and celestial bodies and phenomena in the human world. For instance, Elias Ashmole (1617-1692), John Dee (1527-1608 or -1609), and Richard Napier (1559-1634), scholars in natural history, mathematics, and medicine, were also renowned practitioners of ‘judicial astrology’. Similarly, scholars like Ashmole and Dee engaged in the practice of alchemy, along with the summoning of the spirits of the dead (then called ‘necromancy’, later ‘mediumship’ or ‘Spiritualism’).²²

As mentioned earlier, witchcraft in England generally referred to destructive magic, such as the infliction of disease or the malefic manipulation of the weather (a particularly troublesome

¹⁸ ‘Cunning’ in this instance comes from the Anglo-Saxon term *cunnan*, meaning simply ‘to know’.

¹⁹ Owen Davies, ‘Cunning-Folk in England and Wales during the Eighteenth and Nineteenth Centuries’ (1997) 8(1) *Rural History* 91-107.

²⁰ Robert Burton, *Anatomy of Melancholy* (1621) as quoted in Keith Thomas, *Religion and the Decline of Magic* (New ed, Penguin, 2003) 209.

²¹ Alan Macfarlane, *Witchcraft in Tudor and Stuart England: A Regional and Comparative Study* (Routledge, 1970) 115.

²² Richard Kieckhefer, *Forbidden Rites: A Necromancer’s Manual of the Fifteenth Century* (Pennsylvania State University Press, 1998) 97.

fear for King James VI of Scotland).²³ Yet, prior to the first Witchcraft Act of 1542, witchcraft was ‘treated as a matter for the ecclesiastical courts, where usually minor witchcraft offences fell for decision and sanctions had been lenient and directed more to penance and atonement than punishment.’²⁴ As Durston notes, in the sizeable Canterbury diocese, there were approximately two or three cases per year, with most defendants being simply cautioned not to repeat their offence.²⁵ When witchcraft appeared in secular cases, it was usually considered a means of perpetrating some other act, rather than a practice problematised in its own right, as in the 1441 trial of Margery Jourdemayne, where the accused’s use of a wax effigy of the king was legally relevant insofar as it revealed her treason via black magic.

Keith Thomas questions, in light of extensive medieval belief in witches, why there was no protracted campaign of witch-hunting until the early modern period.²⁶ In response, Unsworth considers whether it was because the law ‘changed in such a way as to encourage an upsurge in prosecutions.’²⁷ As Levack writes, it would not be ‘until judicial authorities defined the alleged activity of witches in statutes, edicts, or law codes’ that the witch-trials could begin in earnest.²⁸ In other words, the law had not yet developed the administrative or conceptual infrastructure appropriate to effectuate widespread witch-hunting, nor had it developed the apparatuses with which it would eventually construct its own stigmatising conception of the witch. Change would begin in 1542, with the ratification of the first Witchcraft Act.

3.2.3 The Witchcraft Acts: A Legal-Historical Overview

3.2.3.1 Witchcraft Act 1542

The first secular Witchcraft Act of 1542, the ‘Henrician’ Act, defined witchcraft as a felony, the punishment for which was generally hanging, not burning, which was reserved for cases featuring petty treason.²⁹ There was no opportunity for the benefit of clergy or sanctuary, while goods and land would be forfeit upon conviction. The primary form of practice criminalised

²³ Behringer (n 15) 342.

²⁴ C R Unsworth, ‘Witchcraft Beliefs and Criminal Procedure in Early Modern England’ in Thomas G Watkin (ed), *Legal Record and Historical Reality: Proceedings of the Eighth British Legal History Conference, Cardiff, 1987* (Hambledon Press, 1989) 71-98, 75.

²⁵ Durston (n 16) 20-21.

²⁶ Thomas (n 20) 548.

²⁷ Unsworth (n 24) 85.

²⁸ Levack (n 13) 468.

²⁹ AD 1542 Hen VIII, c 8.

by the Henrician Act was *maleficium*, the magical infliction of harm, though the use of magic to search for treasure, to recover lost or stolen goods, or to ‘provoke any person to unlawful love’ also constituted an offence. Consequently, the ‘main activities of the cunning [folk] were blatantly illegal’, even if they were not the Act’s principal targets.³⁰

The Witchcraft Act 1542 likely drew inspiration from the sweeping legal changes occurring around the same time on the Continent, including the Carolina Code. The 1542 Act’s proximity to the Reformation might suggest that it also represented part of the Crown’s attempt to wrest spiritual authority from the church, at a time of great change in relations between the church and the state. Even so, this begs the question as to why the punishment for witchcraft became so strict during this period.

While the influence of the Reformation and European legal codes was undoubtedly relevant, the introduction of witchcraft as a secular offence may also have been an attempt to fill a legal lacuna, specifically related to treasonous prophecies. Prophecies in early modern England were part of a wider cognitive system within which symbolically, or spiritually, *willing* harm to a person was tantamount, or at least morally comparable, to directly, physically *inflicting* that harm on the victim, as will be discussed in Section 3.3. Meanwhile, some prophets also threatened a more tangible form of harm – the incitement of rebellion. Treasonous prophecies thus were seen as threatening Henry VIII’s tumultuous rule following his second marriage and the establishment of the Anglican church, yet the Crown lacked the statutory devices with which to counter them. This leads some scholars to question whether the Witchcraft Act 1542 was aimed at dealing with treasonous seers and prophets, bringing us to the matter of treason law in general.

The history of treason law in England, Maitland contends, has ‘more than one centre’.³¹ Feudal norms of loyalty were directed towards the clan or family, on the one hand, and the bond to one’s lord or king on the other, and included not merely the *infliction* of harm by one’s betrayal, but also the plotting of harm.³² Conviction of treason for betrayal of the Crown led to a forfeiture of a defendant’s possessions and land, whereas a peasant’s felony resulted in escheat

³⁰ Thomas (n 20) 292.

³¹ Frederick Pollock and Frederic Maitland, *The History of English Law Before the Time of Edward I* (Reissue ed, Cambridge University Press, 1968) 503.

³² *Ibid* 503-504.

to one's lord. Eventually, tensions between the aristocracy and the Crown over the political trials of lords led to assaults on the Crown's policy of treason, ultimately producing the Treason Act 1351.

Within two hundred years of the Treason Act 1351, Henry VIII faced resistance from many sources, some of which were bolstered by the symbology of prophecy. One example is Elizabeth Barton (1506-1534), the Maid of Kent, who prophesied that Henry would die and that his second marriage would end in ruin.³³ Barton had, since 1527, vehemently opposed his divorce. Fearing Barton's considerable influence, the government had her arrested in November 1533 and tried in Star Chamber.³⁴ While Henry wished for her to be convicted as a traitor, 'verbal treason was not yet criminal by statute,' in that it did not fall under the statutory definition of 'compassing' the king's death – she merely had *visions* of the collapse of Henry's marriage and the impotence of his reign.³⁵

Prophecy was simultaneously motivating resistance in the North, where discontent had lingered since the War of the Roses and Henry VII's accession in August 1485. Further opposition to Thomas Cromwell's expansion of governmental authority in the North, along with land enclosures and the dissolution of the monasteries, coalesced in the Pilgrimage of Grace in 1536, in which Robert Aske (1500-1537) mustered 30,000 armed men in defiance of Henrician rule. The Crown crushed the insurgence, though it became clear that prophecies initiated by institutions like the Furness monastery concerning the illegitimacy of Henry's reign had inflamed tensions and rebellious ambitions.³⁶

Against an outbreak of other anti-Henrician prophecies throughout the realm, these are speculated to have caused great anxiety amongst the government and Crown to deal with a surge of 'magical' opposition to Henry's rule.³⁷ Though the government sought to update the Treason Act 1351 in 1530, their objectives were not realised until the ratification of the Succession Act 1534. Nevertheless, as Van Patten opines, 'if the government was seeking a monopoly on opinion, it soon found that the Succession Act was insufficient' and the tumult

³³ Dom David Knowles, *The Religious Orders in England* (Cambridge University Press, 1979) 182-192

³⁴ Jonathan Van Patten, 'Magic, Prophecy, and the Law of Treason in Reformation England' (1983) 27(1) *American Journal of Legal History* 1-32, 9.

³⁵ Knowles (n 33) 188.

³⁶ Van Patten (n 34) 14.

³⁷ Durston (n 16) 92.

caused ‘by the break with Rome went far beyond the legitimacy of marriage...[and] Henry was repeatedly labelled a heretic.’³⁸ In a legislative campaign to cure any loopholes, another treason statute was passed in 1534, and the Act Extinguishing the Authority of the Bishop of Rome was passed in 1536.³⁹

Again, in a cognitive environment in which distinctions between *willing* and tangibly *effecting* harm to a person were not clearly made, particularly in the context of magic and occultism, prophecy had a double edge – both as an incitement of rebellion *and* as a direct instrument of destruction.⁴⁰ Indeed, understanding Henry VIII’s concerns about prophecies requires us to engage in ‘a recharacterization of rationality and political realism in Tudor society,’ not merely in the scope of the law, but in magical beliefs more generally.⁴¹ The power of symbols and words was not underestimated in Tudor society: to speak of the death of an individual, a family, or similar was often considered as significant as actively willing it into being.⁴² As such, not only did these individuals have to be punished for the insurgency they threatened to incite, but beyond that, it may have been thought that oracles canvassing the monarch’s death were, in some sense, also seen as ‘causing’ it to happen.

Either way, the destructive use of ‘magic’ was conceived of as a real threat to the Crown, at a time where ‘Cromwell and Cranmer were in charge of Church and State, the one bent on eliminating all opposition to what was now *fait accompli*... devoid of all respect for mystics.’⁴³ Thus, against this catalogue of statutes related to treason, it is arguable that the Witchcraft Act 1542 was intended, amongst other reasons related to the post-Reformation consolidation of Anglican authority, to counter the insurrectionary political possibilities engendered by prophecy and witchcraft. Whether it was deployed in practice for that purpose is another question altogether. For now, Section 3.2.3.2 proceeds to examine the legislation that replaced the 1542 Act 21 years after its promulgation: the Witchcraft Act 1563.

3.2.3.2 Witchcraft Act 1563

³⁸ Van Patten (n 34) 10.

³⁹ G R Elton, *Policy and Police: The Enforcement of the Reformation in the Age of Thomas Cromwell* (Cambridge University Press, 1972) 291-293.

⁴⁰ Van Patten (n 34) 19.

⁴¹ Ibid 13.

⁴² Ibid.

⁴³ Knowles (n 33) 186.

Few prosecutions were made under the Henrician Witchcraft Act 1542. It was repealed in 1547 by Edward VI during a programme of legislative overhauls, possibly inadvertently.⁴⁴ Despite its rapid repeal, Henry VIII's Witchcraft Act established a cognitive framework for the legal conceptualisation, and prosecution, of witchcraft, which was later largely replicated, and expanded, by the Elizabethan Witchcraft Act 1563.⁴⁵ The latter created a bifurcated approach to criminalising witchcraft. On the one hand, it prescribed the death penalty for those who had used witchcraft to kill another person. Meanwhile, the use of witchcraft, including via 'invocations and conjurations of evil spirits', to cause damage to the body, or to another person's goods or chattels, would lead to a year of imprisonment without bail and quarterly appearances in the pillory for six hours in a market town on their first offence. On second offence, they would be put to death.

The use of magic by cunning folk was subject to lesser sanctions. For instance, utilising magic to locate buried treasure would lead, as with a first offence of non-murderous *maleficium*, to a year's imprisonment with quarterly appearances in the pillory. For second time offenders, the penalty was the forfeiture of goods and chattels to the Crown, and life imprisonment. Thus, the Elizabethan Act was more technically and conceptually 'sophisticated' than the Henrician Act – with its scalar approach to penalties – while remaining consistent in its formulation of paranormal practices *qua* witchcraft as both efficacious and worthy of persecution.⁴⁶

The Elizabethan and Jacobean Acts provided the legislative infrastructure for most recorded English witch-trials. Yet, like the Henrician Act, Elizabeth I's Witchcraft Act had unclear legislative motives. The Act was likely the outcome of two forces: an attempt on the part of the Privy Council to restore legislation that, perhaps, was not 'meant' to have been repealed in the first place; and, relatedly, as part of a bundle of legislative mechanisms to counter threats to the Protestant Queen.⁴⁷

⁴⁴ AD 1547, 1 Edw VI, c 12. See G R Elton, *The Parliament of England, 1559-1581* (Cambridge University Press, 1986) 110.

⁴⁵ AD 1563, 5 Eliz, c 16.

⁴⁶ Indeed, this trend is observable in Elizabethan legislation more broadly. See, for instance, the contrasts between the Statute of Artificers 1563 and the Statute of Labourers 1351: the Statute of Artificers provides more formal definitions and a sharper schema of penalties and procedures than the Statute of Labourers, possibly in reflection of a wider process of 'maturation' at play in the 16th century English legal system.

⁴⁷ James Sharpe, *Instruments of Darkness: Witchcraft in Early Modern England* (Reprint ed, University of Pennsylvania Press, 1997) 88-89.

John Jewel (1522-1571), who would go on to become Bishop of Salisbury, advised Elizabeth about the threat posed to her by witchcraft in a letter sent over the winter of 1559-1560.⁴⁸ Likewise, the Bishop of London, Edmund Grindal (1519-1583), wrote to Elizabeth's adviser, William Cecil (1520-1598), in 1561, sounding the alarm about the absence of secular witchcraft laws.⁴⁹ Some witchcraft historians draw on these letters to propose that the Elizabethan witchcraft bill was ratified in a period of unease relating to Catholic use of sorcery against the new monarch to restore Marian rule.⁵⁰ Noting another Act of 1580 against seditious words, including prophecies, Sharpe writes that 'there can be little doubt that [the Elizabethan legislation] was seen, both in the Commons and in governmental circles, as part of a wider legislative programme aimed at ensuring the security of the Elizabethan regime' against magical political opposition.⁵¹

Despite anxieties over the absence of secular mechanisms for dealing with witchcraft at the inception of Elizabeth's reign, it took four years for the Witchcraft Act 1563 to be ratified in full. In 1559, a bill entered the House of Commons intended to replace several crimes abolished by Edward VI, including witchcraft.⁵² While this bill did not make it through the House of Lords, it was brought back into the House of Commons in 1563, with some amendments concerning the robbery of masters by servants; once again, it was rejected by the Lords. This omnibus bill splintered into four individual bills, including the Witchcraft Act 1563, which ultimately entered into law, and survived on the books until its repeal by the Witchcraft Act 1604.

3.2.3.3 Witchcraft Act 1604

Elizabeth I's Witchcraft Act 1563 was the defining legislation for the witch-trials until its replacement by the Witchcraft Act 1604,⁵³ ratified following the accession of King James I. James I developed a keen, theologically-driven interest in witches during his time as king of Scotland, fearing that witches were responsible for the storm that nearly capsized his ship while returning from Denmark on one occasion.⁵⁴ Multiple defendants were convicted for this under

⁴⁸ Durston (n 16) 95.

⁴⁹ Ibid.

⁵⁰ Ibid 95-96.

⁵¹ Sharpe (n 47) 88-89.

⁵² Elton (n 44) 110-111.

⁵³ AD 1604, 1 Jac I, c 12.

⁵⁴ Dillinger (n 15) 531.

the Scottish Witchcraft Act 1563 during the North Berwick witch-trials.⁵⁵ James attended the trials personally, and wrote the philosophical treatise *Daemonologie* (1597), endorsing a view of witches as makers of deals with evil spirits – a concept that was, at the time, relatively uncommon in English law, but prevalent in Continental and, increasingly, Scottish jurisprudence.⁵⁶

The accession of James I to the English Crown suggested that the rising trend of witch-trials in the closing years of Elizabeth's reign would continue, and categorically expand.⁵⁷ In the first year of James I's reign, Parliament promulgated the Witchcraft Act 1604, possibly to appeal to the new monarch's sensibilities (even if, by the 1600s, James's view of witchcraft was becoming increasingly sceptical).⁵⁸ The 1604 Act made the practices of the cunning folk, activities like finding treasure or stolen goods, provoking a person to unlawful love, and the use of witchcraft with *intent* to harm, punishable by death on a second offence.

More notably, the 1604 Act extended the prohibition in the 1563 Act on 'invocations of evil spirits' to cover 'compacts' (agreements) with demons and evil spirits. It also prohibited taking the dead from their graves for use in necromantic witchcraft, which, like the ban on devil compacts, was a conceptualisation of witchcraft that had been popular in trials on the Continent and in Scotland, originating in Roman and canon law. The invocation of evil spirits was prohibited in the 1563 Act, but the new legislation introduced the death penalty for those who engaged in pact-making, giving these invocations more defined form: in particular, it became an offence to 'consult, covenant with, entertain, employ, feed, or reward any evil and wicked spirit to or for any purpose.' Distinct to the 1604 legislation, then, was how it gave increased focus to a form of witchcraft that diverged from the earlier English focus on *maleficium*, with suspicion directed towards diabolic agreements.

Regardless of whether James I had become more sceptical of witches by the 17th century, a more relevant question for this chapter is: why did English law, from the 1600s and beyond,

⁵⁵ See Christina Lerner, 'James VI and I and Witchcraft' in Alan Smith (ed), *The Reign of James VI and I* (Macmillan, 1973) 74-90.

⁵⁶ Stuart Clark, 'King James VI's *Daemonologie*: Witchcraft and Kingship' in Sydney Anglo (ed), *The Damned Art: Essays in the Literature of Witchcraft* (Routledge and Kegan Paul Books, 1977) 156-181, 162-164.

⁵⁷ Brian Levack, 'Possession, Witchcraft, and the Law in Jacobean England' (1996) 52(5) *Washington and Lee Law Review* 1613-1640.

⁵⁸ *Ibid* 1626. Levack writes that James I had 'begun to take delight' in exposing false claims of witchcraft, as in the 1606 trial of Anne Gunter in Star Chamber.

begin to accommodate a form of witchcraft embedded in the logic of deals and voluntary assumption of responsibility? What shifts had occurred in the underlying, structural conditions of possibility in early modern law? This requires a discussion of the conditions framing the construction of witchcraft more generally, which forms the subject matter of Section 3.3.

3.3 The Logic of Witchcraft: The Conditions of Possibility for the Legal Construction of the Witch

This section examines the legal conceptualisation of witchcraft, assessing how the courts operated ‘as workshops for the production of witchcraft knowledge’,⁵⁹ and how the implicit, structural features of the law conditioned the process of constructing the witch. To this end, it explores the conditions of possibility sustaining three elements of the witch-trials, equating them to aspects of early modern law’s ‘transitional’ rationality – that is, a rationality transitioning *from* feudal *to* capitalist law.⁶⁰ This was a period in which feudal structures – including legal structures, particularly those related to legal identity as being rooted in status as mediated by land ownership – were beginning to decay, while capitalist structures, and social forces, were beginning to take their place. The transitional qualities of early modern law, this section argues, were reflected in how law reified witchcraft as, in some sense, an ‘empirical’ phenomenon.

This reification, this section (along with Chapters Four and Five) further contends, would be less possible in a comprehensively capitalistic legal system because the emergence of a capitalist legal rationality tended, and tends, to preclude the availability of the juridical ‘tools’ and legal-ontological preconditions conducive to such a construction of paranormality. By contrast, the emergence of this rationality made it more likely that paranormal practices would be conceptualised through a lens governed by empirical, natural-scientific observations and other values related to private proprietary ownership and exchange – through the lens, that is, of concepts like fraud and consumer protection, which are largely contingent on the social relations and positions integral to capitalism.

⁵⁹ Unsworth (n 24) 73.

⁶⁰ This is not to suggest, in some teleological sense, that the transition was linear, nor is it to imply that the point at which feudal law ‘ends’ and capitalist law ‘begins’ can be cleanly identified. Rather, over time, a movement from one rationality to another can be perceived, even if this movement was inconsistent, characterised by periods of stasis and regression, etc. Thus, more feudal features can be detected in one period, and more capitalistic features in another.

During the operation of the Witchcraft Acts, English law was characterised by the forms of action, rather than a technical meta-rule of precedent; it was not yet an autonomous, ‘operationally closed’ system of normative reasoning, in the sense discussed in Chapter Two.⁶¹ Law was formalistic, often revealing the lingering influence of a theological worldview, with trials premised on (often dubious) ‘fact-finding’ rather than legal doctrine in the absence of a codifying mechanism of precedent. Fundamentally, the law was not structured around the concept of the formally equal legal subject with capacity to own and dispose of private property rights good against the world, since, because of the dominance of the forms of action, concepts of private property ownership and contract had not yet crystallised as the organising principles of legal rationality. The abstracted individual, with their formal freedom and panoply of rights and voluntarily assumed obligations, was not yet the nucleus around which all other legal principles – themselves having formed an ordered hierarchy, governed by the state, the rule of law, and the technical doctrine of precedent – could condense.

In this light, this section argues that the following preconditions were central to the legal construction of the witch during the 16th-early 18th centuries, standing in contrast to the conditions that emerged later and would become key to the reformulation of paranormal practices as fraud: (1) the centralisation and secularisation of the administrative bodies that dealt with witchcraft, and how this foreshadowed the emergence of the state with a monopoly on ‘legitimate’ violence; (2) the form of harm underpinning witchcraft, particularly how *maleficium* was contingent on an absence of doctrines of precedent and, by extension, causation, and how later ‘devil compacts’ related to the ‘contractualisation’ of the law; and (3) the methods used for ‘proving’ witchcraft, including rules of admissible evidence (or lack thereof), and how they interacted with the emergence of the rights-bearing defendant.

3.3.1 Witchcraft and the Centralised State

As mentioned in Section 3.2, the secular Witchcraft Acts were not the first mechanism through which witchcraft was constructed and prosecuted in England.⁶² Witchcraft had fallen under the

⁶¹ Simon Deakin, ‘Legal Evolution: Integrating Economic and Systemic Approaches’ (2011) Centre for Business Research, University of Cambridge Working Paper No 424, 15.

⁶² The term ‘state’ in this section should not be confused with the historically specific concept of the ‘nation state’, which refers to a socio-political body with sovereignty over internal affairs and, relatedly, a monopoly on the legitimate use of internal violence. Such a state recognises, and stands in a relation of equality with, the

jurisdiction of the ecclesiastical courts.⁶³ However, the course of the Reformation saw the transfer of ‘spiritual authority and spiritual responsibilities to the secular lawmakers of the various principalities and nation-states, whose supreme authorities now embraced all the jurisdictions that had previously been autonomous.’⁶⁴ This jurisdictional shift engendered ‘the redefinition of a number of offences as being outside of clergy: sodomy, witchcraft, picking pockets’, and, Sharpe contends, ‘the laws against vagrants and the increased harshness of the criminal code’ in these offences ‘are symptomatic of a development of fundamental importance: the growing pretensions of the state.’⁶⁵ Resultantly, a crucial condition of possibility for the witch-trials was their institutional grounding in an expanding, though not yet consolidated, state apparatus.

By the 17th century, the ecclesiastical courts *de facto* handled only minor forms of witchcraft with which the secular courts did not generally concern themselves.⁶⁶ Although records continue to show ecclesiastical courts presiding over witchcraft as late as 1680 in Essex, the Royal Articles of 1628, for instance, saw the bishop enquiring as to whether ‘enchantments, sorceries, witchcrafts, or incantations, which *are not made felony by the statutes of this realm,*’ had been used by members of the addressees’ parishes.⁶⁷ Where witchcraft was treated as an ecclesiastical matter, the harm involved tended to be less severe, and, Rushton observes, very few ecclesiastical cases ‘refer to hurt or damage to people: they are mostly concerned with practising or believing in different types of charming or divination.’⁶⁸ That is, cases of *maleficium*, or magical harm, ceased to be tried in the ecclesiastical courts – yet, they form the basis of a significant proportion of cases in the secular English witch-trials.

Why was this displacement of witchcraft from the authority of the ecclesiastical courts to the common law courts possible, and what is its significance? While witchcraft was made into a

sovereignty, so defined, of other states. Here, ‘state’ refers to a set of relations showing signs of developing *into* the modern, capitalist state, as embodied by the Crown, Parliament, and the judiciary.

⁶³ Karen Jones and Michael Zell, ‘The Divels Speciall Instruments’: Women and Witchcraft before the ‘Great Witch-Hunt’ (2005) 30(1) *Social History* 45-63, 50.

⁶⁴ Harold Berman, *Law and Revolution Vol II: The Impact of the Protestant Reformation on the Western Legal Tradition* (New ed, Harvard University Press, 2006) ix-x.

⁶⁵ James Sharpe, *Crime in Early Modern England, 1550-1750* (2nd ed, Routledge, 2013) 24.

⁶⁶ Alan Macfarlane, *Witchcraft in Tudor and Stuart England: A Regional and Comparative Study* (2nd ed, Routledge, 1999) 67.

⁶⁷ Quoted in Alan Macfarlane, ‘Witchcraft in Tudor and Stuart Essex’ in J S Cockburn (ed), *Crime in England: 1550-1800* (Reprint ed, Routledge, 2016) 74-92.

⁶⁸ Peter Rushton, ‘Women, Witchcraft, and Slander in Early Modern England: Cases from the Church Courts of Durham, 1560-1675’ (1982) 18(1) *Northern History* 116-132, 119.

‘secular’ offence, it nevertheless reflected a focal point of early modern rationality – it spoke to the centrality of theology to how the early modern world was perceived, understood, and navigated by its inhabitants and institutions. The secular courts were ‘secular’ in the sense that the church lacked direct authority over the constitution and outcomes of their trials, yet the premises of religious belief still pervaded common law decision-making – the existence of ‘witchcraft’ as an offence serves as testimony to this. Centralised judicial bodies provided the mechanisms through which the Anglican worldview could be produced and reproduced, albeit as a conduit for the law of governmental, rather than ecclesiastical, authority: a worldview in which illegitimate magic, in the form of witchcraft, was not only treated as possible, but also, as a real danger that should be punished like other forms of social deviance.

Thus, it was not merely the ‘secular’ aspect of the common law courts that allowed them to ‘win’ authority over witchcraft from the ecclesiastical courts. It was not that they offered a forum free from the influence of Christianity within which cases of witchcraft could be argued, because English anti-witchcraft legislation implicitly reproduced an Anglican ontology. Rather, some other elements of the common law courts granted them a jurisdictional-competitive advantage, many of which emanated from the emerging logic of the common law, and the proto-capitalistic relations it was beginning to presuppose between individuals and the state.

Firstly, witchcraft’s enshrinement in centralised legislation was of fundamental importance for how the witch-trials operated. As Levack points out, ‘the passage of [witchcraft] legislation was essential for intensification of prosecution’ in various jurisdictions in Europe.⁶⁹ The expanding court system allowed witchcraft to be standardised to some extent, and to be given institutional entrenchment on a national scale. At the same time, Rushton suggests that the relative decline in witchcraft allegations in the church courts was in part due to the risk of retaliation by the accused via a defamation countersuit, which were common in the ecclesiastical arena while being interpreted more strictly in common law courts.⁷⁰ Notably, women were not legally empowered to bring a defamation retaliation in the secular courts, making a secular witchcraft accusation against them possibly more appealing to social rivals.⁷¹

⁶⁹ Levack (n 13) 470.

⁷⁰ Rushton (n 68) 116-132.

⁷¹ Ibid 132. See also Laura Gower, ‘Language, Power, and the Law: Women’s Slander Litigation in Early Modern London’ in Jennifer Kermode and Garthine Walker (eds), *Women, Crime and the Courts in Early Modern England* (Routledge, 1994) 26-47.

Other possible reasons for the draw of the secular, rather than ecclesiastical, courts as the legal battleground for the prosecution of witchcraft may be attributable to other matters plaguing the accessibility of the latter. Outhwaite, for instance, notes that excessive fees for using ecclesiastical courts in the late 16th century prompted criticism from many quarters, including common lawyers.⁷²

In terms of deeper structural shifts, Houlbrooke refers to ‘a series of changes which gravely undermined the authority and the efficiency of the church courts’ that followed the Reformation and the Crown’s desire to assert its legal supremacy over the church, such as statutory restrictions on the ambit of ecclesiastical jurisdiction and the ecclesiastical courts’ struggle to deal with contumacy (failure of defendants to appear).⁷³ Meanwhile, the common law courts were becoming increasingly standardised and administratively efficient in terms of trial procedures. Following the adoption of legislation like the Marian Statutes in 1555, JPs would assist the accuser in developing their case and gathering evidence.⁷⁴ As such, the JP’s ‘importance, and his potential workload,’ had been ‘consolidated and extended by central government’ owing to ‘perhaps 300’ statutes ‘between the mid fourteenth and late sixteenth centuries.’⁷⁵ Indeed, as Sharpe continues, the assize system had become ‘a remarkably neat means of enforcing the royal law in the localities,’ and owing to them and other mechanisms of centralised justice, ‘England was a much-governed country.’⁷⁶ Thus, as Darr posits, both in *de jure* and *de facto* terms, ‘the state began to construct an apparatus of investigation and prosecution’ that would later become vital to its role as the third party enforcer of legal rights and obligations under capitalism, and its capacity to handle crime was growing more robust.⁷⁷

Crucially, this is not to suggest that what was in place was akin to the historically contingent, capitalistic notion of a nation state. While the state, at this point, was developing its administrative capacities, it lacked other elements of a capitalistic nation state, such as its

⁷² R B Outhwaite, *The Rise and Fall of the English Ecclesiastical Courts, 1500-1860* (Cambridge University Press, 2006) 75.

⁷³ Ralph Houlbrooke, ‘Decline of Ecclesiastical Jurisdiction Under the Tudors’ in Rosemary O’Day and Felicity Heal (eds), *Continuity and Change: Personnel and Administration of the Church in England, 1500-1642* (Leicester University Press, 1976) 239-257, 244, 250.

⁷⁴ Christina Roodt, ‘A Historical Perspective on the Accusatory and Inquisitorial Systems’ (2004) 10 *Fundamina* 138-158, 151.

⁷⁵ Sharpe (n 65) 40.

⁷⁶ *Ibid* 57.

⁷⁷ Orna Alyagon Darr, *Marks of an Absolute Witch: Evidentiary Dilemmas in Early Modern England* (Routledge, 2011) 10.

recognition of the equal status of other states, a legal conception of its own internal sovereignty, a monopoly on the use of legitimate force conceived of in terms of rights and duties vis-à-vis legal subjects, and so on, conceptions that generally are seen as having emerged following the Peace of Westphalia 1648.⁷⁸ Such a form of state is constitutive of capitalism in that it can, *inter alia*, provide the legal system with its coercive normative authority, offering institutionalised protection to private property rights, but could not be said to have entirely coalesced at the time of the earlier witch-hunts. That said, reflecting the nature of the state at this time as in some sense ‘transitional’ between the feudal and capitalistic social orders, the law was becoming more and more underpinned by official, semi-bureaucratic machinery constructed, and reinforced, by royal and parliamentary decree, a machinery that was key to the relative ‘efficiency’ of secular witchcraft prosecutions.

English royal judges would travel on circuit, appoint grand juries, then summon petty juries to evaluate the innocence or guilt of the accused party. The country assizes – where most formal witch-trials were conducted – were populated by jurists with relatively significant legal expertise and training, operating as emanations of royal authority.⁷⁹ The judges administering the trials were educated on the points of law, and were therefore able to impose some measure of consistency on the trials (though, crucially, not through a formal, standardising meta-rule of precedent).⁸⁰ In principle, this centralised judicial oversight along with the stringencies of trial procedures meant that the influence of local gossip and rumour damaging the witch’s reputation was comparatively restrained at trial, even if this did not ubiquitously inoculate trials to such biases.⁸¹

Ultimately, then, the institutionalisation of the judiciary allowed witchcraft to become embedded as a concept in the minds of an emerging legal class while generally providing the conditions for its restricted application. Further, in the witch-trials, this shows the early signs of the emergence of a certain set of hierarchical relations – not between witch and victim, not between defendant and complainant, but between defendant and an institution of the emerging state. As such, one can observe in the witch-trials a developing differentiation between the law

⁷⁸ See Roland Axtmann, ‘The State of the State: The Model of the Modern State and its Contemporary Transformation’ (2004) 25(3) International Political Science Review 259-279.

⁷⁹ Dillinger (n 15) 541

⁸⁰ For a discussion of how the expertise of judges legitimated popular beliefs and practices, see Orna Alyagon Darr, ‘Experiments in the Courtroom: Social Dynamics and Spectacles of Proof in Early Modern English Witch Trials’ (2014) 39(1) Law and Social Inquiry 152-175. See also Durston (n 16) 34-37.

⁸¹ Darr (n 77) 2.

and private relations more generally, albeit not quite in the form that differentiation would assume under capitalism.

In any case, this relation between subject and state came to constitute a mode of witchcraft prosecution alien to previous eras: a mode that, on the one hand, made the legal construction of the witch possible on a national scale, while constraining that paradigm and assigning it boundaries.⁸² Moreover, the nascent procedural mechanisms and restitutionary techniques of the secular courts supported a system of logic favourable to the emerging social functions of witchcraft accusations, and to the relations that would ultimately come to constitute capitalist law. Rushton writes that the key punishments the church courts could deploy were ‘penance, or purgation before witnesses... to ensure a public confession rather than to punish crime,’ in contrast to how criminal sanctions were gradually coming to be conceptualised within the common law – i.e., as a punishment in response to a social harm unjustifiably inflicted on another legal actor.⁸³

As a parallel example, the ecclesiastical remedy of *fidei laesio* was being contemporaneously overtaken by the common law action of *assumpsit*, despite the operational, or functional, similarities between the two devices, both being legal means of enforcing agreements.⁸⁴ Helmholz points out two differences between *fidei laesio* and *assumpsit* that made the latter increasingly attractive – the form of harm and the remedies available. While the harm in *assumpsit* was damage to the plaintiff’s property and/or opportunity for profits, the harm in *fidei laesio* was rooted in the fact the defendant had ‘imperilled his soul’ and contradicted his oath, and so his subjective intentions were irrelevant.⁸⁵ Accordingly, the remedy in *fidei laesio* would be specific performance and/or public penance, whereas *assumpsit* involved the possibility of financial damages.⁸⁶

Indeed, within the secular courts, the ‘injured’ party was increasingly conceptualised as being entitled to what he was ‘owed’ in the form of damages or proportionate punishment recognising the social dimensions of the harm caused – a form of conceptualisation that would become more prevalent within the secularising dynamics of capitalist exchange. Likewise, given that

⁸² Dillinger (n 15) 528-547.

⁸³ Rushton (n 68) 122.

⁸⁴ Richard Helmholz, ‘Assumpsit and *Fidei Laesio*’ (1975) 91 Law Quarterly Review 406-433, 408, 427-428.

⁸⁵ Ibid 428.

⁸⁶ Ibid 424.

‘witch prosecutions in England were initiated by private persons who stood to make a small profit in a rather precarious enterprise’ (that profit being vengeance, defeat of a social rival, and so on), Rushton contends the preferential treatment afforded to the common law forum of witchcraft prosecution cannot be separated from both its conceptualisation of witchcraft as a kind of interpersonal, rather than personal-spiritual, harm – *maleficium* – and its remedies, grounded in an emerging logic focussing on the actions conducted *between* legal actors. This logic concentrated on actions constituting a relation akin to that of equivalent exchange, rather than the relation between the legal actor and his own ‘conscience’ or ‘soul’.⁸⁷

This, critically, dovetailed with the accusatorial mode of procedure that characterised English common law’s conception of a trial consisting of two parties engaging in horizontal legal conflict. This subject will be discussed more in Section 3.3.2.1, but for now, the church courts were reliant on forms of vertical enforcement of anti-heretical conceptions of witchcraft that lacked the robust institutionalisation enjoyed by the common law courts; meanwhile, secular witchcraft accusations could come from ‘below’, supported not only by the accusatorial procedure but also the way conflict, and the court’s response to that conflict, was conceptualised at common law. As such, the common law’s burgeoning conception of relations between legal actors, a conception that would ‘mature’ into the legal relation at the heart of English capitalist legal rationality, served as another factor supporting its victory over the ecclesiastical courts as the administrative body with authority to prosecute witchcraft, along with decreased risk of defamation counterclaims, increasing jurisdictional scope, and efficacy in prosecutions and ensuring compliance by the convicted.

Yet, the repositioning of witchcraft as a secular offence later produced an outcome that would contradict this development. Koyama and Johnson note that ‘as the fiscal demands on the state increased, central governments had an incentive to reorganize and coordinate the enforcement of judicial rules,’ a process which both *entrenched* witch-trials – by making them standardised and efficient – while also eventually compromising them, causing them to fall victim to the strictures of tightening evidential rules and doctrines of causation, *inter alia*, that would make witchcraft ‘unprovable’.⁸⁸ In other words, the secularisation and centralisation of witchcraft

⁸⁷ Elliott Currie, ‘Crimes Without Criminals: Witchcraft and its Control in Renaissance Europe’ (1968) 3(1) Law and Society Review 7-32, 25.

⁸⁸ Noel D Johnson and Mark Koyama, ‘Taxes, Lawyers, and the Decline of Witch Trials in France’ (2014) 57(1) Journal of Law and Economics 77-112, 78.

was a condition of possibility for it to take hold as a legal concept, while ultimately exposing the concept to law's changing rationality. The state's eventual monopoly on violence as a means of enforcing legal obligations and securing property rights and contractual obligations meant that witchcraft – once inserted into the machinery of the state apparatus – had 'nowhere else to go', so to speak, and was helpless when secular law's underlying conceptual structures became hostile towards it. This movement is evidenced by the legal 'progeny' of the Witchcraft Acts – namely, the Witchcraft Act 1736, which abolished the crime of witchcraft, and transformed paranormal practices into a form of fraud, by means of the same institutions that once gave witchcraft juridical life.

This, however, begs the question of how those structures became increasingly 'inhospitable' towards witchcraft as a legal concept. How did early modern law provide the conditions of possibility for the *substance* and *evidential* dimensions of witchcraft as a legal concept, and how did those conditions change? Sections 3.3.2 and 3.3.3 respectively will begin to address this issue by considering the 'harm' of witchcraft and its evidential foundations.

3.3.2 The Harm of Witchcraft

This section explores how the harm embodied by the legal concept of witchcraft was constructed, and the conditions that made this construction possible. It considers three aspects of the legal concept of witchcraft, including *maleficium*, the devil compact, and the lack of tests of causation in determining whether witchcraft had occurred.

3.3.2.1 *Maleficium*, the Accusatorial Procedure, and the Doctrine of Precedent

Historical analyses often emphasise how English witchcraft accusations generally featured claims of *maleficium* as opposed to the heretical devil pacts underpinning Continental trials. Some have attributed this to English law's accusatorial procedure, for reasons explored in this section.⁸⁹ As above, *maleficium* refers to the infliction of harm by black magic, a mechanism through which one party could use witchcraft to 'injure' another. Oftentimes, *maleficium* accusations followed a pattern describable as follows: (1) misfortune occurred (e.g., death of

⁸⁹ See Garthine Walker, 'The Strangeness of the Familiar' in Angela McShane and Garthine Walker (eds), *The Extraordinary and the Everyday in Early Modern England* (Palgrave Macmillan, 2010) 105-124.

cattle, crop blight, inexplicable illness, etc); (2) the victim would ‘blame’ someone (the ‘witch’ or ‘malefactor’) for that misfortune, usually someone with whom they were already in conflict; and (3) a formal witchcraft accusation would ensue.

One might rationalise the prominence of *maleficium* claims by arguing that accusers were simply ‘deluded’ by superstition, ignorance, or religious zealotry. Yet, explanations like these fail to reckon with the structural conditions that allowed those ‘irrational’ beliefs to be given legal expression. This section argues there were two structural aspects of early modern English law that accommodated witchcraft cases that assumed the form of *maleficium* accusations. The first, as mentioned, relates to early modern English law’s accusatorial procedure.

Levack posits that the accusatorial mode of trial suited claims of *maleficium* because that procedural style presupposed one actor bringing a horizontal claim against another.⁹⁰ Durston notes that English common law courts ‘could not initiate prosecutions by themselves’ and ‘assigned responsibility for determining guilt or innocence to lay juries,’ yet ‘nevertheless managed to convict significant numbers of witches.’⁹¹ One proposed explanation is that individuals were empowered, by the Witchcraft Acts and the accusatorial mode of procedure, to claim a social opponent had harmed them through intangible means and thus eliminate rivals. By contrast, on the Continent, witchcraft was treated as heresy, emphasising the diabolic nature of the witch and his or her craft. Deals with the devil, or ‘devil compacts’, being associated with heresy, were a spiritual offence that required the instigation of a vertical, inquisitorial legal infrastructure – that is, they presupposed an institution with an interest in maintaining religious purity. As such, scholars like Levack suggest, the prominence of *maleficium* in England and devil compacts on the Continent is partially explicable by reference to their differing modes of trial procedure.

However, the predominance of the accusatorial procedure does not comprehensively explain why *maleficium* was so common from a legal-structural perspective, because it begs two questions. The first asks what other conditions related to the underlying structures of English law allowed *maleficium* to subsist as a highly capacious legal concept. According to historians like Gaskill, Briggs, Thomas, and Herrup, the ‘social meaning’ of witchcraft was multivalent:

⁹⁰ Levack (n 13) 471.

⁹¹ Durston (n 16) 474.

it could be readily imported into all kinds of conflicts, ranging from conflict over land boundaries, to conflict over unpaid wages, to conflict over a refusal to pay alms to beggars, among others.⁹² Meanwhile, the practices seen as constituting *maleficium* itself could involve ‘murder, poisoning, theft, destruction of crops, the killing of livestock, arson, sodomy, fornication, adultery, infanticide, and conspiracy. In 1584, Reginald Scot identified fifteen different crimes attributed to witchcraft.’⁹³ Many of these acts would later be legally recognised as constituting torts like nuisance and trespass, though, at the time, witchcraft served as a sufficiently wide legal concept to capture these actions, and more. Indeed, *maleficium* could be conducted through the basic fact of ‘fascination’ or ‘overlooking’ – this being a procedure wherein the ‘witch’ bewitched her victim by simply looking at them. Witchcraft has been, for this reason, identified as a ‘composite’ crime, one that took many different forms that a simple reading of the legislation might not anticipate.⁹⁴

This elasticity was, in part, contingent on a structural feature of early modern law, which was that it did not operate through robust, clearly formulated legal doctrines and principles capable of threshing out concepts as amorphous and imprecise as *maleficium*. Under capitalist law, legal concepts are always indeterminate to some extent, and indeed some are highly open-ended and dynamic, applicable to radically different sets of facts.⁹⁵ However, capitalist legal concepts generally operate as such because they are conceived, *doctrinally*, as malleable. They are governed and encoded by doctrine, and precedent related to them is expanded with every decision made, meaning the overall tendency of such legal concepts is to gain more boundaries with each subsequent litigation.

By contrast, many of those features were not present in early modern English law, and so *maleficium*, both functionally and conceptually, was capacious for distinct reasons to flexible concepts under capitalistic law. Specifically, *maleficium* was not constructed elastically because it was encoded to operate as an open-ended juridical concept. Its vagueness flowed from historically specific structural conditions that meant the mechanism of ‘encoding’

⁹² Malcolm Gaskill, *Crime and Mentalities in Early Modern England* (Cambridge University Press, 2000) 54-55, 60-61. See also Robin Briggs, *Witches and Neighbours: The Social and Cultural Context of European Witchcraft* (Penguin, 1998) 304; Cynthia Herrup, *The Common Peace: Participation and the Criminal Law in Seventeenth-Century England* (Cambridge University Press, 1987) 33; and Thomas (n 20) 517-558.

⁹³ Levack (n 13) 482-483.

⁹⁴ Ibid 482.

⁹⁵ Consider Hart’s contention that this is a feature of any linguistic system, given the necessarily abstract qualities of language. H L A Hart, *The Concept of Law* (Oxford University Press, 1961) 123-125.

discussed above was not operative. The meta-doctrine of precedent had not yet emerged, while the law's formal autonomy and the rule of law were not structurally prevalent, all elements that would become crucial to the capitalist legal system (even if, at times, the rule of law can be suspended and precedent may also emerge within other macro-structures).

Precedent, here, does not simply refer to discourse between judges, nor knowledge drawn from following the examples set by others. Rather, as Berman contends, precedent – in the 'technical' sense – originated in the 'transformation of some of the forms of action into modern remedies for the protection of rights of property and for enforcement of obligations of contract, tort, and unjust enrichment', which gave precedent 'its modern meaning' wherein 'every question was "placed" within a system of genus and species.'⁹⁶ This transformation of the forms of action was the historical result of the 'eventual supremacy of the common law over Chancery, Admiralty, and the ecclesiastical courts', which led to the reconstruction of older forms of action into mechanisms to protect property to account for the remedial lacunae left by the dissolution of those other courts, while maintaining consistency with the general methodology of the common law courts.⁹⁷

With the structural reformulation of the forms of action and the emergence of a meta-rule of precedent, the law could assert its autonomy as a body of self-referential norms, a system of reasoning that had boundaries and a consistent, hierarchical conceptual structure. To refer back to the discussion of a capitalist legal rationality in Chapter Two, capitalist law's autonomy is predicated on its capacity to 'learn' and 'communicate', and to self-organise its conceptual web via precedential meta-rules, because those meta-rules enable English law to reflexively respond to proprietary conflicts.⁹⁸ In its absence, legal actors' understanding of what *maleficium* entailed did not tend to draw on a relatively stable set of crystallised, mutually referential norms, but rather was 'susceptible' to the influence of local folkloric beliefs and conflicts, consistent between trials insofar as those beliefs transmitted across regional boundaries and (informal) discourse emerged between jurists and judges. As such, witchcraft's later evolution into a form of fraud offence can be seen as a historical embodiment of the formal differentiation, and autopoiesis, of the legal system.

⁹⁶ Berman (n 64) 9, 270.

⁹⁷ Ibid 277.

⁹⁸ Deakin (n 61) 12-15.

Indeed, it is challenging to see how a concept as multifarious and fundamentally ambiguous as *maleficium* could survive the conditions of a legal system governed by technical precedent. An operationally closed legal system – that is, an autonomous legal system, running via the encoding function of precedent – may still be cognitively open and therefore able to ‘receive’ and ‘translate’ information from local beliefs and conflicts into legal norms, but that does not equate to the methodology through which the early modern conceptualisation of witchcraft was produced. Without a co-ordinating doctrine of precedent, greater influence was afforded to the ‘petty gentry’ and ‘middling sort’ who ‘directed their agency into a course of partnership and support’ as witnesses and JPs.⁹⁹ These actors were able to influence how *maleficium* was legally conceived by furnishing the court with informal, but apparently persuasive, proofs and forms of evidence that drove the construction of the witch (the details of which will be explored in Section 3.3.3). That is, the texture and complexity of witchcraft as a legal concept was largely fuelled, and developed, through the *ad hoc* admission of local conceptions of the supernatural rather than through any judicial or statutory mechanism facilitating the legal system’s capacity to ‘learn’, as it would as an autopoietic system under capitalism.

Maleficium was, then, largely conceived with a great deal of informality. At the very least, the doctrine of precedent would have given *maleficium*, and witchcraft more generally, a more clearly defined conceptual, and institutional, basis – a process which may have curtailed convictions, given how those convictions were regularly derived from an amorphous set of claims. Rather than illustrating the operation of a core feature of capitalist law – the meta-doctrine of precedent – this dimension of the witch-trials was deeply reflective of the underlying logic of the early modern English legal system, preceding its maturation into a capitalist legal rationality.

3.3.2.2 Devil Compacts and the ‘Contractualisation’ of the Law

The explanation of *maleficium*’s prominence in English common law by (exclusive) reference to the accusatorial mode of procedure leaves a second question unanswered. If English law’s procedural style did not accommodate trials aimed at determining whether the witch had made a deal with the devil, why did ‘devil compacts’ nevertheless still appear in English law, albeit to a lesser extent than on the Continent? It is true that the 1604 Act added rewarding,

⁹⁹ Darr (n 80) 171.

employing, and covenanting with evil spirits to the roster of possible forms of witchcraft. Yet, this statutory provision *alone* does not explain why that aspect of the Act was operationalised. In other words, it does not explain how – in the absence of inquisitorial legal machinery – English law, and legal discourse, provided the conditions of possibility for accusations assuming the form of a claim that an agreement, or ‘compact’, had been made between the accused and the devil.

Some have argued that the rise of devil compact cases in the 17th century is largely attributable to their over-representation during the Civil War. This is primarily the case in East Anglia, where royal influence waned and puritanical forces ran rampant, a symptom, Peter Elmer contends, of how ‘the end of the Personal Rule, followed by the recall of Parliament, unleashed a puritan backlash throughout England that was felt with particular intensity in the eastern counties of England.’¹⁰⁰ Indeed, Levack writes that the Civil War was a period in which the frenzy and form of the Scottish witch-trials temporarily manifested in England, disrupting English law’s conventional emphasis on *maleficium* for a brief, yet potent, period.¹⁰¹ Accordingly, between 1645 and 1647, some 200 individuals were convicted in Essex alone for alleged devil compacts.

One analysis points to the administrative chaos of the Civil War as an explanation. From July 1643, the ordinary routine of the assizes was suspended following disruptions related to military activity and because, over the course of 1641-1642, several judges had been impeached over their support for Charles I’s Personal Rule.¹⁰² Extra-regional judicial oversight, therefore, was limited in many cases occurring during this time. With the supervision of travelling judges interrupted, it was possible for (private) individuals to adopt informal inquisitorial positions without a need to identify *maleficium* to secure a conviction. In other words, as soon as procedural constraints were temporarily ‘lifted’, trials took an extremely different form, and were hijacked by opportunists like the infamous ‘witchfinders’, John Stearne and Matthew Hopkins, who stood to receive material gain by demanding payments from local authorities for rooting out neighbourhood witches.

¹⁰⁰ Peter Elmer, *Witchcraft, Witch-hunting, and Politics in Early Modern England* (Oxford University Press, 2016) 135.

¹⁰¹ Brian Levack, *Witch-Hunting in Scotland: Law, Politics and Religion* (Routledge, 2008) 70.

¹⁰² Malcolm Gaskill, ‘Witchcraft and Evidence in Early Modern England’ (2008) 198 *Past and Present* 33-70, 47.

Yet, while this explains the rise in devil compact cases during the Civil War, it does not explain cases beyond the context of that administrative disruption, nor does it explain how contemporaneous legal scholars conceptualised devil compacts in law. Indeed, Sharpe argues that many witchcraft historians have exaggerated the prevalence of *maleficium* in England.¹⁰³ At times, owing in part to atavistic theological remnants from pre-Reformation English beliefs, the devil was seen as the force that granted witches the power to inflict *maleficium* in the first place; this makes categorising some cases as cleanly one or the other unstable, specifically when the witch, accused of *maleficium*, was said to derive their underlying capacity for witchcraft from some diabolic covenant.¹⁰⁴

That is, while many cases on record support the claim that *maleficium* was a focal element of English witch-trials, devil compacts nevertheless feature with some frequency, particularly after the 1604 Act was promulgated.¹⁰⁵ Sharpe writes, therefore, ‘it is now... impossible to sustain the idea that there was a separate ‘English’ witchcraft to be set against a monolithic ‘Continental’ witchcraft; the English experience... was a variation on a European theme.’¹⁰⁶ This leads to the question of how the devil compact was conceptualised in line with the structural conditions of English law, and the significance of this against the emergence of capitalist legal rationality. This is because, as explained, in the absence of an inquisitorial procedure, devil compacts generally could not rely on theological doctrines of heresy alone when it came to their legal expression.

In his posthumously published *A Discourse of the Damned Art of Witchcraft*, the Cambridge scholar William Perkins (1558-1602) offered legal guidance regarding devil compacts, arguing about whether such agreements should be seen as legally valid, and therefore meritorious of a conviction for witchcraft.¹⁰⁷ These included that a ‘league between a Witch and the Devil’ was not ‘lawful, but wicked, and damnable, yet being once made, however unlawfully, it is a league and compact...[therefore] there can be a lawful covenant betwixt them which no man will

¹⁰³ Jim Sharpe, ‘The Devil in East Anglia: The Matthew Hopkins Trials Reconsidered’ in Jonathan Barry, Marianne Hester, and Gareth Roberts (eds), *Witchcraft in Early Modern Europe* (Cambridge University Press, 1996) 237-254.

¹⁰⁴ See Nathan Johnstone, ‘The Protestant Devil: The Experience of Temptation in Early Modern England’ (2004) 43(2) *Journal of British Studies* 173-205, 185.

¹⁰⁵ Prior to 1604, the devil compact was often used as proof of an accused witch’s *capacity* to inflict *maleficium*, as in the 1566 trial of Elizabeth Frauncis. See Walker (n 89) 111.

¹⁰⁶ Sharpe (n 47) 32. See also Bengt Ankarloo and Gustav Henningsen (eds), *Early Modern European Witchcraft: Centres and Peripheries* (Oxford University Press, 1990) 1-3.

¹⁰⁷ Perkins (n 68).

deny.’¹⁰⁸ Further, he rejected the possibility that witches in such an arrangement could be innocent, or that their autonomy could be overreached, despite the notorious deceitfulness of the devil, since the bargain ‘faileth only in the circumstance, the substance, which is the consent of the parties was not wanting.’¹⁰⁹

Overall, Perkins’ analysis of the devil compact – and his references to the consent, and therefore culpability, of the witch to the devil’s will – places heavy focus on the voluntary agency expressed by the defendant. Both Perkins and the 1604 Act, along with subsequent increases in devil compact discourse in actual cases, suggest that witches were increasingly viewed legally as ‘doing business with demons, entering into bilateral exchange relationships with them’ and thus ‘the legal situation of the witch’ was ‘reconceptualised’.¹¹⁰ Earlier, it was mentioned that Hopkins and Stearne were responsible for leading the greatest uptick in devil compact witchcraft cases in England. Indeed, it was further suggested that this was possible because of disruptions to England’s legal-administrative apparatus, allowing the infiltration of Continental ideas into English law for a time. Yet, the courts involved in the witchfinders’ campaigns often conceptualised the devil compact not solely in terms of *Continental* ideas, but rather in those of Perkins via Bernard.¹¹¹ Accordingly, one can see, the legal logic of the witchfinders and the courts was entrenched both in theology and in the intentional, culpable decisions made by those accused of witchcraft.

As such, some scholars, like Luke Wilson, have proposed that legal thought around witchcraft showed signs of being influenced by an emerging contractual model of legal responsibilities.¹¹² In this light, Unsworth interprets early modern English devil compact discourse as drawing on legalistic terminology such as ‘the possibility of illegal contracts, the capacity of the parties to contract, the sufficiency of consensus between the parties to found a contract in the absence of formalities, and the effect of deceit upon the contractual relation.’¹¹³ Indeed, legal thought around the devil compact seems to have contemplated the relation between the devil and the witch not purely in spiritual or theological terms, but as if it were also a juridical relation, indicating some reliance on emerging ideas concerning law’s conception of the person and

¹⁰⁸ Ibid 640.

¹⁰⁹ Ibid.

¹¹⁰ Luke Wilson, *Theaters of Intention: Drama and the Law in Early Modern England* (Stanford University Press, 2000) 184-193, 189-190.

¹¹¹ Gaskill (n 102) 51.

¹¹² Wilson (n 110) 185.

¹¹³ Unsworth (n 24) 79.

contractual consent. Thus, writers like Unsworth and Wilson implicitly suggest that the cognitive architecture that supported the contractualisation of the law may have given some life to witchcraft accusations by supplying those engaged in witchcraft discourse with the conceptual tools needed to understand, and articulate, what an agreement with an ‘evil spirit’ would entail, and what preconditions would need to be in place for it to have legal significance.

Wilson supports this argument by pointing to decisions like *Slade’s Case* as a herald of the process of contractualisation that swept up not only burgeoning contract doctrines, but also, the legal construction of witchcraft.¹¹⁴ Yet, as Ibbetson shows, the revolutionary nature of *Slade’s Case* has been inflated by modern commentators; the decision allowed the single action of assumpsit to be brought even where it overlapped with causes of action in debt, centring assumpsit as the mechanism through which promises – be they express or implicit – could be enforced.¹¹⁵ This does not, however, imply a radical, structural overhaul of how the law understood the relations between parties, abandoning post-feudal notions of personal status, and the formalistic nature of the law, for a system predicated on atomised individuals engaging in voluntary relations. To suggest otherwise would be an ahistorical exaggeration, significantly prefiguring the emergence and consolidation of a mature capitalist legal rationality that more clearly coalesced in the 18th century and beyond.

That said, the origins of assumpsit in the tort of trespass were still important, for trespass presupposes intentionality, and it is this affirmation of the importance of the plaintiff and defendant’s intentions that signifies the importance of *Slade’s Case*. It was a component of a wider, long-term process of transition and emergence, of conceptual evolution and decay. To support this claim, Wilson notes how Coke’s report of *Slade’s Case* relays how Slade argued Morley’s failure to pay came from his ‘scheming and intending... to deceive and defraud.’¹¹⁶ Indeed, it is conceded that the increasing emphasis on the intentions of parties to an agreement, and therefore on their voluntary assumption of responsibility, can be traced not just to *Slade’s Case*, but across the 17th century, when several foundational contractual principles emerged, such as the establishment of absolute contractual liability in *Paradine* in 1647¹¹⁷ and in *Hyde*

¹¹⁴ Wilson (n 110) 185-186.

¹¹⁵ David Ibbetson, ‘Sixteenth Century Contract Law: *Slade’s Case* in Context’ (1984) 4(3) *Oxford Journal of Legal Studies* 295-317.

¹¹⁶ *Slade v Morley* (1602) 4 Co Rep 91. John Baker, *Baker and Milsom’s Sources of English Legal History: Private Law to 1750*, (2nd ed, Oxford University Press, 2010) 460.

¹¹⁷ *Paradine v Jane* [1647] 4 (KB).

J's statement in 1663 that 'in every contract there is a mutual assent of their minds, which mutual assent is an agreement.'¹¹⁸ Further, this element of the *emergence* of a capitalist legal rationality does seem evident in the discourse regarding devil compacts. However, to claim that the devil compact was contractual in a 'fully' capitalist-legal sense – that is, conceptualised through a capitalist legal rationality, as a voluntary relation assumed by formally equal and autonomous actors – would overstate the case.

As discussed in Chapter Two, voluntary contracting was not a central component of early modern law, which was still transitioning from the feudal system. As Adams writes, 'contract did not connote equality of right,' which would emerge 'throughout the course of the eighteenth and nineteenth centuries.'¹¹⁹ Certainly, freedom of contract had not yet been embraced as an organising principle of an autonomous system: though promises and agreements in general were legally enforceable, they were still subject to the strictures of the forms of action, and the free and equal legal subject, with their panoply of rights, had not yet materialised as the entity conceived of as constituting such relations. As Braithwaite and Drahos note, legal agreements only assumed the capitalist form of contracting once they, along with private property, began to concern not merely agreements relating to 'things', 'resources', and/or 'promises', but rather, a set of free and equal 'relations between individuals, those relations being constituted in terms of rights and duties.'¹²⁰

That is, a key transition occurring over the 17th and 18th centuries was the progression from a system of law that viewed legal relations as being determined by the formal statuses of parties as mediated by reference to land ownership (feudalistic) to a system wherein legal relations were determined by autonomous legal decisions, and all parties were formally free and equal (capitalistic). Perhaps the way jurists constructed the devil compact reflected early 'steps' in this 'transition'. Yet, conceptualising the devil compact as an unqualified expression of capitalistic contractual rationality in the late 16th and early 17th centuries would be an anachronistic misdiagnosis. Indeed, the distinction between how capitalist contracts and devil compacts are, and were, conceptualised offers an opportunity to perceive the differences between capitalist and early modern legal rationalities, evincing another facet of how changing

¹¹⁸ *Manby v Scott* (1663) 86 ER 781 [126].

¹¹⁹ Zoe Adams, *Labour and the Wage: A Critical Perspective* (Oxford University Press, 2020) 89-90.

¹²⁰ John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press, 2000) 39.

conditions of legal possibility contributed to the reformulation of witchcraft as a form of fraud in 1736.

Some distinctions are evident in the language of the Witchcraft Act 1604. ‘Covenanting’ with the devil may have been unlawful, but a covenant was not the same legal concept as a modern contract. Along with the arguments above, the writ of covenant specifically lay for cases where the promise being litigated was bound by sealed writing.¹²¹ Further, while Perkins contemplates the witch’s compact in terms of quasi-contractual consent, the relation between the witch and the devil was also often conceptualised as one wherein the witch would swear ‘fealty’ to the devil.¹²² This drew on distinctly feudal notions of lord and peasant¹²³ and was a corollary to how the devil was positioned in ‘hierarchical opposition’ to God, and to the King, who was imbued with divine right to rule.¹²⁴

In other words, the witch and the devil were not constructed in terms of their freedom and equality to contract with one another in the sense of either possessing legal subjectivity. Even Perkins’s analysis of the witch’s relation with the devil in terms of intentionality and consent lacks any substantive conception of legal personhood. The law, transitional as it was, may have been *contractualising*, but the devil compact was not capitalistically *contractualised*. As with *maleficium*, the legal possibility of a deal with the devil, at least in terms of how it was conceptualised in the early modern period, was swept away with the full transition to capitalism, even if early conceptions of voluntary assumption of responsibility helped to give the concept of witchcraft temporary life.

Distinctions between capitalist and early modern contracting are also visible in the notion of the ‘familiar’. The term ‘familiar spirit’ loosely referred to magical servants that could take the form of (often domestic) animals, like dogs, cats, birds, moles, or bees.¹²⁵ The notion of a familiar was central to many devil compact cases, and, in many instances, were conceptualised as possessing sufficient ‘autonomy’ to be perceived as the witch’s equal, or, at least, as a key

¹²¹ See David Ibbetson, ‘The Requirement of a Deed in the Action of Covenant’ (2021) 42(3) *Journal of Legal History* 233-257.

¹²² Clark (n 1) 86-92.

¹²³ Note, however, that these ideas did persist in master and servant law into the late 19th century, albeit in a modified form. Adams (n 119) 138-159.

¹²⁴ Clark (n 1) 134-147.

¹²⁵ See James Serpell, ‘Guardian Spirits or Demonic Pets: the Concept of the Witch’s Familiar in Early Modern England, 1530-1712’ in Angela N H Creager and William Chester Jordan (eds), *The Animal/Human Boundary: Historical Perspectives* (University of Rochester Press, 2002) 157-190.

source of their power and knowledge.¹²⁶ However, a contract between a witch and their familiar presupposes the possibility of attributing agency to the animal. Yet, the emergence of a capitalist legal rationality presupposed a formalised, doctrinal division between ‘persons’ and ‘things’, with the central legal subject being a human (or an organisation constituted by humans), and certainly not an animal.

As Waldau posits, ‘in modern legal systems, humans are the paradigmatic legal subjects and thus comprise the entire universe of legal persons. A by-product of this form of thinking is the exclusion of any and all nonhuman animals’ from the realm of contracting and legal responsibility.¹²⁷ This is a corollary to generalised market exchange under capitalism, that the animal constitutes a ‘thing’ capable of uncompensated exploitation; as Marx writes, ‘Descartes, in defining animals as mere machines, saw with eyes of the period of manufacture.’¹²⁸ As such, the correlative principle to ‘the liability of an owner for the conduct of his animal’ is that an animal is ‘not itself the subject of legal liability.’¹²⁹ Thus, the central premise of the devil compact inhering in a legally-recognised agreement between a human and an animal would place it on unsteady ground with the entrenchment of capitalist legal rationality.

In this light, the devil compact and the modern doctrine of contract may share similarities, and even some cognitive roots, both being agreements conceptualised and adjudicated within legal discourse. Yet, the ways they contrast allow the distinctions between an early modern and a capitalist legal rationality, and how they emerge through the history of the legal system’s conceptualisation of paranormal practices, to be gleaned.

3.3.2.3 Witchcraft and Causation

The lack of formal doctrines of causation in early modern English law was critical to the formulation of witchcraft, whether an accusation involved *maleficium* or a devil compact. To develop further the model of how *maleficum* accusations generally functioned, as discussed in Section 3.3.2.1, witch-trials often involved: (1) the identification of a ‘syndrome’ commonly

¹²⁶ Emma Wilby, *Cunning Folk and Familiar Spirits: Shamanistic Visionary Traditions in Early Modern British Witchcraft and Magic* (Sussex Academic Press, 2005) 21.

¹²⁷ Paul Waldau, ‘Animals as Legal Subjects’ in Linda Kalof (ed), *The Oxford Handbook of Animal Studies* (Oxford University Press, 2015) 167-187, 167.

¹²⁸ Karl Marx, *Capital: Volume I* (Ben Fowkes (trans), Penguin Classics, 1990) 512.

¹²⁹ For more on the position on the legal position of animals, see Philip Jamieson, ‘Animal Liability in Early Law’ (1988) 19 *Cambrian Law Review* 45-68, 45.

associated with witchcraft exhibited by a victim's behaviour or circumstances; and then (2) the attribution of that syndrome to the agency of a person whose *specific* practices or 'profile' were *generally* associated with *maleficium* or devil compacts, regardless of whether any empirical, aetiological connection could be drawn between those practices, and/or profiles, and the harm suffered by the 'victim.'¹³⁰ These forms of reasoning, this section argues, contradict a modern legal causation analysis, since 'fault and causation are confounded in the state of being a witch or the act of practising sorcery.'¹³¹ As such, this construction of the witch was rooted in the intellectual structures and aetiological paradigms of early modern law, paradigms that would be alien to capitalist legal thought.

Under early modern English law, the presence of an inexplicable 'syndrome' of witchcraft included phenomena like a cow ceasing to provide milk, an unexplained illness, or a sudden fire without an identifiable culprit. These syndromes would often form the foundations of witchcraft accusations, yet to attribute this to the natural-scientific 'ignorance' of early modern legal actors would leave several questions unanswered. After all, the 'syndrome' of witchcraft gave rise to the normative, not merely descriptive, issue of who *should* be treated as responsible for inflicting the constructed harm, which in turn presupposed structures allowing culpability to be imposed on individuals for those 'inexplicable' phenomena.

Once a syndrome of witchcraft was identified, a defendant could be held liable for engaging in certain practices that lacked an empirical link to the misfortunes suffered. The cultural practices associated with casting spells, such as speaking curses or the desecration of an image of the victim, were examples of this, but as could be the mere muttering of a grievance or a vow of vengeance.¹³² As mentioned earlier, reports of a hostile glance by the accused – sometimes called 'fascinating' or 'overlooking' the victim – could be taken as indicative of witchcraft.¹³³ Witchcraft, Currie writes, amounted to a form of social deviance that often centred around 'a sort of thought-crime', and a perceived *desire* to inflict harm, perhaps attributable to some

¹³⁰ For an American perspective from which these terms are derived, see Jane Campbell Moriarty, 'Wonders of the Invisible Worlds: Prosecutorial Syndrome and Profile Evidence in the Salem Witchcraft Trials' (2011) 26(43) Vermont Law Review 43-99.

¹³¹ T W Bennett and W M Scholtz, 'Witchcraft: A Problem of Fault and Causation' (1979) 12(3) Comparative and International Law Journal of Southern Africa 288-301, 297.

¹³² Thomas (n 20) 612-613, 653, 660-661.

¹³³ On how this practice emerged as a feature of witchcraft accusations throughout many cultures, see Amica Lykiardopoulous, 'The Evil Eye: Towards an Exhaustive Study' (1981) 92(2) Folklore 221-230.

earlier conflict between defendant and victim, could be as indicative of culpability as the tangible infliction of harm itself.¹³⁴

Further, the details of a defendant's 'profile' – their appearance, vocation, character, etc – were often treated as revelatory of guilt. Indeed, association with a certain class of person *generally seen* as being desirous of inflicting harm could be sufficient for an accusation of witchcraft to lead to a conviction. In such a case, then, no evidence *of the harm being in fact* caused would need to be demonstrated, in the modern sense of looking at the defendant's actions, intentions, and the empirical link between those actions and intentions and their outcome. In this context, the rationality of early modern law on matters like witchcraft often focussed on semiology, with 'blame' not a matter of explicitly analysing cause and effect by reference to doctrinal principles, but one of interpreting circumstantial evidence in the form of signs and symbols.¹³⁵ For example, the accused witch's capacity to cure a disease was, at times, considered to be tantamount to a correlative capacity, and propensity, to inflict that same disease.¹³⁶ In other words, being seen as having 'magic' in general could imply the infliction of a specific instance of 'witchcraft' at trial, a logic similar to suggesting that because a person has the physical capacity to light a match *in general* that they must be responsible for a *concrete* instance of arson.

Moreover, in many, though not all, cases, the social position of a defendant could be revelatory of their witchcraft, or at least could bias a jury towards conviction. Witches tended to be, though were not always, local cunning folk (folk healers, 'good' spellcasters, wise women, and so on, as above),¹³⁷ female,¹³⁸ elderly,¹³⁹ impoverished,¹⁴⁰ physically or mentally disabled,¹⁴¹

¹³⁴ Currie (n 87) 9.

¹³⁵ Silvia de Renzi, 'Medical Expertise, Bodies, and the Law in Early Modern Courts' (2007) 98(2) *Isis* 315-322.

¹³⁶ Mary Kilbourne Matossian, 'Bewitched or Intoxicated? The Etiology of Witch Persecution in Early Modern England' (1983) 18 *Medizinhistorisches Journal* 33-42, 36.

¹³⁷ Richard A Horsley, 'Who Were the Witches? The Social Role of the Accused in the European Witch Trials' (1979) 9(4) *Journal of Interdisciplinary History* 689-715.

¹³⁸ Jim Sharpe, 'Women, Witchcraft, and the Legal Process' in Jenny Kermode and Garthine Walker (eds), *Women, Crime, and the Courts* (Routledge, 1994) 125-141.

¹³⁹ See Durston (n 16) 64-65.

¹⁴⁰ Anna Garland, 'The Great Witch Hunt: The Persecution of Witches in England, 1550-1660' (2000) 9(4) *Auckland University Law Review* 1152-1180, 1166. See also Malcom Gaskill, 'Witchcraft in Early Modern Kent: Stereotypes and Backgrounds to Accusations' in Jonathan Barry, Marianne Hester, and Gareth Roberts (eds), *Witchcraft in Early Modern Europe: Studies in Culture and Belief* (Cambridge University Press, 1996) 257-287, 258.

¹⁴¹ However, reconstructing 'abnormal' behaviour of the past as 'mental illness' risks dislocating that behaviour from its social context, while overlooking the historical specificity of how 'mental illness' is constructed under capitalism: see Thomas J Schoeneman, 'The Role of Mental Illness in the European Witch Hunts of the Sixteenth

physically ‘disfigured’ or otherwise ‘othered’ in a bodily sense,¹⁴² outspoken,¹⁴³ or related to other accused (or convicted) witches.¹⁴⁴ Many witches exhibited a constellation of these traits, rather than one alone. In many instances, individuals in these groups were more vulnerable to various forms of social risk, but in others, and of key importance for the purposes of understanding the use of ‘profile’ evidence, their demographic was generally *perceived* as being susceptible to deviance. For instance, the disproportionate targeting of women in English witch-trials has been associated with patriarchal stereotyping of those women as being more ‘vulnerable’ to diabolic influence, with much imagery associated with the witch drawing on cultural links between ‘failed’ motherhood and ‘evil’. The witch’s mark, as an example, was seen as a teat through which the witch could suckle imps and familiars with blood, an example that also speaks to the connection made between bodily disfigurements and diabolism.¹⁴⁵ Thus, whatever the reason for their marginalising association with witchcraft, in many instances, some of these demographics were often constructed as having a *greater propensity* towards witchcraft, and so their profiles were sufficient, in some cases, to associate witchcraft with their agency.¹⁴⁶

Given there is no natural-scientific proof that witchcraft ‘exists’, judicial acceptance of these unsound aetiological bases for convictions was an essential element of the legal construction of the witch. By contrast, establishing causation in witchcraft cases through the practices or profiles outlined above would be challenging, though not impossible, under modern legal analysis, which presupposes the possibility of identifying an empirical connection between a

and Seventeenth Centuries: An Assessment’ (1977) 13 *Journal of the History of the Behavioural Sciences* 337-351.

¹⁴² The presence of a distinguishing ‘mark’ on the body, sometimes called a witch’s mark, was often of high evidential importance. Indeed, searching defendants’ bodies for witch’s marks was a rare occasion in which women were granted some degree of ‘agency’ in early modern legal decision-making: Clive Holmes, ‘Women: Witnesses and Witches’ (1993) 140 *Past and Present* 45-78.

¹⁴³ On ‘scolds’, see David Underdown, ‘The Taming of the Scold: The Enforcement of Patriarchal Authority in Early Modern England’ in Anthony Fletcher and John Stevenson (eds), *Order and Disorder in Early Modern England* (Cambridge University Press, 1985) 116-136.

¹⁴⁴ This was evident in the infamous Pendle trials of 1612 in which several of the accused, including those from the Bulcock and Device families, were related.

¹⁴⁵ On the complex social relations, and their interactions with a demonological cognitive framework, that made this overrepresentation possible, see Deborah Willis, *Malevolent Nurture: Witch-Hunting and Maternal Power in Early Modern England* (Cornell University Press, 1995); Louise Jackson, ‘Witches, Wives, and Mothers: Witchcraft Persecution and Women’s Confessions in Seventeenth-Century England’ (1995) 4(1) *Women’s History Review* 63-84; and, for a wider European perspective, William de Blécourt, ‘The Making of the Female Witch: Reflections on Witchcraft and Gender in the Early Modern Period’ (2000) 12(2) *Gender and History* 287-309.

¹⁴⁶ On the historical development of the association of women with witchcraft in England, see Heidi Breuer, *Crafting the Witch: Gendering Magic in Medieval and Early Modern England* (Routledge, 2009).

given cause and its postulated effects, as well as the constructed, atomised agency of the individual involved.¹⁴⁷ If person A suffers misfortune, and person B is found to have attempted to ‘cast a spell’ with the intention of causing A harm, there remains no legal fault on B’s part, no *actus reus*. The actions of B would not be legally, or empirically, recognised as ‘causing’ whatever misfortune afflicted A, even if that misfortune was intended. This is not least because ‘blame’ can be attributed to a *novus actus interveniens*, such as pathogenic infection. ‘Casting a spell’ cannot be treated as a ‘but for’ condition for the incidence of A’s misfortune because legal doctrines of linear causation hold, in principle, individuated responsibility and empiricism at their heart (along with, crucially, the reproducibility that empiricism entails), as opposed to the interpretation of syndromes, profiles, and circumstantial evidence.¹⁴⁸

To examine the preconditions facilitative of constructing witchcraft in this way, the lack of a formal causation analysis in the legal conceptualisation of witchcraft should not be seen as incidental, but rather as historically specific to the underlying structures of early modern law. This goes beyond the absence of a formalised notion of a legal subject who can be causally linked to some empirical event, though that is also a key foundation of causation doctrines. Though some philosophers held discussions about aetiology during this period, legal discourse had not yet developed the relatively complex, and empirically grounded, doctrines of foreseeability, proximate cause, remoteness, and so on that are realised under, and are fundamental to, capitalist legal thinking.¹⁴⁹ Indeed, Kelley argues the absence of substantive examples of legal causation in the law at this time connects to certain formal aspects of early modern law that generally precluded the emergence of such doctrinal tests due to its lack of a cohesive, autonomous form.¹⁵⁰

That is, while early modern law did exhibit some implicit concern for what might be reconstructed as cause and effect, ‘the basic concept of early tort law was that if one hurt another, however innocently, he must make recompense’, rather than placing emphasis on more

¹⁴⁷ This does not mean, however, that tests of legal causation always yield self-evidently ‘correct’ answers; they are socially constructed and are, therefore, necessarily deployed through historically specific, anthropocentric lenses. See Lawrence Solan and John Darley, ‘Causation, Contribution, and Legal Liability’ (2001) 64(4) *Causation in Law and Science* 265-298, 295-298.

¹⁴⁸ Moriarty (n 130) 43-48 offers an American perspective on these issues, noting that syndrome and profile evidence can still appear in modern criminal trials, even if the use of that evidence can be perceived as irrational.

¹⁴⁹ See, e.g., the history of the thin skull rule in Gary Bahr and Bruce Graham, ‘The Thin Skull Plaintiff Concept: Evasive or Persuasive’ (1982) 15(3) *Loyola of Los Angeles Law Review* 409-430, 413-414.

¹⁵⁰ Patrick Kelley, ‘Proximate Cause in Negligence Law: History, Theory, and the Present Darkness’ (1991) 69(1) *Washington University Law Review* 49-105, 55-56.

complex conceptions of ‘cause’ described in terms like ‘direct, proximate, imputed, presumed, inducing, efficient, active, culpable... remote, passive, sole, intervening, independent, superseding, supervening, and similar’, which were a ‘creation of the nineteenth century’.¹⁵¹ Early modern law was principally concerned with formulaic forms of action, without necessarily demanding evidence of ‘damage’ to ascribe liability (as in the early tort of trespass), possibly because notions like ‘harm’ as a modern legal rationality understands it presuppose underlying, autopoietically recognised interests capable of *being* harmed. This stands in contrast to a system oriented around coherent doctrines of precedent, private property rights, contractual obligations, and the legal subject. Pre-capitalist English law revolved around what was pleaded, the facts of the case, and the extent to which this would be sufficient for a petty jury to be called. Milsom thus writes that ‘the essence of a law-suit was still the formulation of a question to be put to some deciding mechanism, whether wager of law or jury... they [would] not often answer legal questions asked in modern terms.’¹⁵² For this reason, trials remained generally rooted in ‘fact’ and formalism, rather than conditions within which abstract legal causation doctrines, independent from individual factual circumstances, could be cultivated.

Additionally, early modern law lacked any central conception of personal, individual responsibility as understood under capitalism, organised around the autonomous legal subject and placed at the core of how legal thinking understands cause and effect. ‘Responsibility’ was imputed, implicitly, to resolve interpersonal conflicts as needed for given legal actions, instead of as part of a determination of empirical reality. By contrast, doctrines of causation are integral to a distinctly capitalist conception of relations between individuals, and the world around them. Because capitalist law abstracts and individualises agents as legal subjects, and assigns them responsibility for their actions based on (in principle) legally certain contractual obligations and proprietary relations, it follows that the legal system would also develop mechanisms for constructing a predictable, empirical link between agents and their commissions and omissions.

Indeed, regarding modern forms of causation and fault in law, Norrie writes that ‘the individualism of the causal analysis reflects the individualism of legal practice. But it is necessarily an abstract individualism which seeks to attribute causation to individuals in

¹⁵¹ Leon Green, ‘Duties, Risk, Causation Doctrines’ (1962) 41 Texas Law Review 42-74, 42-43.

¹⁵² S F C Milsom, *Historical Foundations of the Common Law* (Revised ed, Butterworth-Heinemann, 2014) 37.

situations of multiple and socially structured causation.’¹⁵³ In other words, the capitalistic construction of causation does not emerge from any ‘external’ or transhistorical source of ‘objective’ knowledge, but instead is contingent on the legal relation itself (or, more accurately, on the social conditions in which that legal relation originates), a corollary of clearly demarcated subjects entering into relations of property exchange and ownership. Legal doctrines of causation operate as simplifications, as abstractions of a complex social reality that must be produced and reproduced by legal actors to apply capitalist legal concepts consistently and effectively, assuring stabilisation of expectations between those actors and repeated relations of exchange.

That is, since property relations and contractual obligations are contingent on foreseeability and delineation, their enforcement presupposes the existence of some mechanism to enshrine the criteria determining when those rights have been infringed. This mechanism, which co-developed alongside the positivist empiricism endemic to capitalist rationality in general, manifests in English law as doctrines of causation. In that sense, doctrines of causation tend to emerge in legal systems embedded in developed capitalist, rather than feudal, or early modern, relations. For this reason, *cultural beliefs* in witchcraft may be possible under capitalist society, but the legal system is unlikely to conceptualise paranormal practices in the way early modern law conceptualised witchcraft. The capitalist-legal worldview is one in which events and actions are viewed as linear and discrete, an aetiological paradigm with which witchcraft would struggle to be reconciled. This leads us to a discussion of the principal basis upon which convictions of witchcraft rested in the absence of causation tests, namely the strength of available ‘proof’.

3.3.3 Proving Witchcraft: Early Modern Rules of Evidence and the Emergence of the Rights-Bearing Defendant

Assessing the forms of evidence admitted to ‘prove’ the commission of witchcraft is vital for understanding the legal construction of the witch. This is because determining whether the accused had bewitched their victim depended mainly on evidential ‘fact-finding’ and the derivation of conclusions from ‘presumptions’, rather than the application of empirical,

¹⁵³ Alan Norrie, ‘A Critique of Criminal Causation’ (1991) 54(5) *Modern Law Review* 685-701, 700.

probabilistic tests of causation and foreseeability.¹⁵⁴ Indeed, Gaskill contends, ‘no social, economic, religious or cultural factor shaped the history of English witchcraft more’ than ‘the evidentiary status of the crime.’¹⁵⁵ As such, uncovering the ‘rules’ of evidence, their structural origins, and how they applied in witchcraft cases is central in perceiving how witchcraft was conceptualised and proven, and its specificity to the logic of early modern law. This section explores several (non-exhaustive) case-studies related to the evidential components of witchcraft to make this argument.

The evidential value of indications of witchcraft was determined through ‘proofs’ and ‘presumptions’, sometimes divided into a hierarchy of violent, probable, and light presumptions, derived from Roman law – reliance on presumptions being necessary in the empirically unobservable crime of witchcraft.¹⁵⁶ Jurors were to determine whether they were convinced by those presumptions not according to doctrinal principles, in the absence of a meta-rule of precedent, but rather on the basis of their moral or spiritual ‘conscience’. This was therefore a logic of decision-making grounded in the theological.¹⁵⁷ The anti-witchcraft legislation did not, after all, offer specific legislative procedures for proving the ephemeral practice of bewitchment, making this reliance on non-statutory proofs and presumptions largely inevitable.¹⁵⁸

The clergyman Richard Bernard (1568-1641) militated that evidence of witchcraft should be clear, and presumptions strong, before setting down a *billa vera*.¹⁵⁹ Likewise, the physician John Cotta (1575-1650), while accepting that tentative presumptions were insufficient for a petty jury to sentence a witch to death, advised that they should be enough for a grand jury to pass the case to trial.¹⁶⁰ Meanwhile, the jurist Michael Dalton (1564-1644) listed in *The Countrey Justice* several proofs for JPs to rely on when examining witchcraft allegations, including the accused making ‘bitter imprecations’ or ‘diligent inquiry after the sick party,’

¹⁵⁴ The modern probabilistic approach is exemplified by the notion of determining truth based on a ‘balance of probabilities’, and also in cases like *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, which emphasises the need to identify a material increase in ‘risk’ when establishing the liability of a postulated tortfeasor.

¹⁵⁵ Gaskill (n 102) 38.

¹⁵⁶ Darr (n 77) 80.

¹⁵⁷ Thomas Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200-1800* (University of Chicago Press, 1985) 139.

¹⁵⁸ Darr (n 77) 271.

¹⁵⁹ Richard Bernard, *A Guide to Grand-Jury Men: In Modern English* (Brett Warren (ed), CreateSpace, 2017).

¹⁶⁰ John Cotta, *The Triall of Witch-craft* (1616) available at <https://wellcomecollection.org/works/twwrzb5y> (accessed 15/02/2023) 78-102.

along with the ‘testimony of other witches’, and more.¹⁶¹ Noting that ‘open and evident proofs are seldom’ present in witchcraft cases, Dalton maintained, as Barbara Shapiro examines in detail, that JPs needed not ‘expect direct evidence’ on the grounds that witchcraft involved ‘works of darkness,’ their occult character generally precluding the existence of direct witnesses.¹⁶²

Evidence of witchcraft often constituted what might, in modern jurisprudence, be considered testimonies concerning the defendant’s ‘bad character’ – their ‘ill repute’ in the community, their socially disruptive behaviour, and so on, and it was through this (informal) mechanism that the ‘profile’ evidence referenced in the previous section often gained legal life.¹⁶³ ‘Spectral’ evidence was also heard, only becoming controversial around the 1660s – that is, evidence that came to the victim in the form of dreams or visions, especially during seizures.¹⁶⁴ Circumstantial evidence, like owning a suspicious animal (interpretable as a familiar spirit) or the accused having waxen images of the victim in their possession, were also admissible.¹⁶⁵ The presence of a witch’s mark on the flesh (another example of the ‘profile’ evidence discussed in Section 3.3.2.3), discovered when a magistrate ordered a search of the accused’s body, came to be particularly indicative, especially under the reign of James I.¹⁶⁶

Meanwhile, juries often treated confessions as probative when determining if witchcraft had been performed.¹⁶⁷ However, extracting confessions ‘usually required force of a type alien to common law’ outside of state trials, and as such greater weight was placed on the circumstantial evidence outlined above.¹⁶⁸ Indeed, much has been made of how torture was illegal in England, leading to reduced reliance on confessions to prove witchcraft when compared with Continental rates. Yet, while torture was legally prohibited, pre-trial procedures sometimes saw the ‘swimming’ and ‘pricking’ tests being deployed by laypersons or even by JPs, although

¹⁶¹ Michael Dalton, *The Countrey Justice* (1622) available at <http://lawlibrary.wm.edu/wythepedia/library/DaltonCountreyJustice1666.pdf> (accessed 16/02/2023) 320-321.

¹⁶² For a discussion of methods of proof, as well as ‘fact’ and ‘probability’ in the witch-trials, see Barbara Shapiro, *Probability and Certainty in Seventeenth-Century England: A Study of the Relationships between Natural Science, Religion, History, Law, and Literature* (Princeton University Press, 1983) 51-54, 164-168.

¹⁶³ Walker (n 89) 115.

¹⁶⁴ Brian Levack, ‘Possession, Witchcraft, and the Law in Jacobean England’ (1996) 52(5) *Washington and Lee Law Review* 1613-1642, 1619.

¹⁶⁵ Dalton (n 161) 320.

¹⁶⁶ Levack (n 164) 1618.

¹⁶⁷ Gaskill (n 102) 51

¹⁶⁸ *Ibid.*

this was formally prohibited.¹⁶⁹ These were practices wherein the defendant would be dunked under water to see if they floated or pierced with a needle to see if they bled, raising strong presumptions of witchcraft. While in later years, officials were removed from office for such conduct – as in the case of John Goodare, a Hertfordshire JP in 1716 – this was well into the decline of the witch-trials. Indeed, this raises the question of what preconditions were in place for the above forms of evidence to be considered admissible *a priori*, and how the use of such presumptions and proofs differs from evidential methodologies under capitalism.

To begin with these evidential methodologies in general, probabilistic approaches to ‘truth’ and ‘fact’ consist of those that seek to demystify a given uncertainty by adjudicating the ‘relation of partial support or confirmation, short of strict entailment, between one proposition and another’, helping to identify whether a given event has occurred or will occur.¹⁷⁰ Such standards are rooted in the empiricism of a natural-scientific rationality geared towards reproducibility, predictability, and so forth. In law, a probabilistic approach can be seen in the ‘but-for’ and ‘foreseeability’ causation tests, the conviction standard of ‘beyond reasonable doubt’, and so on. While these are pertinent, therefore, to the discussion about causation in the previous section, they also bear key relevance for the legal adjudication of evidential admissibility, and the probative weight a certain piece of evidence should be afforded, and thus warrant closer inspection.

Empirical probabilism stands opposed to the standard of ‘moral certainty’ previously embedded in Western intellectual thought, including legal thought, by the papacy. The former emerged in law across the 18th-19th centuries, contemporaneously with their emergence in fields of business, history, philosophy, and scientific inquiry.¹⁷¹ Early modern thinking may have contained conceptions of ‘empirical tests’ and ‘probable reason,’ including in discourse about the evidential standards necessary for proving witchcraft,¹⁷² yet these notions of probability were not governed by statistical, natural-scientific analysis, but rather were predicated on a worldview moved primarily by the engines of divinity and the ‘natural order’ instated by Providence.¹⁷³ In any case, probabilistic standards were not formally embedded in

¹⁶⁹ Ibid 52-53.

¹⁷⁰ James Franklin, *The Science of Conjecture: Evidence and Probability Before Pascal* (Johns Hopkins University Press, 2015) xviii.

¹⁷¹ Shapiro (n 162) 114-243.

¹⁷² See, e.g., Cotta’s discussion of ‘probable reason’ in witchcraft cases in Cotta (n 160) 85.

¹⁷³ On the co-emergence of statistical reasoning and modern society, see Foucault’s seminal arguments in Michel Foucault, *Security, Territory, Population* (Graham Burchell (trans), Palgrave Macmillan, 2007).

legal doctrines associated with evidential admissibility in witchcraft trials, for the same reasons that abstract doctrines of causation were not encoded in the law in general – law lacked systemic capacity for encoding precedent. By contrast to the probabilistic, empirical standard, Gaskill notes, the logical foundation of the use of proofs in witchcraft cases was deeply embedded in theological justifications, despite the abolition of the ordeals as a mode of legal decision-making – proof of a crime, while determined by human jurors, nevertheless was often predicated on their ‘conscience’ and ‘moral certainty’, as mentioned above, rather than empirical analysis.¹⁷⁴

The conditions facilitative of empirical approaches to evidential fact-finding taking root in law were less present in early modern legal discourse as in capitalistic legal rationality. An empirical, probabilistic methodology alone is, and was, an insufficient criterion for the rejection of the possibility of witchcraft, as shown by how several early proponents of empirical methodologies, including Glanville and Hale, were also believers in witchcraft. Thus, one must ask, what legal conditions *would* be favourable to the cultivation of an empirical approach to questions of evidence and witchcraft? The answer lies not in the rise of the ‘scientific method’ *per se*, but rather in the emergence of capitalism, and capitalist law, and the preference for legal certainty and categorisation that coalesces in a system based on private property and contractual obligations.

The development of a relatively sophisticated body of rules regarding evidential standards co-emerged, unevenly, across the late 17th-18th centuries along with other systemic qualities of capitalist law, like the doctrine of precedent, the rule of law, the rights-bearing defendant, formal private property rights, and the associated reconstruction of the old forms of action. While the Marian statutes developed the judicial apparatus in 1555, establishing an infrastructure later legal changes would build upon, the process of fact-finding had not yet assumed its form under capitalism, that is, as one involving rules of evidential admissibility that thresh out ‘irrelevant’ information from the reasoning of jurors. Perhaps most importantly, the social and legal predicates for the capitalist conception of the legal subject – generalised relations of exchange, and so on – had not yet emerged, and so neither had the model of the legal subject as the core around which rules of criminal evidence and procedure were forged, providing infertile conditions for probabilistic conceptions of empirical ‘fact’ to blossom.

¹⁷⁴ Gaskill (n 102) 65.

Indeed, it was not these probabilistic approaches to fact-finding *alone* that would have challenged the evidential components of witchcraft. Rather, another factor may have been more, or at least similarly, fatal for the legal concept of witchcraft, and that is the notion of a ‘rights-bearing defendant.’ As Gimson argues, the modern (capitalist) defendant is ‘rights-bearing’ in the sense that they enjoy a panoply of rights, such as the presumption of innocence.¹⁷⁵ The defendant’s status as such can be seen as derivative from the characteristics of the legal subject themselves – that is, a person free and equal in his or her capacity to own and dispose of property, good against all other legal subjects, enshrined as the central axiom around which other legal constructions orbit and tend to respect.¹⁷⁶ The emergence of the rule of law as an inhibiting constraint on state power, the meta-rule of precedent, and the formal autonomy of the legal system produced a systemic ‘enclosure’ of the law that meant legal subjects must be treated axiomatically *qua* subjects irrespective of which ‘field’ of law is applicable to their circumstances. The state cannot abrogate the subject’s rights, even, or perhaps especially, when the subject becomes a criminal defendant, because discretionary application of state power to subjects might compromise the ownership and exchange of private property. In this sense, not only does criminal law presuppose that legal subjects have responsibility for their acts and omissions, but relatedly, it presupposes that those legal subjects are free and equal before the law *and thus* deserve procedural fairness, a trend Rabin contends emerged across the 18th century.¹⁷⁷

The emergence of the criminal defendant as rights-bearing, then, should be seen as a dimension of the more fundamental evolution of a legal subject, visible in the development of a set of evidential rules over the 18th century and, particularly, in the justifications that congealed around them. Noting how the development of these rules generally precluded the methods used to ‘prove’ witchcraft brings into relief the logic underpinning the witch-trials and their specificity to early modern law. Firstly, the emergence of rules concerning ‘bad character’ evidence, and their connection to the legal subject and the rights-bearing defendant, reflects a crucial development in this regard. Scholars like Wigmore posit that the exclusion of ‘bad

¹⁷⁵ Rachel Gimson, ‘The Mutable Defendant: From Penitent to Rights-bearing and Beyond’ (2020) 40(1) Legal Studies 113-130.

¹⁷⁶ This observation also relates to arguments concerning the endogeneity of many legal rights to capitalism discussed in Chapter Two. See Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton University Press, 1995) 96-134.

¹⁷⁷ Dana Y Rabin, *Identity, Crime, and Legal Responsibility in Eighteenth-Century England* (Palgrave Macmillan, 2004) 1-21, 164-169.

character' evidence occurred in the mid 17th century, though Langbein maintains that early jurisprudence on this point lacks discussion of the 'policy that is considered central to the rule of character evidence' under modern law – namely, the principle that evidence should not be 'unduly prejudicial to the accused.'¹⁷⁸

Langbein maintains that a bad character rule was enforced uncertainly 'from 1684 to 1714' by judges at the Old Bailey, but would not become a 'fail-safe for another thirty odd years.'¹⁷⁹ While jurists casted doubts regarding the probabilistic utility of bad character evidence at least as early as the 1650s in proving whether a defendant had performed a given act, it was not until the 18th-19th centuries that the norm adopted its modern rationality, placing focus not exclusively on the juridically constructed 'value' of the evidence *per se*, but also on the contravention of the defendant's 'rights', 'dignity', 'integrity,' *inter alia*. In either case, that no formal bad character rule was in operation during the peak years of the witch-trials was plainly vital to the latter's survival, as discussed in relation to profile evidence and causation in Section 3.3.2.3.

The bad character exclusion, formulated so as to ensure a trial is not 'prejudicial' to the defendant rather than in commitment to a more abstract conception of objective 'truth', draws on the cognitive framework of, along with the broader material relations presupposed by, a distinctly capitalist model of law. The existence of rights, especially rights that apply universally, in accordance with an implicit rule of law, presupposes a free and equal legal subject in whom they inhere. More widely, this emphasis on the individual as the juridical axiom is conditional on a system focussing not on community membership or personal status but rather on free subjects forming voluntary relations (in this instance, relations of contract and property). In turn, the notion that one of those rights – the right against being judged based on bad character evidence – is justifiable because it prevents the infliction of 'injustice' *on that subject* presupposes that the legal system centres the interests, rights, and duties of individuals rather than the protection of the community through, say, primary commitment to 'objective' truth. Again, it implies a system based on relations voluntarily constructed between individuals rather than individuals perceived and treated as components of a wider social web.¹⁸⁰

¹⁷⁸ John Langbein, *The Origins of Adversary Criminal Trial* (Oxford University Press, 2005) 191.

¹⁷⁹ Ibid 196.

¹⁸⁰ Consider also, in this light, Blackstone's seminal formulation that 'It is better that ten guilty persons escape than that one innocent suffer.' William Blackstone, *Commentaries on the Laws of England Book IV: Of Public*

In this light, the construction of witchcraft assumed that the accused lacked certain legal rights that today derive from a defendant's status as a (capitalistic) legal subject – that is, the accused did not enter the courtroom as a rights-bearing defendant. For this reason, the way witchcraft was proven – and, by extension, the manner through which paranormal practices were conceptualised in early modern law – stood in tension with the logic of capitalist law while sitting comfortably with the logic of the law in the early modern period.

This trend continues elsewhere. For instance, many witchcraft convictions relied on the defendant's confession. Meanwhile, the procedural rule that 'disapproved evidence that the defendant had confessed the crime, unless that confession had been voluntary' only crystallised over the course of the 18th century.¹⁸¹ As formulated in the 1783 case of *Warickshall*, confessions would only be admitted if they had not been 'forced from the mind by the flattery of hope, or by the torture of fear.'¹⁸² The emphasis on the 'voluntary' nature of admissible confessions leads one to suspect, once again, that the emergence of the confession rule was also influenced by an underlying logic of individualism, voluntarily-assumed obligations, and the rights inherent in free and equal legal subjects within the framework of a formally autonomous legal system. The confession rule, after all, has a dual function – both in threshing out irrelevant evidence, but also in ensuring respect for the autonomy of the defendant.¹⁸³

In this latter sense, the confession manifests, or legally presents, within capitalism as an expression of a juridical relation constructed between individual and state, a dimension of some supposed social 'contract' that is obviated in (some) instances of legal non-consent not only because of its potentially weak probative value but also because such quasi-contractual relations are conceptualised as contingent not on status but on the exercise of individual 'agency'.¹⁸⁴ The retention of this ideology of 'voluntary' relations between not only individuals and individuals but also individuals *and the state* is crucial to ensuring the legitimacy of that state and, by extension, the autonomy of the legal system itself, particularly as a system

Wrongs (Clarendon Press, 1765-1769) 352, available at: https://avalon.law.yale.edu/subject_menus/blackstone.asp (accessed 16/02/2023).

¹⁸¹ Langbein (n 178) 218.

¹⁸² *R v Warickshall* [1783] 168 ER 234.

¹⁸³ Fredric Lederer, 'The Law of Confessions – the Voluntariness Doctrine' (1976) 74 *Military Law Review* 67-97, 70.

¹⁸⁴ On the quasi-contractual relation between subject and state, see Geoffrey Kay, 'Right and Force: A Marxist Critique of Contract and the State' in Michael Williams (ed), *Value, Social Form and the State* (Macmillan Press, 1988) 115-133.

formally separated from ‘economic’ relations of market exchange, amongst other social sub-systems of capitalism.

Returning to early modern law, then, this shift in procedural conditions related to confessions would have made securing a conviction on the basis of a witch’s forced confession challenging, and, indeed, Gaskill notes that confessions in witchcraft cases in general were losing their probative capacity by the 1670s, a trend that increased as the decades continued.¹⁸⁵ This is not to say that the confession rule, in a technical sense, specifically operated to exclude the semi-coerced, or entirely coerced, confessions of witches in practice; it only fully emerged *after* witch-trials declined in quantity, and eventually were abolished altogether in 1736. Rather, this suggests that the cognitive environment of the law, its logic, was beginning to change, and ‘witchcraft, while theoretically possible, became impossible to prove...Coherent laws of evidence and proof did not emerge until the eighteenth century, but their core principles were shaped decades earlier.’¹⁸⁶ Further, it reinforces the important assertion for current purposes that capitalistic English law would struggle to conceptualise paranormal practices as witchcraft, at least in the same sense that witchcraft was reified under the first three Witchcraft Acts.

As already alluded to, many confessions were extracted via informal methods that the rules protecting the rights-bearing defendant would tend to problematise. That is, while torture does occur in some capitalist societies, that torture is often treated as irrational, abhorrent, and so on, a characterisation that also draws on capitalist conceptions of the rights-bearing legal subject. While torture was formally illegal, the informal nature of English pre-trial procedure enabled many communities (and JPs) to extract confessions from witches through torture with impunity, such as by blowing gunpowder into the accused’s face.¹⁸⁷ These methods are reminiscent of the use of swimming and pricking as pre-trial devices to indicate the possibility of witchcraft to grand juries, as discussed earlier. Indeed, in his *Discourse of the Damned Art of Witchcraft*, Perkins endorsed the use of torture to determine the guilt of a witch.¹⁸⁸ While others, like Cotta, may have opposed the use of the swimming test, they did so because it was inconsistent with theological doctrine rather than in the interests of protecting the integrity of the defendant.¹⁸⁹

¹⁸⁵ Gaskill (n 102) 60-61.

¹⁸⁶ Ibid 61, 64.

¹⁸⁷ Ibid 51-52.

¹⁸⁸ Perkins (n 68) 643.

¹⁸⁹ Cotta (n 160) 104-114.

Not only would a formal confession rule (and, moreover, the entrenchment of the rights-bearing defendant) have tended to restrict these practices, but, relatedly, so too would it have come into conflict with the constellation of norms structuring the ‘impersonal and impartial application of the coercive power of the state’ – that is, the capitalistic presupposition of the law’s autonomy.¹⁹⁰ The rule of law, along with the legal system’s autonomy and deployment of precedent, operates to maintain systemic closure and consistency under capitalism, wrangling legal norms to cohere, and evolve, according to some procedural level of legal certainty and consistency. Yet, the use of informal, extra-legal techniques to secure confessions – and, therefore, legal outcomes – would compromise that autonomy by transgressing the juridical boundaries necessary for guaranteeing the formal differentiation of the legal system from other social systems. In other words, the acceptance of informal, unlawful evidence-gathering of this form would puncture the juridical membrane, shattering the formalistic borders isolating law from the economy, the family, and so on.

By contrast, while these early modern informal methods, legitimated by legal officials when accepted as evidence by judges and juries, and when initiated by JPs, may have been illegal, they did not compromise the ‘legitimacy’ of early modern law because such legitimacy was not integral to the system’s endurance as under capitalism. A JP who sanctioned a swimming test may have been in formal breach of rules against torture, but their going unpunished, and the use of any resultant confession to secure a conviction of a witch, did not undermine the law on a systemic level because it was, *inter alia*, uncharacterised by an underlying rule of law safeguarding legal consistency, equality of subjects, and systemic autonomy.

That is, extra-legal evidence-gathering techniques did not abrogate the law’s autonomy because such autonomy had not yet been institutionally entrenched. The rule of law functions as a precondition for the retention of law’s systemic boundaries under capitalism, as it binds together legal norms through the institutionalisation of equality of subjects. This is reflected in how, in ‘underdeveloped societies, where the rule of law is compromised by a degree of arbitrary power’, authorities must rely more on ‘coercion, and less on the operation of legal

¹⁹⁰ Deakin (n 61) 18.

rules.’¹⁹¹ As such, in early modern English law, the independence and impartiality of the state, and the judiciary, did not crystallise as a juridical requirement since the exercise of discretionary power over ‘subjects’ was not positioned as contrary to the fundamental conception of what ‘subjecthood’ constituted in this period. Once again, the legal system did not place the legal subject, and their relations of proprietary ownership and exchange, at its heart. As such, the ‘witch’, when viewed in light of modern, rationalistic conceptions of empiricism, could exist as a legal construction embodying the arbitrary deployment of power.

3.4 Conclusion

In conclusion, this chapter has explored several non-exhaustive case studies related to law and witchcraft, allowing us to draw some preliminary conclusions: (1) the preconditions for the legal construction of the witch were contingent on the rationality of early modern law, which retained traces of feudal law while foreshadowing a more capitalistic approach; and (2) the dialectical processes that would eventually reconstitute the law as a capitalist system also swept away those preconditions for witchcraft, leaving it with unstable foundations as a legal concept. In that sense, the burgeoning legal system both provided the apparatus of the witch-trials, while also eventually evolving to the point where its ontological framework became obstructive to the reification, and prosecution, of witchcraft.

Indeed, the structural legal changes that made witchcraft challenging to prove also facilitated its breakdown and subsequent transformative reconstitution into a form of fraud. This can be seen in how some functions of the Witchcraft Acts were retained, such as persecuting persons socially presenting as ‘magical’, while their form was fundamentally altered to categorise those persons not as mystical threats, but rather as deceptive threats to private property relations. In this light, Chapter Four will now turn to the legislation that abolished the witch-trials and reconceptualised paranormal practitioners as frauds: the Witchcraft Act 1736.

¹⁹¹ Simon Deakin, David Gindis, Geoffrey Hodgson, Kainan Huang, and Katharina Pistor, ‘Legal Institutionalism: Capitalism and the Constitutive Role of Law’ (2015) Centre for Business Research, University of Cambridge Working Paper No 468 1.

4. The Transformation of Legal Conceptions of Paranormal Practices: Fraud and Vagrancy, 1736-1951

4.1 Introduction

Chapter Three argued that early modern English law reified paranormal practices through the juridical concept of witchcraft. This chapter explores how the law's construction of paranormal practices changed with the emergence of capitalism and a capitalistic legal rationality. To this end, it examines the repeal of the Witchcraft Act 1604 ('WA 1604') by the Witchcraft Act 1736 ('WA 1736'), which reconceptualised paranormal practices as forms of fraud, supplemented by s 4 Vagrancy Act 1824 ('VA 1824').

The period in which these statutes were passed saw the emergence of capitalist social relations on an unprecedented scale, with the institutions and dynamics of capitalism coalescing throughout English society and beyond.¹ Markets as a generalised means of organising production and the distribution of social resources, predicated on the private ownership and exchange of property, took root. These included markets in land and labour, following the dispossession of workers from direct access to the land (and means of subsistence). This resulted from periods of intense, and violent, primitive accumulation as represented by the land enclosures, alongside the entrenchment of market institutions like banks and private property, and the liberalisation of statutory constraints on many trades. Meanwhile, imperialist systems of colonial exploitation and patriarchal 'housewifisation' were operating to create marginalising relations of gender and race that fuelled, through various forms, market expansion throughout the British Empire and its competitors.²

Against this context, formal status hierarchies had disintegrated as the principal mechanism of social organisation, giving way to the rise of a (capitalistic) set of social relations premised on 'voluntary' association. Social imperatives of capital accumulation and ever-increasing productivity began to congeal, driven by emerging competitive market forces. Co-evolving with these shifts, the systems of belief deemed politically and socially legitimate underwent

¹ Jeffrey Sachs, 'Twentieth-century Political Economy: A Brief History of Global Capitalism' (1999) 15(4) *Oxford Review of Economic Policy* 90-101.

² Maria Mies, *Patriarchy and Accumulation on a World Scale: Women in the International Division of Labour* (2nd ed, Bloomsbury, 2014), especially 74-111.

secularisation, eclipsed by the empirical observations of natural science, as promoted by, *inter alia*, the demands of legal contracting and private property ownership.³

All the while, law served as an institutionalised technology of power, operating to the exclusion of the emerging working classes from land, and the means of production more generally, and to the benefit of the co-emergent class of capital, safeguarding their ownership and control over those same means.⁴ As referenced, the abovementioned relations of capitalism co-evolved with a catalogue of legal developments like the state's monopolisation of legitimate violence, the emergence of a technical doctrine of precedent and the rule of law, the consolidation of the forms of action into remedies, the crystallisation of private property rights and freedom of contract, and the evolution of an abstract, atomised legal subject. Collectively, these structural shifts constituted law's formal differentiation as an autonomous system of norms protecting the institution of private property and thus underpinning generalised market exchange, while composing law's burgeoning capitalistic rationality.

This chapter argues that this evolution in the law's rationality was reflected in how legal constructions of the paranormal transformed, contending that the emerging logic of the law ceased to offer the conceptual 'tools' conducive to the reification of the paranormal as empirically possible. This is because it was no longer a system that reproduced an Anglican ontology, but rather one premised on law's 'new' role in constituting the markets, and other institutions, of capitalism. Accordingly, in a system co-ordinated around the defence and enforcement of private property rights, paranormal practices became reconfigured not merely as empirically impossible, but also, as forms of fraud.

The chapter develops as follows. Section 4.2 provides a legal history of the WA 1736 and the VA 1824. Section 4.3 then explores the elements of the new offences related to their *actus rei*. It considers how the meaning of vagrancy as a legal concept had changed, and why courts were particularly drawn to vagrancy as the central lens through which to conceptualise paranormal practices, considering how those practices were constructed as *per se* deceptive in the courts.

³ On the complexities of the supposed social process of 'disenchantment' that Weber posited as occurring alongside this secularisation, see Michael Saler, 'Modernity and Enchantment: A Historiographic Review' (2006) 111(3) *American Historical Review* 692-716.

⁴ Zoe Adams, *The Legal Concept of Work* (Oxford University Press, 2022) 2; Paul O'Connell, 'Law, Marxism and Method' (2018) 16(2) *Communication, Capitalism, and Critique* 647-655.

Section 4.4 examines the fault aspect of the offences – their *mens reae* – to locate them within capitalistic frameworks of responsibility, intentionality, and dishonesty. Section 4.5 concludes.

4.2 Witchcraft, Fraud, and Vagrancy: A Legal-Historical Overview

The WA 1736 repealed the anti-witchcraft statutes of England and Scotland, including the WA 1604. In their place, the WA 1736 provided that *pretending* to perform spells, see the future, and find lost goods, among other practices identifiable as ‘paranormal’, was now a criminal offence. Section IV WA 1736 stipulated that ‘any person’ who ‘shall... pretend to exercise or use any kind of witchcraft, sorcery, enchantment, or conjuration’ would be subject to criminal sanctions. This terminology echoed the language of the offence of witchcraft in the anti-witchcraft statutes, including the WA 1604, which applied sanctions against those who used ‘witchcraft, sorcery, charme, or inchantment’ to kill or injure, as well as those who employed ‘any invocation or conjuration of any evil and wicked spirit.’ The transformation in legal conceptions of paranormality, then, occurred by way of partial bricolage, the language redeployed within a legislative framework that was beginning to express a distinct set of values and meanings, while functioning to marginalise similar practices and beliefs. The statute’s internal justification for criminalising these practices was made explicit, with s IV WA 1736 stating that it was aimed at ‘punishing... any Pretences to Such Arts or Powers as are before mentioned’ by which ‘ignorant persons are frequently deluded and defrauded.’

The Act also drew from vagrancy legislation, which had long operated in parallel with the anti-witchcraft statutes to marginalise vagrant fortune-tellers. As discussed later, from at least the 16th century, early modern vagrancy statutes had criminalised fraudulent fortune-tellers who also happened to be vagrants (rather than fortune-telling *per se*). In the WA 1736, fortune-telling was a crime *simpliciter*, since s IV criminalised all those who ‘undertake to tell fortunes.’ This echoed a provision from the Vagrancy Act 1714, which had consolidated all vagrancy legislation that preceded it and criminalised those ‘pretending to have skill in physiognomy, palmistry, or like craft science, or pretending to tell fortunes’. A key innovation of the WA 1736, however, lay in its decoupling of juridical notions of fraudulent paranormal practices from vagrancy, rendering them an offence in their own right.

Although the legal transformation engendered by the WA 1736 was a landmark in the history of regulating paranormal practices in England and Wales, its legislative origins are somewhat

mysterious. Given the limited amendments made to the bill, it appears to have passed through Parliament with little controversy, save for the objections of Lord James Erskine, whose vehement opposition may have cost him political legitimacy, at least in the eyes of his rival Robert Walpole.⁵ Nevertheless, Bostridge contends that the bill that became the 1736 Act seems to have appeared *ex nihilo* in the absence of substantial parliamentary records.⁶

Its sponsors were the Whig MPs John Crosse, George Heathcote, and John Conduitt. Davies argues that while ‘Conduitt’s admiration for Newtonian thought’ may hint at a ‘rationalist motive for his interest in repealing the witchcraft laws... apart from all three men being Whigs, there is little to connect’ them all, particularly if the bill was conceived as a ‘scientifically-inspired project.’⁷ On the former point, while Conduitt may have been Newton’s son-in-law and was a strong believer in his scientific findings, Newton’s own ‘thinking on the subject owed more to his immersion in radical, heterodox, and mystical strains of Protestantism than it did to his mathematical conception of the natural world.’⁸ Reducing Newton’s intellectual project to one that had no space for the paranormal, therefore, would be an oversight, as would construing Conduitt’s motives as a rationalistic attempt to impress his father-in-law.

Another motivation may have flowed from witchcraft’s increasing redundancy as an offence. There had been a steady decline in witchcraft prosecutions from the late 17th century, a central factor of which was the emergence of certain rules of evidence, as discussed in Chapter Three.⁹ Isolated confessions and bad character evidence had lost their probative force, making witchcraft more and more difficult to ‘prove’.¹⁰ These legal factors, alongside the increasing scepticism of the judiciary promoted by the Whig Sir John Holt following his assumption of the office of Lord Chief Justice in 1689, operated to thresh out witchcraft accusations within

⁵ Ian Bostridge, *Witchcraft and its Transformations c.1650-c.1750* (Oxford University Press, 1997) 184-191.

⁶ Ibid 182.

⁷ Owen Davies, ‘Decriminalising the Witch: The Origin and Response to the 1736 Witchcraft Act’ in John Newton and Jo Bath (eds), *Witchcraft and the Act of 1604* (Brill, 2008) 207-232, 219.

⁸ Peter Elmer, ‘Science and Witchcraft’ in Brian Levack (ed), *The Oxford Handbook of Witchcraft in Early Modern Europe and Colonial America* (Oxford University Press, 2013) 548-560, 557.

⁹ See Barbara Shapiro, “Beyond Reasonable Doubt” and “Probable Cause”: *Historical Perspectives on the Anglo-American Law of Evidence* (University of California Press, 1991) 51-54, 164-168; Malcolm Gaskill, ‘Witchcraft and Evidence in Early Modern England’ (2008) 198 *Past and Present* 33-70, 69-70; and Brian Levack, ‘The Decline and End of Witchcraft Prosecutions’ in Brian Levack (ed), *The Oxford Handbook of Witchcraft in Early Modern Europe and Colonial America* (Oxford University Press, 2013) 429-446, 439-440.

¹⁰ James Sharpe, *Instruments of Darkness: Witchcraft in Early Modern England* (Reprint ed, University of Pennsylvania Press, 1997) 213-234. For a continental comparison, see Noel D Johnson and Mark Koyama, ‘Taxes, Lawyers, and the Decline of Witch Trials in France’ (2014) 57(1) *Journal of Law and Economics* 77-112.

the juridical sphere.¹¹ By the 1730s, the Jacobean WA 1604 was seldom deployed in trials, and convictions were increasingly rare.¹²

Beyond legislative spring-cleaning, however, one can diagnose political elements to the ratification of the WA 1736. According to Elmer, following the Glorious Revolution and ‘the emergence of a religiously and politically plural state’, the eventual parliamentary abolition of witchcraft as a legal concept was ‘implicit from the outset.’¹³ The Tories held power through their appeals to traditionalism and loyalty to the Crown and the church, and its theological doctrines. By contrast, many Whigs, especially those loyal to Robert Walpole like John Conduitt, sought to promote ‘free’ government by continuing to disrupt royal authority, which was perceived as being entangled with, and partially derivative from, the Crown’s position as leader of the Church of England.¹⁴ In this sense, repealing the WA 1604 may have been calculated to eviscerate another tendril, however small, of ecclesiastical and monarchical influence. Projects like this, excising theology from legal institutions, may have been perceived as helping to reduce the risk of monarchical threats to the post-Revolution ‘liberties’ now enjoyed by merchants and landowners, which included many Whigs, like Conduitt himself. As such, the WA 1736 ‘was not a progressive measure befitting the age of enlightenment, but the Whig government thumbing its nose at the Tories’ who wished to retain the legislation despite its redundancy in the courts.¹⁵

In any case, the question of why paranormal practices were reframed as *fraudulent* remains unanswered. On this point, the Act can be contextualised against the wider emergence of private property relations discussed in the introduction and, more specifically, legislative trends emerging around property offences. Crimes involving ‘dishonesty’ like fraud, forgery, and extortion were scarce in the English common law before the mid 16th century, with fraud and treason, for instance, generally falling under the jurisdiction of Star Chamber. However, with the ‘triumph of the common law courts over their rivals... these branches and elements of

¹¹ Malcom Gaskill, ‘Witchcraft Trials in England’ in Brian Levack (ed), *The Oxford Handbook of Witchcraft in Early Modern Europe and Colonial America* (Oxford University Press, 2013) 283-299, 295-298.

¹² Ibid 298.

¹³ Peter Elmer, *Witchcraft, Witch-hunting, and Politics in Early Modern England* (Oxford University Press, 2016) 293.

¹⁴ On the conflicts between Whigs and Tories in the 1730s, see T F J Kendrick, ‘Sir Robert Walpole, the Old Whigs and the Bishops, 1733-1736: A Study in Eighteenth-Century Parliamentary Politics’ (1968) 11(3) *The Historical Journal* 421-445.

¹⁵ Gaskill (n 11) 298.

criminal law were received into the common law'.¹⁶ The assimilation of these legal concepts into the common law occurred alongside the general transfer of all legal competence from the Crown to Parliament, beginning noticeably with the Civil War in 1640 and culminating in the Glorious Revolution in 1689. This jump-started a cavalcade of parliamentary legislative programmes that continued into the 18th century and beyond, aimed at 'protecting the property rights of the landed gentry and merchant classes' who either constituted or served the interests of the legislature's membership.¹⁷

As such, from the 1720s, a raft of (often capital) offences associated with property and deception were passed, many of which helped to safeguard the interests of the bourgeoisie with whose interests those of the state were becoming increasingly aligned.¹⁸ As Berman writes, 'the common felony of larceny was extended to a variety of economic offences that had previously not been punishable in the common law courts', including increasingly specific larceny offences preventing, for instance, theft of vegetables and parts of buildings, along with the Black Act 1723, which introduced offences related to piracy and forgery, particularly in banking.¹⁹ Linebaugh, meanwhile, notes the increasing criminalisation of customary appropriation – a practice whereby labourers would take excess resources from the workplace – as part of this trend.²⁰ Another significant statutory development was the promulgation of the Bloody Code, for which King and Ward point out the consolidation of the state's monopoly over 'legitimate' violence was a key precondition – a precondition that also underpinned the widespread enforcement of all newly emerging property offences to secure burgeoning relations of private property, including those associated with paranormal practices.²¹

Thus, a surge of legislation concerning property offences was building from the late 17th and early 18th centuries onwards, and a subset of that wave were offences premised on 'deception' and 'dishonesty'. Against this backdrop, Davies suggests that the WA 1736 'was an explicit

¹⁶ Harold Berman, *Law and Revolution Vol II: The Impact of the Protestant Reformation on the Western Legal Tradition* (New ed, Harvard University Press, 2006) 311.

¹⁷ Ibid 315.

¹⁸ See Douglas Hay, 'Property, Authority, and the Criminal Law' in Douglas Hay, Peter Linebaugh, John G Rule, E P Thompson, and Cal Winslow (eds), *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (Verso, 2011) 17-63.

¹⁹ Berman (n 16) 315.

²⁰ Peter Linebaugh, *The London Hanged: Crime and Civil Society in the Eighteenth Century* (Verso, 2003) 390-397.

²¹ Peter King and Richard Ward, 'Rethinking the Bloody Code in Eighteenth-Century Britain: Capital Punishment at the Centre and on the Periphery' (2015) 228(1) *Past and Present* 159-205, 202.

attack on the numerous cunning folk and fortune-tellers who plied their trade by unbewitching, healing, detecting stolen property, provoking love and performing other magical services,' who 'were the very same magical practitioners who had been targeted' under the anti-witchcraft legislation.²² In this light, the perceived need to reconceptualise witchcraft through the emerging rubric of private property rights, and the associated transformation of the legal form, is more understandable: as capitalist social relations were beginning to crystallise and receive institutional entrenchment, so too were concerns about the *preservation* of those relations, within which the legal practice of constructing paranormality – once conceptualised as witchcraft – became swept up. These relations may have framed the practices of the Whigs responsible for the Act, and, indeed, such a reformulation may have exposed the redundancy, or even 'irrationality', of the earlier crime, leading to its statutory disposal.

Consequently, for almost one hundred years, the WA 1736 was the principal statute criminalising paranormal practices. Even so, from around the late 19th century onwards, the WA 1736 fell out of favour in the courts, possibly due to 'embarrassment on behalf of magistrates about invoking a law that referred explicitly to witchcraft even as a fraud.'²³ Indeed, in 1824, a new vagrancy statute was passed which came to eclipse the WA 1736 as the main legal mechanism invoked to criminalise of paranormality. To summarise its language, s 4 VA 1824 provided that 'every person pretending or professing to tell fortunes, or using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any of his Majesty's subjects' was to be classified and sanctioned as a 'rogue and vagabond,' restating older laws in a new, capitalistic context within which what it meant to be propertyless – to be a vagrant – had taken on new significance.

The historical origins of the VA 1824 can be traced to the Statute of Labourers 1351 and the Statute of Cambridge 1388, the latter of which, Middleton contends, should be seen 'more accurately and centrally' as 'a statute concerning vagrancy.'²⁴ In the wake of the Black Death, to counter the increasing bargaining power of peasants vis-à-vis their lords and employers, the Statute of Labourers 1351 was passed as 'a determined attempt to bring the labourers back, as

²² Owen Davies, 'Magic in Common and Legal Perspectives' in David J Collins (ed), *The Cambridge History of Magic and Witchcraft in the West: From Antiquity to the Present* (Cambridge University Press, 2015) 521-546, 524.

²³ Ibid 526.

²⁴ Anne Middleton, 'Acts of Vagrancy: The C Version "Autobiography" and the Statute of 1388' in Steven Justice and Kathryn Kerby-Fulton (eds), *Written Work: Langland, Labor, and Authorship* (University of Pennsylvania Press, 1997) 208-318, 208.

nearly as practicable, to the servile conditions of preceding generations.’²⁵ In that sense, the Webbs contend, early vagrancy laws were premised on feudal notions of a ‘social hierarchy of rulers and ruled, of landowners and those who belonged to the land.’²⁶

Therefore, the law’s original approach to vagrancy concerned itself with individuals who subverted and operated beyond the boundaries set by feudal conceptions of status as mediated by land, and was deployed ‘to restrain the labouring population from moving outside their designated areas’ for the purposes of personal economic advantage or otherwise.²⁷ In other words, the earliest incarnations of vagrancy law were framed by distinctly feudal relations, and a perceived need to resuscitate and reinforce the feudal political order such as to ‘provide a kind of substitute for the system of villeinage and serfdom, which was then breaking down.’²⁸

In subsequent centuries, the early modern period witnessed myriad laws explicitly targeting vagrancy. In the 15th century, Henry VII passed his Vagrancy Act 1494, followed by Henry VIII’s Vagabonds Act 1530 and the Egyptians Act 1530, which prohibited those who travelled ‘from shire to shire, and place to place’, including those who ‘by palmistry...tell men’s and women’s fortunes’ to deceive ‘the people of their money.’ This practice was said to be evidence of the villainy of a group of ‘outlandish people, calling themselves Egyptians’. The Vagabonds Act of the same year provided that those ‘feigning’ to use ‘palmistry, or other crafty science’ to tell ‘fortunes and such other like fantastical imaginations to the great deceit of the King’s Subjects’ were ‘vagabonds and beggars.’ Several subsequent vagrancy statutes ran in parallel with the anti-witchcraft legislation, such as the Egyptian Act 1554, the Vagabonds Act 1597, and the Vagrancy Act 1711, many of which reproduced provisions that included fortune-tellers in its catalogue of vagrants.

While the manorial system, and the feudal political order more generally, was in strong decline by the 16th century, the early modern statutes should not be seen as entirely divorced from the logic that informed the Statute of Labourers 1351 and the Statute of Cambridge 1388. Vagrancy was closely related to the settlement regulations, being administered by reference to the

²⁵ Sidney Webb and Beatrice Webb, *English Poor Law History, Part I: The Old Poor Law* (Frank Cass and Co, 1927) 25.

²⁶ Ibid 23.

²⁷ Dennis J Baker, ‘A Critical Evaluation of the Historical and Contemporary Justifications for Criminalising Beginning’ (2009) 73 *Journal of Criminal Law* 212-240, 216.

²⁸ James Fitzjames Stephens, *A History of the Criminal Law of England Vol 3* (Cambridge University Press, 2014) 204.

vagrant's home parish via bureaucratic technologies like begging licences, vagrant passports, and settlement certificates.²⁹ As Pounds notes, the delineation of parishes, initially, was derivative from feudal social relations, since many feudal estates 'in the firm hand of a manorial lord...[were] endowed with a church which became the focus of a parish.'³⁰

The logic of tethering an individual's identity to a specific location carries feudal overtones, and early modern vagrancy and settlement can be seen as the fractured remnants of the system the Statute of Labourers had attempted to reinforce. For this reason, Polanyi identifies the Act of Settlement 1662 as a mechanism for instituting 'parish serfdom,'³¹ even if migrant workers could enjoy a right to settlement through hiring as under the Poor Relief Act 1691. As Goluboff contends, later vagrancy laws were still chiefly aimed at a similar goal to the 14th century legislation that preceded them, even with the disintegration of the feudal political order: 'untethered workers could exact exorbitant wages in a tight labour market and the wandering unemployed could try to obtain relief from local governments not obligated to support them.'³² Thus, while the formal structures of feudalism may have been deteriorating in the face of land enclosures, urbanisation, demographic shifts, and so forth, the legal practice of identification of personal status by reference to land was partially perpetuated within the framework established by the vagrancy and settlement statutes.

As such, these early modern vagrancy statutes may have contained allusions to 'fraudulent' fortune-telling, but their understanding of fortune-telling as an offence was constructed in relation to how vagrancy was then defined, as a matter of status. In Beier's formulation, vagrancy was deployed as a legal category criminalising certain *classes* of individuals, as opposed to specific actions, as in the case of murder or larceny – the vagrant 'class' being characterised by displacement, and detachment from legal status established in relation to land.³³ Fraudulent fortune-telling was, therefore, principally marginalised because such practices were stereotyped as evidence of masterlessness, itinerancy, and deviance from land-based social-hierarchical categorisation. As Section 4.3 will explain, this logic would be

²⁹ Steven Hindle, 'Technologies of Identification Under the Old Poor Law' (2006) 36(4) *The Local Historian* 220-236, 221.

³⁰ N J G Pounds, *A History of the English Parish: The Culture of Religion from Augustine to Victoria* (Cambridge University Press, 2000) 28.

³¹ Karl Polanyi, *The Great Transformation* (2nd ed, Beacon Press, 2001) 82.

³² Risa Goluboff, *Vagrant Nation: Police Power, Constitutional Change, and the Making of the 1960s* (Oxford University Press, 2016) 15.

³³ A L Beier, *Masterless Men: The Vagrancy Problem in England, 1560-1640* (Methuen, 1987) xxii.

reconfigured by the VA 1824, evinced by how courts reconceptualised the offence in terms of dishonesty and deception, rather than subversion of a given land relation.

To progress beyond early modern law, the Vagrancy Act 1744 introduced the tripartite conception of vagrancy that would also define the VA 1824. Under this trinary classification, three subclasses of ‘vagrant’ could be identified: the ‘idle and disorderly’; the ‘rogues and vagabonds’; and the ‘incorrigible rogues.’ Fortune-telling fell under the intermediate category of ‘rogues and vagabonds’, which ‘comprised a larger and more distinctly criminal and/or fraudulent class’ than the ‘idle and disorderly’.³⁴ The 18th century would see the ratification of other vagrancy statutes, yet it would not be until the 1820s that the key legislation would come into force.

This leads us to the vagrancy laws of the 1820s, of which there were three – one in 1821, a second in 1822, and then a third, the VA 1824. An immediate motivation behind the three vagrancy statutes of the 1820s was the skyrocketing unhoused populations that emerged within England after the Napoleonic Wars, which had concluded nine years prior to the VA 1824’s promulgation.³⁵ Following the wars, the Royal Navy and the British Army struggled to sustain vast swathes of their membership; the need for so many sailors and soldiers had dwindled following the conclusion of military conflict. Both began discharging recruits on a large scale, leaving many without income, or property.³⁶ Meanwhile, the decades following the Gordon Riots of 1780 had seen increasing demands for preventive management of crime and institutional controls on ‘vice’ to support social stability, especially in light of the disintegrative effects of war and the collapse of London’s textiles economy.³⁷ Thus, Roberts argues, the post-war English ‘better-off’ were becoming increasingly conscious of – and concerned about – ‘post-war demobilization, economic distress, urban radicalism and the apparent crime wave which so alarmed them.’³⁸

³⁴ Alistair Robinson, *Vagrancy in the Victorian Age* (Cambridge University Press, 2021) 12.

³⁵ Nicholas Rogers, ‘Policing the Poor in Eighteenth-Century London: the Vagrancy Laws and their Administration’ (1991) 24(47) *Social History* 127-147, 145.

³⁶ Evidence of this specific legislative goal and its connection to military veterans can be found in s 4 VA 1824, which criminalises ‘any person wandering abroad, and endeavouring by the Exposure of Wounds or Deformities to obtain or gather Alms’ – meaning, former servicemen who used their injuries as a means of eliciting sympathy while begging.

³⁷ Rogers (n 35) 142.

³⁸ M J D Roberts, ‘Public and Private in Early Nineteenth-century London: the Vagrant Act of 1822 and its Enforcement’ (1988) 13(3) *Social History* 273-294, 281.

Amidst these concerns, residents and legal officials began promoting a (perceived) need to control the unruly poor. *Prevention* of crime was entering into vogue as a legislative goal, while ‘the growth of a free market in labour had been tacitly encouraged, and the old concern with stabilising the population in parish of settlement allowed to fall away.’³⁹ In other words, free market relations had ‘usurped’ social relations predicated on formal status derived from land ownership. Institutions like the Mendicity Society took umbrage with how they saw the poor laws and vagrancy laws as offering a system of incentives to certain undesirable practices in this budding free market in labour. Rural workers might abandon their old forms of employment, travel to the cities in search of opportunity, and – when those new opportunities dried up – exploit the vagrancy laws such that they could be ‘repatriated to their parish of settlement at rate-payer expense, only to begin the cycle once again when opportunity offered.’⁴⁰

Existing policies and statutes on vagrancy were subject to review by Select Committees in 1815 and 1822.⁴¹ Rogers notes that the Committees ‘led their witnesses, posing questions that were designed to highlight the abuses of the law and the moral turpitude of the vagrant.’⁴² To curtail behaviour perceived as undesirable, one solution proposed in the Committee’s Report for dealing with public indecency and the unhoused was to reform previous vagrancy statutes, which were seen as no longer fit for purpose. The Vagrancy Act 1821 was quickly passed, followed by the more expansive Vagrancy Act 1822, the temporary provisions of which were set to lapse in 1824, if the VA 1824 had not revived them. In Parliament, the stated objectives of the legislation included consolidation of the disparate vagrancy statutes that predated it, along with ‘regulation and amendment’ if not outright abolition of ‘the present system of passing vagrants.’⁴³ As an alternative to passing vagrants back to their parish, the VA 1824 provided that convicted vagrants could be sentenced to a minimum of one month in a House of Correction, to perform hard labour. Section 4.3 explores how this crucial distinction related to wider shifts in the meaning of vagrancy.

³⁹ Ibid.

⁴⁰ Ibid 281-282.

⁴¹ See Select Committee on the Existing Laws Relating to Vagrants, *Report, Minutes of Evidence* (HC 1821, IV.121).

⁴² Rogers (n 35) 129.

⁴³ HC Deb 12 March 1822, vol 6, cols 1047-1048.

For now, the Vagrancy Act 1822, and by extension the VA 1824, also expanded the category of vagrants to include those engaging in ‘indecent’ or ‘obscene’ behaviour, even if they were housed or engaged in employment. For instance, the ‘display of obscene prints in shop windows, which were ostensibly private property’ also became precluded under the Act.⁴⁴ Again, as Section 4.3 discusses, the *meaning* of vagrancy was becoming less about maintaining the status-based distinctions of the feudal period, and more about the prevention of disruptions to the social (and legal) relations of private property and exchange. This can also be felt in provisions associated with the possession of lockpicks and the intent to commit felonies; the prevention of crime (particularly, prevention of property-based crimes), rather than crime itself, was coming to define the logic of vagrancy law.⁴⁵

As mentioned, the Vagrancy Act 1822 was only a temporary measure. Following Home Secretary Robert Peel’s admonishments to Parliament that they faced a situation in which no legislation would be available to deal with vagrants upon the Vagrancy Act 1822’s lapse, the VA 1824 was passed with ‘surprisingly little debate’ in Parliament.⁴⁶ The VA 1824 had been preceded by a wave of Metropolitan legislation since the 1780s similarly aimed at preventative control of disorder, including the Depredations on the Thames Act 1800, the Peace Preservation Act 1814, and the Night Poaching Act 1828. It was briskly followed by the Metropolitan Police Act 1829, with the former coming ‘to underpin the massive expansion of policing’ from 1829 onwards by granting the police power to arrest ‘idle and disorderly persons’, making it synergetic with the enforcement of the VA 1824.⁴⁷ No longer would private individuals have to rely on informal or ‘entrepreneurial, reactive policing... as typified by the Bow Street Runners,’ bailiffs, and night watchmen,⁴⁸ nor would they have to haul offenders before the justice system by their own private means. Now, the infrastructure was in place for the VA 1824 to be deployed to its full potential by an institutionalised police force acting pre-emptively to stop criminal activity and haul ‘vagrants’ before the magistrates.

From this legal-historical overview, some shifts in the form and meaning of the legislation can already be detected. That said, how the language of the statutes was interpreted and applied in

⁴⁴ Robinson (n 34) 15.

⁴⁵ On ‘pre-crime’, see Lucia Zedner, ‘Pre-crime and Post-criminology?’ (2007) 11(2) Theoretical Criminology 261-281.

⁴⁶ Paul Lawrence, ‘The Vagrancy Act (1824) and the Persistence of Pre-Emptive Policing in England Since 1750’ (2017) 57 British Journal of Criminology 513-531, 517.

⁴⁷ Ibid 517.

⁴⁸ Ibid 514.

the courts reveals more fully how the provisions on paranormal practices were integrated and understood within the framework of a now more fully realised capitalist legal system. Thus, with the statutes' legal history established, Section 4.3 will now examine how these statutes were interpreted, and enforced, in practice, exposing the preconditions structuring legal decision-making in this phase in the genealogy of how paranormal practices have been constructed in law.

4.3 The Transformation of Paranormality: Vagrancy, Irrationality, and Harm

This section examines the juridical conceptualisation of paranormal practices as forms of deception during the period under examination. It then uses that analysis to interrogate the conditions of possibility contributing to this framing – specifically, the conditions constituted by law as an institutional system of norms preserving the proprietary relations of capitalism.

In overview, the transformation of paranormality in law engendered by the WA 1736 and the VA 1824 resulted in the emergence of a key aspect of modern legal discourse around regulating paranormal practices – the presumption of impossibility, linked to a presumption of dishonesty. Courts began to assume that any paranormal practice could not produce the empirical results its practitioners claimed. Thus, especially where a fee had been charged, the courts extrapolated that any paranormal service transaction must have involved deception, even where there was no identifiable victim or duped 'vulnerable consumer,' despite the early 19th century's oft-observed status as the heyday of freedom of contract in English law.⁴⁹ The following section will explore the relationship between this conceptualisation and the emergence of a capitalist legal rationality.

4.3.1 Paranormality and Shifting Conceptions of Vagrancy

In prosecuting fortune-telling and mediumship, the courts heavily relied on the VA 1824, rather than the WA 1736, adopting a methodology that principally categorised paranormal practices as *per se* deceptive. Considering the text of the statutes, however, such an axiomatic, unchallengeable categorisation was not a necessary outcome, but rather one contingent on several implicit preconditions in the emerging rationality of the law. The WA 1736, for

⁴⁹ See Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press, 1985).

instance, was aimed at ‘preventing and punishing of any pretence to such arts... whereby ignorant persons are frequently deluded and defrauded’, according to the Act itself. By implication, if there were any reasonable doubts about whether ‘such arts’ were efficacious, or if no ‘ignorant persons’ were ‘deluded and defrauded’, then, in principle, there ought to be no finding of an offence. This was not, however, the interpretation generally afforded to the statute by the courts.

Likewise, the VA 1824 provided that ‘pretending or professing to tell fortunes, or using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any of his Majesty’s subjects,’ rendered one a ‘rogue and vagabond.’ Again, the references to ‘pretending or professing’ and deception *could* be read as suggesting, where juries experienced reasonable doubt as to whether the fortune-telling performed was in fact empirically possible, a conviction would be unsafe. Further, while the statute did not specifically require a victim who had suffered loss, the statute still implied a victim would be in some sense relevant, since paranormal practices tacitly had to target ‘his Majesty’s subjects’ to attract liability. As such, while both Acts criminalised the deceptive use of paranormal practices, they did not stipulate that *all* such practices were deceptive or even harmful. Yet such a distinction was rarely drawn by the courts in their jurisprudence.

To understand this, one must return to how the logic of vagrancy had evolved since the early modern period to the 19th century, which will be of particular significance when considering how the ‘victim’ was constructed in the caselaw. As previously explained, vagrancy was originally constructed through feudal ideas of status and land, even when vagrancy as a legal category came to be based on parishes rather than fiefs. By the 19th century, fortune-telling as an expression of vagrancy was not conceptualised as indicating some wider land-based transgression, but instead ‘the 1824 Act now allowed [fortune-tellers] to be punished for what they practised, rather than for their itinerant status.’⁵⁰

More precisely, 19th century vagrancy legislation was shifting towards a model of preventive control of social disorder geared towards the preservation of capitalistic private property relations, retaining only vestiges of its legal heritage. That is, particularly after the introduction of the Metropolitan police force in 1829, 19th century vagrancy law began to be organised

⁵⁰ Owen Davies, *Witchcraft, Magic, and Culture, 1736-1951* (Manchester University Press, 1999) 54.

around the concept of ‘pre-crime.’⁵¹ For instance, the VA 1824, Lawrence writes, ‘anticipates crimes and then proceeds as if they had already happened’ to maintain ‘public order’ – or, more specifically, the order of private property.⁵² The increasing prevalence of private property rights as the framework of social production and interpersonal relations, determined not by status but by voluntary assumption of legal responsibility, propagated an increased need for sanctions protecting the system of private property relations that, as Section 4.2 discussed, had been seen as under threat of destabilisation in the wake of riot, war, and economic volatility.

By the 19th century, the emerging nucleus of the legal system was the abstract legal subject, whose central characteristics pertained to their capacity to own and dispose of property, a development that rippled throughout the legal system, including criminal law. Pashukanis, for this reason, identifies criminal law as ‘a variation of that basic form to which modern society is subject – precisely the form of equivalent exchange with all its consequences.’⁵³ In other words, while criminal law and laws explicitly concerning equal legal status and consent (i.e. contract law) may have become differentiated, by virtue of remaining a form of law in which the legal actors are specifically legal subjects, the criminal law was, and is, necessarily framed by the higher level abstractions around which the totality of the legal system is organised – property, precedent, contract, the legal subject, the division between persons and things, and so forth. Contractual agreements, for instance, had previously been treated as subordinate to the status relations between the parties, that key dimension of feudal law. But by the promulgation and application of the VA 1824, freedom of contract, the ultimate expression of voluntary assumption of responsibility as law’s central premise, had been steadily emerging as an organisational principle of English private law since the 1780s, and now enjoyed robust juridical expression.⁵⁴

This is evident in how land, ‘which in the eighteenth century had been the foundation of social position and political power, became in the nineteenth century a commodity, just like any other.’⁵⁵ Likewise, the employment relationship had not been previously treated as the contractual sale of labour power in exchange for wages, but rather as fundamentally

⁵¹ See Zedner (n 45).

⁵² Lawrence (n 46) 513.

⁵³ Evgeny Pashukanis, *The General Theory of Law and Marxism* (Barbara Einhorn (trans), Transaction Publishers, 2003) 176.

⁵⁴ See Atiyah (n 49).

⁵⁵ Ibid 400.

proprietary. It was ‘an exclusive property relationship between an employer and the servant’s service’ that was ‘independent from, and took primacy over, the contract between the parties’ since it was key to feudal property relations that ‘rights in land gave rights to service.’⁵⁶ Legislation enforced these ‘constraints’: wages were fixed by statute, like the Statute of Artificers 1563, and the enclosure of the commons was legally prohibited. Yet, by the 19th century, voluntary contracting, largely inoculated from intervention by the state, had been adopted as one of the central abstractions applicable to all market exchange. The emerging model was premised on ‘arm’s length’ exchange between *abstract* legal subjects, and offer and acceptance instead of status-based hierarchical presumptions, along with personal responsibility for the carrying out of the contract, absolute liability flowing from individual consent, and the justificatory logic of ‘freedom of contract’ – that is, the notion that ‘the content of the contract, the terms and the price and the subject-matter, are entirely for the parties to settle.’⁵⁷

The reconfiguration of law to emphasise the autonomous legal relations of parties, rather than their personal statuses as mediated by land, can be observed throughout a series of legal developments that co-emerged alongside wider socio-economic processes related to the emergence of capitalism: the land enclosures, the emergence of markets in agricultural leases, and other practices understandable as examples of primitive accumulation.⁵⁸ Berman, for instance, focuses on how factors like these influenced the way ‘the underlying theory of liability shifted from breach of promise to breach of a bargain.’⁵⁹ The legal enforcement of a contract ceased to be logically justified by reference to the receipt of a benefit or the defendant’s personal breach of an oath (as in the ecclesiastical court remedy of *fidei laesio*, discussed in Chapter Three) and instead orbited around their failure to uphold their part in a freely entered relationship. The autonomous ‘promises’ of the parties were no longer a matter of personal conscience within legal discourse, but rather were treated as ‘mutually interdependent’.⁶⁰

Further, the reception of the forms of action from the prerogative courts into the common law and their reformulation as remedies allowed contractual doctrines to operate in the abstract rather than the particular, illustrating how the legal form manifested changes not only in the

⁵⁶ Zoe Adams, *Labour and the Wage: A Critical Perspective* (Oxford University Press, 2020) 84, 96.

⁵⁷ Atiyah (n 49) 402-403.

⁵⁸ See Ellen Meiksins Wood, *The Origin of Capitalism: A Longer View* (Verso, 2017).

⁵⁹ Berman (n 16) 339.

⁶⁰ Ibid.

substance of legal rules but also in legal *procedure*. Finally, following decisions like *Paradine v Jane*, the law had adopted absolute liability as its central prism through which to view the relations between contractual parties, empowering the promisee to collect compensation regardless of the grounds of non-performance insofar as performance was expected within the contract as agreed and supported by consideration.⁶¹

Overall, then, the underlying rationality of the law was centring autonomous, contractual exchange of private property rights. The same legal axioms, such as personal responsibility for legal agreements, that provided the infrastructure of abstract exchange were part of a broader movement that also influenced the transformation of other legal norms, such as those associated with vagrancy, which could be redeployed for the protection and enforcement of private property. Co-evolutionary with these developments in contract law were those in property itself, which had gradually, albeit inconsistently, transitioned from inhering in land vis-à-vis personal status (feudalistic) to a form of relation constructed as subsisting between a person and an ‘asset’ involving the right to control the asset and to regulate its use, the right to appropriate any fruits produced by that asset, the right to exclude other subjects from accessing the asset, and the right to transfer the asset, and all rights associated with it, to other legal subjects (capitalistic).⁶²

Key to this development, as referenced above, were the statutes facilitating land enclosures and the abolition of the system of feudal land tenure, as achieved through a series of legislative developments in 1641, 1645, and 1656, eventually culminating in the Tenures Abolition Act in 1660 (though, in practice, the manorial system had already been thoroughly in decline during preceding centuries). The assimilation of all judicial authority into the common law, and the consequent emergence of the technical doctrine of precedent, further cemented the emergence of private property rights by allowing the common law courts to respond to all property conflicts while facilitating the dynamic evolution of its jurisprudence. No longer did property in law refer to a system of social tyranny in which lords held dominion over peasants through their ownership of land; nor did it merely connote a ‘right’ to possess. By the second half of the 18th century, Blackstone’s commentaries reveal glimpses of a capitalistic notion of private property rights emerging, referencing property as ‘an exclusive right to retain in a permanent

⁶¹ Ibid 340.

⁶² Paul H Rubin and Tilman Klumpp, ‘Property Rights and Capitalism’ in Dennis C Mueller (ed), *The Oxford Handbook of Capitalism* (Oxford University Press, 2012) 204-217, 205.

manner...specific land, which before belonged generally to everybody,’ noting that property relations signified that the owner ‘intends to appropriate the thing to his own use’ and thus ‘it remain in him, by the principles of universal law, till such time as he does some other act which shews an intention to abandon it.’⁶³

Considering this shift, the transition within vagrancy law towards the protection of relations of private property reflects how changes in the rationality of the law were not limited to private law but extended to all juridical discourse. That is, all legal practice began to be conceived within, and thus drew on the principles immanent to, a system of private property, and so the logic of private property found itself expressed throughout legal reasoning. As Pashukanis writes, the ‘struggle for existence’ embodied by interpersonal violence as conceptualised within the criminal law ‘takes on juridical form through the projection into it of the principle of equivalence.’⁶⁴ In this configuration, the increasingly complex emphasis on, and theorisation of, the intentions of the defendant in a criminal case can be analogised with the focus on the subjectivities of the parties, rather than receipt of benefit, personal oath-breaking, or status relations, that emerged in contract and property law, as discussed in Section 4.4.

Likewise, changes in the legal concept of vagrancy reflected law’s emerging market-constitutive role within capitalism. This is visible in vagrancy law’s shift towards preventing crimes that threatened to undermine private property relations, thus safeguarding their boundaries. That is, the emergence of private property, voluntary assumption of legal obligation, and the doctrine of precedent engendered an accompanying shift in law’s substantive legal rationality – its justifications and desiderata – towards legal certainty, the stabilisation of expectations, and the provision of abstract rules for resolving social disputes in juridical terms.⁶⁵ As discussed above, criminal law norms served as a mechanism for enforcing the boundaries of private property and thus gave the substantive rationality of capitalist law its violent edge. Yet, despite how the VA 1824 operated to protect private property and sustain the expectations of property owners, the statute functioned by identifying heterogenous forms of life, and so, ‘far from defining the “vagrant” as a legal category, the law as it was written

⁶³ William Blackstone, *Commentaries on the Laws of England Book II: The Rights of Things* (Simon Stern (ed), Oxford University Press, 2016) 5.

⁶⁴ Pashukanis (n 53) 176.

⁶⁵ Niklas Luhmann, *Social Systems* (John Bcdarnz Jr (trans), Stanford University Press, 1995) 295-299, 304-305.

and practised demonstrated how porous the term could be.’⁶⁶ The legislation might have been deployed to maintain certainty in property relations, but it did so through uncertain means.

To reduce this aspect of the vagrancy statutes to ‘clumsy bricolage’, however, would be to misunderstand its historical specificity and implicit function.⁶⁷ While the legislation might not have explicitly stated any link between the practices that constituted vagrancy, Nicolazzo notes that it operated by ‘evoking the vagrant through endless proliferation rather than the theorisation of a particular subject.’⁶⁸ Yet, it is precisely the apparent incoherence of the category of vagrancy that belies its central target: practices that subverted the normative constraints, boundaries, and expected behaviours that constituted the capitalist system of private property relations by resisting classification, stratification, and legal control by capital or the state.

Robinson posits that the *prima facie* amorphous set of practices that amounted to vagrancy collectively captured anything that ‘threatened to destabilise public space’ and ‘clutter or disorder the streets.’⁶⁹ Bearing in mind the Act’s emphasis on pre-crime, one can see how practices like the possession of lockpicks, begging, and being unhoused were arguably perceived as practices representing *threats* to the stability of property ownership of exchange. In this light, the practices described as vagrancy may have appeared heterogenous, yet were underpinned by a consistent logic, aiming to remove from public life behaviours and beliefs that tended to be positioned as ‘disruptive’ – which also, not coincidentally, happened to be those that transgressed normatively desirable legal categorisations.

This repositioning of vagrancy towards prevention of public disorder and, interrelatedly, disruption to private property relations was critical to the court’s construction of paranormality. After all, considering the paradigm of a fortune-teller requesting a fee for his or her services, Atiyah’s characterisation of the 19th century as period in which ‘freedom of contract’ was at its ascendent begs the question of why paranormal practices were prohibited, rather than being integrated into capitalistic exchange. On the one hand, this is the product of path dependence: earlier vagrancy statutes had used fortune-telling as evidence of itinerancy, and so fortune-

⁶⁶ Robinson (n 34) 13.

⁶⁷ Ibid 14.

⁶⁸ Sal Nicolazzo, *Vagrant Figures: Law, Literature, and the Origins of the Police* (Yale University Press, 2021) 68.

⁶⁹ Robinson (n 34) 15.

telling remained a form of vagrancy even after vagrancy law's underlying purposes transformed. But this would not explain how the criminalisation of paranormal practices was interpreted, and additionally constructed, by the courts.

As shown in the following sections, the emergence of a capitalist legal rationality had constrained law's capacity to assert or sustain the empirical possibility of practices with 'spiritual' dimensions. Certainly, following the reasoning in Chapter Three, English law's conceptual architecture struggled to accommodate legal rules like those that enabled the prosecution of witches, given its emerging focus on standardisation, classification, certainty, and definition within the abstract rubric of the legal subject, precedent, and property exchange. Understanding this outcome requires an engagement with the way the paranormal tends to be positioned within capitalist law, which Section 4.3.2 articulates, followed by an assessment of case-studies illustrating how paranormal practices were interpreted in the case-law of the VA 1824 and WA 1736.

4.3.2 The Paranormal as Contra-Legal

Writing contemporaneously with the WA 1736 and the VA 1824, Blewett Lee critiqued similar American laws on fortune-telling and mediumship, asking:

'If there should be an honest medium, who really has the faculty of producing easily and freely on occasions, communications purporting to come from the dead.... has the law any moral basis to forbid the exercise of his powers? ... If in a criminal case a medium proves in his defence that there was no misrepresentation or fraud of any kind and that he acted in good faith, in fair play they ought not to be punished.'⁷⁰

With some exceptions, the courts did not embrace Lee's proposal. This section argues that this was because the paranormal was in some sense 'contra-legal', or antithetical to the ontological perceptions entrenched within the legal system through various foundational concepts and logics. To explain this characterisation, the notion of contra-legality draws on systems-

⁷⁰ Blewett Lee, 'Spiritualism and Crime' (1922) 22(5) Columbia Law Review 439-449, 441-442.

theoretical understandings of the legal system, particularly those related to ‘noise’.⁷¹ ‘Noise’ in these formulations refers to extra-systemic, or environmental, information. Autopoietic systems can understand noise through processes of assimilation: a non-juridical fact is interpreted by the court and converted into a legal concept, for instance. But what of noise that *cannot* be recursively processed and reconciled within the system’s rationality without fundamental disruption? That is, noise so alien to legal reasoning that its juridical conceptualisation would presuppose radical adjustments – or even revolution – in the ways in which legal rationality and discourse operate. This unintelligible noise can be understood as being ‘against’ or largely irreconcilable with legal rationality – or, contra-legal.

Thus, the term contra-legality as used in this thesis entails practices that the law struggles to cognise in legal terms – a practice difficult to reconcile with the law’s formal legal rationality, within its network of concepts.⁷² Since the conversion of contra-legal phenomena into legal terms would require modification of the system’s foundational precepts, one would expect their existence to be generally perceived, and treated, as ‘harmful’ to the legal order. An ontology emerges within the law founded on (relatively) stable concepts of property, contracting, precedent, and the legal subject, all contingent on the stabilisation of expectations and legal certainty. As such, any practice contravening that paradigm, as with paranormality, may face increased likelihood of being designated as uncertain and unpredictable, and thus harmful to the cohesion, and internal logic, of (relatively) legally determinate concepts like property, contracting, the subject, and so forth.

Indeed, through the WA 1736 and the VA 1824, the courts implicitly treated the substantive components of paranormality as not being articulatable in (capitalist) legal terms, save for those

⁷¹ ‘Noise’ of this form allows systems to continually regenerate, develop, and learn from their external environments. In that sense, noise is, though extrinsic to a given system, vital to its development, in contrast to the way paranormal practices will be positioned against a capitalist legal rationality in this section. As Luhmann writes, ‘Without “noise,” no system.’ Luhmann (n 65) 117. This should not be confused with Kahneman’s notion of noise, which is used to account for distortions in decision-making: see Daniel Kahneman, Olivier Sibony, and Cass R Sunstein, *Noise: A Flaw in Human Judgment* (William Collins, 2021).

⁷² Practices can have juridical and contra-legal dimensions. Consider employees. ‘Employee’ is a legal category, and thus has juridical qualities. However, the courts generally conceptualise the relationship between employee and employer as one between free and equal legal actors, perhaps conceding a surface-level ‘inequality of bargaining power’ as subsisting between them. The legal system does not factor in the structurally engrained inequalities that manifest between capital and labour *as distinct classes*, precisely because those substantive inequalities are (partially) engineered by law’s institutional protection of private property rights, and their coercive effects contradict the construction of legal subjects as equal, autonomous agents. In this sense, recognising, and attempting to consciously ameliorate, legally entrenched class divisions could be contra-legal. See Adams (n 4) 19-26.

that problematised paranormality as empirically impossible and unclassifiable, and therefore disruptive and deceptive, all while, as might therefore be expected, abstaining from providing definition or context – precisely because providing such a definition runs contrary to the mechanisms and conceptual tools law has developed for constructing, and interpreting, empirical reality. By the time these decisions were handed down, the law had transitioned away from a system that could produce knowledge about, and thus reify, witchcraft to one that struggled to accommodate discourse regarding spells, spirits, fortune-telling, and so forth. Such practices were considered by their very nature unpredictable, uncertain, governed by ritual and superstition – the antithesis of a legal system underpinned by a capitalist legal rationality. As a result, the way paranormality was positioned can be reconstructed as flowing from its contra-legal elements.

In the context of this contra-legality, three key dimensions of the case-law that contributed to the conceptualisation of paranormality as *per se* deceptive can be gleaned. Firstly, the law often refused to define the paranormal when dealing with ‘fraudulent’ fortune-tellers and mediums; secondly, the law rarely allowed defendants to demonstrate their postulated abilities in court; and, thirdly, the law did not always require evidence of actual harm suffered by a victim to justify conviction. Altogether, these aspects of the caselaw can be seen as an expression of a new focus integral to a capitalist legal rationality, aimed not at reconciling issues of spirituality, but rather at assigning fault and blame within a framework of commodity ownership and exchange.

4.3.2.1 Defining Paranormality

One might expect that a crucial objective for the courts, in prosecuting fortune-tellers and mediums, would be defining the paranormal practices in question. After all, the criminalisation of a practice generally presupposes that the practice is clearly delineated – that subjects have ample warning of the law so they can modify their behaviour accordingly. Fortune-telling, on the one hand, seems like an ‘easy’ case: the courts generally appeared to have some implicit conception of fortune-telling that allowed them to identify its incidence, and, indeed, the VA 1824 at least provided that palmistry represented a concrete example of the practice. Yet, capturing the more general meaning of fortune-telling is not as simple as referring to ‘making predictions about the future’, which can be normatively acceptable under capitalism: making predictions is fundamental to many contracts, and the court legitimises prediction-making

throughout a myriad of legal doctrines, as in doctrines regarding reasonable foreseeability. Thus, in defining fortune-telling, the court would have had to canvas the question of what precisely amounted to *paranormal* predictions (fortune-telling) versus what constituted a normatively acceptable method of prediction. However, casting such definitions is precisely what the courts avoided.

In *Monck v Hilton*, the court read into the clause ‘by palmistry or otherwise’ in s 4 VA 1824 to include conducting a séance in its definition of fortune-telling.⁷³ To justify the expansion, Pollock B offered *obiter* an implicit attempt at defining the paranormal. The defendant, who was accused of fraudulently claiming to be a medium, was described as ‘assuming a special power beyond the ordinary limits of human agency;’ in other words, they were assumed to be invoking powers beyond the means which legal subjects were more widely conceptualised as possessing.⁷⁴ But this definition could include a plethora of practices. It could include a priest performing religious rites. Yet the VA 1824 was not deployed against Christian institutions.

Further, the vague term ‘special power’ could, arguably, include an athlete born with a genetic advantage that helps them break a world record (in the sense that, following the court’s definition, such an athlete could be seen as transcending the so-called ‘ordinary limits of human agency’). This definition of paranormality, then, was incoherent, or at least underdeveloped. Pollock B further suggested that the appellant’s wrong was that he ‘intended to convey the impression that he was dealing with or assisted by a supernatural agency.’⁷⁵ Yet the court refused to define directly what this ‘supernatural agency’ might be, leading to a problem of circularity. Drawing on *Johnson v Fenner*,⁷⁶ Cleasby B clarified that theft by sleight of hand would *not* amount to a ‘subtle craft’ (or, to use the term employed by this thesis, a paranormal practice).⁷⁷ Yet, this negative definition does not help in identifying a positive conception of what paranormality might entail within capitalist juridical rationality.

Such definitional reluctance was not reserved for vagrancy cases. In *R v Giles*, a case concerning obtaining money by false pretences, the defendant claimed he had the power to

⁷³ *Monck v Hilton* (1877) 2 Ex. D. 268.

⁷⁴ *Ibid* [277].

⁷⁵ *Ibid* [279].

⁷⁶ (1869) 33 J. P. 740.

⁷⁷ *Monck v Hilton* (n 73) [276].

restore the victim's deceased husband to life.⁷⁸ Erle CJ held that 'the pretence of power, whether moral, physical, or supernatural, made with the intent to obtain money, is within the mischief of the law, and sufficient to constitute an offence within the language of the statute.'⁷⁹ Yet the court still did not expand on what they meant by 'supernatural', a key ingredient for applying the law, given that one must know what is meant by 'supernatural' before soundly identifying a given act as such; its pretence was assumed. The fact the defendant had charged a fee on the grounds of a presupposed impossibility – paranormal abilities – was sufficient to convict her without further clarification, the conviction justified through the lens of a fraudulent contractual exchange. But again, what was it about the law that made decision-makers reluctant to offer a stable definition of paranormality, or, in this case, the 'supernatural'?

Similar results can be seen in cases under the WA 1736. In the more modern decision of *R v Duncan*, the defendant, along with her assistants, was accused of conspiracy to commit an offence under the WA 1736 for claiming she could speak with spirits.⁸⁰ Part of Duncan's defence was that the WA 1736 only precluded pretending to conjure 'evil' spirits, rather than spirits *per se*. Since Duncan herself only claimed to summon 'good' or 'neutral' spirits, her defence argued, she should not be convicted under the Act, which criminalised pretending to summon 'evil' spirits.⁸¹ At appeal, Viscount Caldecote CJ maintained that a moral-categorical 'scale' such as this for the nature of spirits was unworkable and therefore not relevant. Whereas early modern law was quite able to theorise about the 'evil' nature of demons summoned by witches, by 1944, the court clearly felt unable to pronounce on such questions. Caldecote CJ even claimed 'such a distinction would raise an issue of fact incapable of determination,' and was irrelevant on the grounds the Act was chiefly designed to prevent fraud and that the language of the Act was 'wide enough to cover the conspiracy alleged.'⁸²

By refusing to identify a stable definition of the paranormal or the supernatural, even when vague statutory language created a need for interpretation and definitional clarity, the court implicitly revealed how capitalistic legal logic was composed of a set of structures that did not offer the intellectual environment for such a definitional practice to be undertaken. Law was no longer predicated on theology, but property rights and exchange, and so developing doctrine

⁷⁸ (1865) 169 E.R. 1490.

⁷⁹ *Ibid.*

⁸⁰ *R v Duncan* [1944] KB 713.

⁸¹ *Ibid* [714].

⁸² *Ibid* [718].

and precedent around the identification of paranormality was not readily achievable using the conceptual tools available to them. This will be explored in more detail once other aspects of the court's jurisprudence have been identified. Before doing so, let us consider another case-study illustrating how the courts abnegated responsibility to conceptualise paranormality.

4.3.2.2 Paranormality in the Courtroom

Moving on to the second element of the jurisprudence, the courts frequently refused to allow defendants to demonstrate their abilities, or to adduce witnesses testifying to their abilities, before a jury. In *R v Lawrence*, the defendant was accused of performing séances in exchange for a shilling.⁸³ When prosecuted, his defence maintained that he could not be accused of pretence on the grounds that summoning spirits 'has not yet been shown to be impossible.' Edge interprets the court's response as an affirmation that 'miraculous claims' were within 'the power of the courts to determine', yet, *empirical* investigations into those claims were not legitimate courtroom practices.⁸⁴ This latter proposition can be seen in the first instance decision of *Bloodworth*, wherein the court was expected to 'function as a finder of fact in relation to the case before them, rather than as a board of inquiry into a broader class of claims.'⁸⁵

Yet, if the court criminalised an act on the grounds that it was 'deceptive', one might expect the presentation of countervailing evidence to be relevant to the project of fact-finding. This would parallel other practical demonstrations given to juries in courtrooms, such as by expert witnesses in, for example, medical cases. However, this is not the methodology the court generally adopted for mediumship and fortune-telling. The courts might have retained authority to determine such matters of fact, yet they tended not to invoke it to the extent, Edge suggests, that their course of action often fell under the doctrine of judicial notice – the determination that certain facts could be presupposed without evidence. For those accused of paranormal practices, this became prejudicial because it would 'mean, therefore, that a defendant whose defence is based on an exceptional claim, the falsity of which the courts would be prepared to

⁸³ *R v Lawrence* (1877) 37 LTR (n s) 404.

⁸⁴ Peter W Edge, 'Naturalism and Neutrality: Trying Miraculous Claims Fairly in English Courts' (2002) 44(2) *Journal of Church and State* 521-537, 525.

⁸⁵ *Ibid.*

treat as an invariable part of nature, will inevitably fail because of this evidential and procedural doctrine.’⁸⁶

Similarly, in *R v Stephenson*,⁸⁷ the defendants were accused under the WA 1736 of claiming they could use palmistry and crystal balls to perceive the future. The defendants attempted to adduce evidence that the practice of palm-reading was supported by natural science, thus invoking the perceived ‘legitimacy’ of empirical models of reality to validate it and encourage the court to approve palmistry as a normatively acceptable profession. This attempt was also summarily dismissed with minimal consideration by the court. Likewise, in *Monck v Hilton*, the court stipulated that the question of whether speaking with the dead is possible ‘would be a very improper [subject] for argument and decision in a court of law.’⁸⁸

This comment is revealing: the court viewed itself as lacking the methodologies required to investigate or, perhaps, even conceptualise the question of whether the supernatural existed. In that sense, this dimension of the jurisprudence intersected with the court’s reluctance to define paranormal practices while nevertheless presupposing their deceptive nature *a priori*. Indeed, perhaps this provides another glimpse of the possibility that the judiciary were treating the substance of paranormality as a fundamentally contra-legal concept. That is, they implicitly reinforced the juridical form by excluding a set of practices that they conceived of as inappropriate legal subject-matter, as contradicting the substance of law at its ontological level.

Refusing defendants the opportunity to demonstrate their abilities also occurred in *Penny v Hanson*.⁸⁹ In that decision, the court rejected the defendant’s argument that he was not claiming any supernatural powers, but rather that his astrology followed robust scientific methods. Their reasoning was chiefly couched in the language of intention and dishonesty, and so will be discussed primarily in Section 4.4, but the court’s identification of astrology as ‘absurd’ without considering countering evidence is notable; astrology was axiomatically positioned as existing beyond the legal paradigm.⁹⁰ Meanwhile, in *Slade v Lankester*, expert witnesses were called by the defence to attest to the efficacy of the defendant’s ability to speak with the dead.⁹¹

⁸⁶ Ibid 527.

⁸⁷ (1904) 68 JP 524.

⁸⁸ *Monck v Hilton* (n 73) [275].

⁸⁹ (1887) 18 Q.B.D. 478.

⁹⁰ Ibid [480].

⁹¹ Unreported (1876). The case was appealed, and the conviction quashed, on a procedural matter of mandamus in *R v Middlesex Justices* (1877) 2 QBD 516.

However, according to Edge in his analysis of the case, the magistrate ‘rejected this evidence in favour of inferences drawn from the known course of nature’ on the grounds that a defendant was not entitled to question ‘the court’s view of the known course of nature.’⁹²

Returning to the case of *R v Duncan*, the defendant – as in *Slade v Lankester* – called witnesses to confirm her ability to commune with the dead. While this was permitted, Duncan also tried to perform her mediumship before the jury by means of an in-court séance, though was barred from doing so by the trial judge. At appeal, Viscount Caldecote CJ confirmed that the judge was correct to do so on the grounds that ‘the difficulty of arranging such a demonstration satisfactory in all its detail to both sides is obvious’: a demonstration could never ‘be conclusive on the issue which the jury had to try, and, indeed, might well confuse the jury or operate to the great disadvantage of the appellants.’⁹³ In any event, stopping Duncan from even attempting to demonstrate her ‘powers’ and then proceeding as if such a presumption was inarguable – despite contestation by the defendant – revealed the court’s implicit presumption that mediumship was not only impossible, but that its impossibility was incontestable.

This was also the result in *Laing v Macpherson*.⁹⁴ The defendant requested to demonstrate her powers to the court by adducing witnesses to testify to their existence. Unlike in the later *Duncan* decision, she was not permitted to do so. This issue intersected with the court’s implicit reluctance to define paranormality: the defendant had been accused of engaging in a practice called ‘psychometry’, a technique by which she would use an object belonging to her client to interpret and discuss existing details about their lives. Arguably, this was not fortune-telling, which in principle one might assume to involve descriptions of the future. Yet the court interpreted the term ‘...or otherwise’ that followed ‘by palmistry’ in the statute to render the distinction between the defendant’s psychometry and fortune-telling immaterial, enabling her conviction. Lord Salvesen rationalised this decision by stating he did ‘not think it matters in the least’ which method was used ‘in telling fortunes.’⁹⁵ As such, collectively, the law’s refusal to define paranormality while simultaneously obstructing defendants from demonstrating their perceived powers operated to eschew the possibility of those defendants arguing for their

⁹² Peter William Edge, *Legal Responses to Religious Differences* (Kluwer Law International, 2002) 212.

⁹³ *R v Duncan* (n 80) [715].

⁹⁴ [1916] JC 70.

⁹⁵ *Ibid* [77].

innocence and potentially bringing into focus distinctions between different typologies of those presented powers.

Given the technical doctrine of precedent and the law's emerging substantive rationality premised on certainty and predictability, one might wonder how the courts justified abstaining from defining the paranormal while refusing to allow demonstrations of paranormality in the courtroom. The caselaw does not generally offer many insights, which in fact returns us to the suggestion made at the outset of this section that paranormality was problematised precisely because of this reasoning – the substance of paranormality was implicitly considered to be contra-legal. The law's framework of logic did not readily provide the tools for processing the 'substance' of paranormality in terms it could understand. That is, engaging with the question of which forms of paranormality were *not* deceptive was not the sort of issue with which the legal system was constituted to deal, being, as it was, a normative system of property rights and contractual exchange, of clearly delineated boundaries between 'persons' and 'things', rather than communication with ghosts and perceiving the future in the stars. The reasons why the law could not cognise these specific practices will be discussed later, but, for now, the law was premised on the commodity, and so any exchange involving phenomena the law struggled to theorise as commodifiable subject matter, like the empirically impossible, was axiomatically presupposed to be deceptive. In this light, the preference the courts expressed for using vagrancy law, the law of the subversive and ill-defined, to prosecute paranormal practices becomes understandable.

Thus, whether they were accused under the WA 1736, under vagrancy law, or for obtaining money by false pretences, paranormal practitioner defendants faced an uphill battle. The law neither defined paranormal practices, nor gave them the legal space within which to argue that their practices were empirically possible (or, rather, that there could be sufficient *doubt* as to whether they were possible). Even if they were permitted to do so, underlying presumptions of impossibility meant that practitioners would effectively have to challenge generalised, abstract presumptions of the law in the specific, concrete forum of their own trial, which in practice was regularly treated as unsuitable for the courtroom. As such, the law could use the bare fact of someone performing a paranormal practice, particularly for a fee, as justification for criminalisation, even where the victims who handed over their fee did not even believe in the

efficacy of fortune-telling, as in *R v Entwistle*.⁹⁶ Indeed, the extraction of a fee was not necessary for conviction, nor, relatedly, was the presence of an identifiable victim. Paranormality as an expression of vagrancy meant that its punishment could be justified as prevention of public disorder and disruption to private property rights. This, then, leads us to the third key dimension of the *actus rei* of the offences: how the law conceptualised the ‘victims’ of fortune-telling and fraudulent mediumship.

4.3.2.3 Victims of Paranormality

In *R v Birch*,⁹⁷ the defendant was alleged to have borrowed rings from individuals to lift curses placed upon their persons. Having read their fortune, the defendant would return this ring, and then advise them on how to improve their poor luck through various magical procedures such as sleeping with crystals and burying human hair. Her defence was that she never kept the victim’s rings, but since intent to keep the goods was considered irrelevant under the WA 1736, her defence was excluded. Birch, in fact, returned the rings; the rings were handed over to her by her clients temporarily and consensually. For this reason, she was acquitted of her original count of obtaining goods on false pretences, and a count under s 4 WA 1736 was inserted. Actual harm of a clear victim was unnecessary for her to be convicted of an offence under the WA 1736: the prosecution of paranormality was not about rectifying harm done to victims, but eliminating the practices themselves on account of their incompatibility with capitalist social relations.

Similarly, in *Penny v Hanson* the defendant placed advertisements in newspapers that he could use astrological methods to perceive an individual’s susceptibility to disease, their ideal profession, who they should marry, and so on.⁹⁸ The use of these advertisements *per se* was treated as sufficient to warrant criminalisation, rather than the infliction of harm via deception on any tangible victim, after the police themselves answered the defendant’s advertisement as a means of tracking him down. No clear victim could, or even had to, be identified – the victim, instead, was a *potential* victim, and the crime was a pre-crime.

⁹⁶ *Ex parte Jones* [1899] 1 QB 846 [849].

⁹⁷ Unreported (1939). See Jeremy Patrick, *Faith or Fraud: Fortune-Telling, Spirituality, and the Law* (UBC Press, 2020) 43.

⁹⁸ *Penny v Hanson* (n 89).

However, almost fifty years after *Penny v Hanson*, the decision of *Barbanell v Naylor* saw a contradictory result.⁹⁹ Professing to see the future in newspaper articles was held *not* to be criminalised under the VA 1824 as no victim was directly implicated or harmed. Though this position did not hold in the jurisprudence for long and the law soon returned to the *Penny v Hanson* approach, it is testament to the premise that the ways through which the statutes were interpreted for the criminalisation of paranormality were contingent, rather than necessary – that is, the construction of the statutes adopted by the courts was conditioned, or made possible, by the law’s structural logic, even if it was not determined by it.

That said, similar to *Penny*, in *Irwin v Barker*, the police approached the defendant and asked her to read their fortunes, before arresting her for doing so.¹⁰⁰ She was convicted, but, on appeal, argued that she did not in practice deceive anyone – the police entrapped her in full belief that she was a fraud. Thus, how could she, in practice, have defrauded them? The court did not accept this argument. Rather, the court maintained that it did not matter, as debated in *Davis v Curry*, whether the statutory words ‘deceive and impose’ applied directly to the words ‘pretending or professing to tell fortunes’ in the statute on the grounds that fortune-telling could not be anything other than fundamentally deceptive. That is, the practice was conceptualised as deceptive, and criminal, even in the absence of identifiable harm (or, as will be later shown, the intent of the practitioner). Once again, then, the operation of the statute was largely justified as pre-emptive; it did not matter whether anyone in fact had been deceived, because the practices were deceptive at some axiomatic level, irrespective of the presence of a victim.

In *Stonehouse v Masson*,¹⁰¹ the court addressed the justifications underpinning this approach, with Lawrence LCJ commenting that the VA 1824 was ‘aimed at... a public mischief, because it affected the lives and happiness of those people who were weak enough to patronize such people, and the thing itself was the thing which ought to be repressed.’¹⁰² Notably, the mischief embodied by paranormal practices was formulated as a public, rather than a private or interpersonal, wrong. Darling J reinforced this with an appeal to parliamentary intention, maintaining that ‘the Legislature had come to the conclusion that all such things were

⁹⁹ *Barbanell v Naylor* [1936] 2 All ER 66.

¹⁰⁰ *Irwin v Barker* (1925) Solicitor’s Journal 69.

¹⁰¹ [1921] 2 KB 818.

¹⁰² *Ibid* [825].

mischievous nonsense,’¹⁰³ framing the crime in terms of public disorder, rather than interpersonal harm, while also denigrating paranormal practices, and the possibility of their empirical existence, in unambiguous terms.¹⁰⁴

This approach to the construction of victimhood under the WA 1736 and the VA 1824 was not quite that of the modern legal paradigm regulating paranormal services, a central feature of which is its emphasis on the commercial relation between service-provider and consumer, and which self-justifies as consumer protection, as will be discussed in Chapter Five. By contrast, the VA 1824 and the WA 1736 were not generally deployed to protect specific consumers – victims and the harm done to them were rarely mentioned – and did not need a fee to be charged, even if many prosecutions did involve such a fee. At most, perhaps the implicit objective involved protecting a hypothetical ‘victim,’ who *might* be tricked out of their money, but this certainly was not consumer protection in substance. The court’s conception of a hypothetical ‘victim’ was largely implicit, rarely directly alluded to, and effectively operated as an abstract, normative construct through which to discipline fortune-tellers, rather than to vindicate targets of fraud; this was about the preservation of capitalist social relations, and suppressing potential sources of disruptions to exchange, as much as anything else.

This point may be most clearly expressed by the somewhat contradictory models the court developed of the vulnerability of the hypothetical ‘victim’ versus the predatory intentionality of the defendant. While *mens rea* will be discussed at length in Section 4.4, for the purposes of assessing how deception, and victimhood, was constructed, the courts generally presupposed that it was impossible for a fortune-teller or medium to have ‘good faith’ or sincere belief that their practices were real. Yet, this appears paradoxical to the court’s (infrequent) references to the risk of ‘credulous’ victims being duped.¹⁰⁵ That is, how could the court simultaneously embrace the policy goal of protecting potential ‘ignorant persons’ from being tricked, while treating it as inconceivable that anyone would ever believe in their own paranormal abilities? How could the courts assume, at the same time, the sincere, misguided belief of victims *and* the opportunistic non-belief of practitioners?

¹⁰³ As earlier mentioned, the legislature did *not* come to this conclusion – the laws could be read in several ways, rather than criminalising paranormal practices *per se*, as Darling J tacitly suggests through this assertion.

¹⁰⁴ *Stonehouse v Masson* (n 101) [827].

¹⁰⁵ *Monck v Hilton* (n 73) [276].

There are two possible ‘solutions’ for this apparent contradiction. Firstly, the law did not need to resolve such a contradiction because the victim in question did not truly exist, and merely provided a convenient hypothetical abstraction around which to orientate the law’s interventions. Since the ‘victim’ was always a vehicle for pursuing a policy goal of marginalising disruptive paranormal practices, any contradictions between their constructed beliefs and the impugned beliefs of the practitioner can be dismissed as irrelevant. Secondly, perhaps the law was implicitly positioning the paranormal practitioner as a conscious ‘initiator’ of fraudulent exchange because they had access to information the victim did not – that is, the medium or astrologer ‘knew’ that they were not, in fact, receiving information from the beyond, because they were privy to their own cognitive processes while their victim never could be and so would presumptively take the practitioner at face value. The court did not explicitly engage with this issue and thus it is difficult to know if one, both, or neither of these explanations are applicable.

To conclude, this section has established three key strands of doctrinal reasoning – the court’s reluctance to define the paranormal, its restrictions on practitioners demonstrating their abilities before a jury, and the hypothetical nature of the victim – to show how it maintained the general presupposition that paranormal practices were *per se* deceptive. At the root of these tendencies, this chapter contends, was the contra-legality of paranormality, which leads us to ask what *preconditions* facilitated the court’s development of this reasoning.

Firstly, consider, once again, how vagrancy operated as a heterogenous legal category. The practices that constituted vagrancy were positioned as disparate, but this disparate quality was historically specific: their characterisation as such flowed from the fact they subverted, or struggled to be fit within, normatively legitimate capitalistic classifications associated with property and contract, which in turn led to their undesirability, and thus criminal status. Paranormality, like vagrancy, is unstructured, unrepeatable, and challenging (though not impossible) to define within the constellation of abstractions related to property, selfhood, contract, and precedent that constitute the legal form. Vagrancy, therefore, perhaps offered itself as a suitable mechanism for conceptualising the paranormal, given that it captured all that fell beyond legal expectations. The resistance to classification and organisation exhibited by paranormal practices can thereby, when interpreted through the lens of vagrancy, be reconstructed as evidence of its harmfulness.

Further, since paranormal practices often struggle to be squared within the logic of property rights, they also struggle to constitute the subject matter of a contract. As such, any contract with a paranormal service at its core can, in certain historical configurations, stand in tension with the rationality of the law and thus axiomatically becomes an expression of fraud; perhaps this tension established the conditions within which the law's framing of paranormal practices occurred. Indeed, this offers an example of how the logic of natural science coheres with the rationality of the law – it allows for the imposition of boundaries, predictability, and the annihilation of ambiguities that threaten the stability of property rights and the observation of contractual responsibilities. One cannot see the future, in natural-scientific models of empirical reality as 'commandeered' within juridical rationality: thus, any contract in which one party claims to do so must be fundamentally deceptive, and in opposition to normatively acceptable exchange relations, classifiable as either fraudulent or vagrancy.

This chapter has not yet, however, engaged directly with the specific mechanisms and principles that make the law's conceptual environment ill-suited to reifying the existence of the supernatural. Therefore, the following section considers how the law theorised concepts related to certain paranormal practices, like fortune-telling and mediumship, to see more directly how a framework of property rights and contractual agreement tends not to readily accommodate the substance of paranormality where that substance clashes with the rubric of commodity exchange.¹⁰⁶

4.3.3 The Presupposition of Impossibility and Ontological Incompatibility

This section engages with the preconditions implicit in a capitalist legal rationality that affected law's capacity to theorise, and reify, the substance of paranormality and, for this reason, deployed judicial notice to construct it as presumptively impossible and therefore *per se* deceptive. This section particularly engages with mediumship and fortune-telling for this purpose, setting them in contrast with the law's notions of temporality (for fortune-telling) and the divide between the life and death of the legal subject (for mediumship) to unearth the conditions of possibility beneath the jurisprudence of the WA 1736 and the VA 1824.

¹⁰⁶ As we will see in Chapter Five, the 'legalisation' of paranormality still would not confront the substance of paranormality, preferring to carve out a space for the consumption of paranormal practices insofar as they had been explicitly bounded and 'blunted' as purely 'entertainment' commodities.

To offer a theoretical context for those examples, generally speaking, capitalist law's apparent lack of conceptual 'tools' through which to process the substance of the paranormal partially reflects Weber's (at times unstable) theses regarding the 'disenchantment', or decay of superstition and 'magical' thinking, that accompanied the emergence of capitalism more generally.¹⁰⁷ Federici contends that the emergence of capitalism saw 'a historic battle against anything posing a limit to the full exploitation of the labourer, starting with the web of relations that tied the individuals to the natural world, to other people, and to their own bodies.'¹⁰⁸ Further, Federici proposes that the substance of paranormality is often positioned as problematic within capitalism because it subverts the expectations, functions, and limitations capitalism, and by extension capitalist law, presupposes regarding the exchange of commodities.¹⁰⁹ On this, Thomas posits that the repeal and reconfiguration of anti-witchcraft legislation can also be seen as an 'affirmation of the potentialities of human labour, which was to encourage men to seek a technological solution to their problems than a magical' one.¹¹⁰

However, unlike the approach Federici at times adopts, this section does not argue for the existence of an 'intentional' project wherein paranormal practices were marginalised in the name of bourgeois interests or for the disciplining and instrumental disenchantment of bodies for the purposes of their integration into the mechanics of capitalism. Rather, it argues that capitalist legal rationality is not generally predisposed to the construction of the substance of the paranormal given the nature of its high-level abstractions, conceptual frameworks, and resulting logic, expressing the relationship between the functional limits of capitalist law and the macro-structure of capitalism itself.

Several dimensions of capitalist law that would render the substance of paranormality contra-legal have already been discussed. These include its emphasis on calculable, definable property rights and clearly expressed contracting, into which the paranormal struggles to be inserted, along with its overall substantive rationality focused on certainty and stabilisation of expectations. Additionally, several doctrines referenced in Chapter Three that were argued to be antithetical to proving the commission of witchcraft – such as doctrines of causation, the

¹⁰⁷ See Richard Jenkins, 'Disenchantment, Enchantment and Re-Enchantment: Max Weber at the Millennium' (2000) 1(1) *Max Weber Studies* 11-32.

¹⁰⁸ Silvia Federici, *Witches, Witch-Hunting, and Women* (PM Press, 2018) 27.

¹⁰⁹ See also Silvia Federici, *Caliban and the Witch: Women, the Body, and Primitive Accumulation* (2nd ed, Autonomedia, 2014), particularly 133-218.

¹¹⁰ Keith Thomas, *Religion and the Decline of Magic* (New ed, Penguin, 2003) 332.

technical doctrine of precedent, and rules of evidence related to the rights-bearing defendant – can also be seen as antithetical to positively conceptualising the substance of paranormality more generally, but will largely not be repeated here.

That said, the incompatibility of doctrines of causation with paranormal practices is particularly significant to the juridical construction of fortune-telling. Section 4.3.2 pointed out that the law was reluctant to define fortune-telling, which could arguably be problematic on the grounds that predictions occur within capitalism all the time, and yet the question of whether, say, a prediction made by an insurance broker or an investment banker in speculative markets constitutes fortune-telling was seldom raised in cases related to paranormality. The answer, perhaps, may lie in how legal discourse constructs expectations related to linear time and how the ontological assumptions underlying that construction struggle to accommodate fortune-telling, unless given certain boundaries.

In short, clock time, within capitalism, is ‘artefactual’, being constructed, metered, and standardised into units of general, abstract, and, crucially, *linear* application: the time is consistent within time-zones; hours break down into minutes, seconds, and milliseconds; months and specific dates repeat and are predictable across years; and so on.¹¹¹ This use of clock time functions as a social practice, given that our (historically contingent) epistemic conception of temporalities necessarily ‘materialises through human consciousness’ and is encoded within human social systems.¹¹² Indeed, the construct of clock time stands in contrast to what Thompson calls ‘nature’s time’, or methods of measuring time by reference to ‘natural’ phenomena like the crowing of a cockerel, the lunar cycle, and, in particular, the process of performing a certain task or set of tasks that so often characterised pre-capitalist understandings of time.¹¹³ Under capitalism, the central focus on clock time helps co-ordinate the expectations of market actors, and is industrialised in the sense of being ‘controlled’ and ‘used as a medium for the translation of labour power into a monetary value... It belongs firmly to the history of Western economic life and paid employment.’¹¹⁴

¹¹¹ Barbara Adam, *Timewatch: The Social Analysis of Time* (Polity Press, 1995) 75-76.

¹¹² L J B Hayes, ‘Work-time Technology and Unpaid Labour in Paid Care Work: A Socio-Legal Analysis of Employment Contracts and Electronic Monitoring’ in Sian Beynon-Jones and Emily Grabham (eds), *Law and Time* 179-195, 179.

¹¹³ E P Thompson, ‘Time, Work-Discipline, and Industrial Capitalism’ (1967) 38 *Past and Present* 57-97.

¹¹⁴ Adam (n 111) 77.

An example of this is work time schedules. By establishing fixed times of work commencing and ending (through contracts), the factory can ensure that all workers are on the factory floor as needed, and thus can be coordinated efficiently, while also constituting a differentiation between ‘non-working’ time which is ‘free’ for the worker to use as they ‘choose’, and ‘working’ time in which the employer enjoys control over the worker’s labour. In other words, time – like law – operates by providing standardised abstractions that stabilise the expectations of market actors for the realisation of contractual obligations and, in particular, the control of the life processes of labour by capital. Indeed, around the same time of the prosecution of fortune-tellers under the WA 1736 and the VA 1824, failure to strictly adhere to working times was often used by the factory owner to impose ‘fines’ on workers – more precisely, these were deductions from wages, justified by reference to the terms of the contract.¹¹⁵ Employers would couch fines in terms of freedom of contract, informing their employees ‘no one forced you to agree to such a contract if you did not wish to; but now, when you have freely entered into it, you must be bound by it.’¹¹⁶

That said, how law adopts a linear, standardised approach to clock time is visible in an array of other doctrinal principles, and this approach is integral to the preservation of capitalistic relations of private property. The concept of reasonable expectations, as in tort law, presupposes that one cannot ‘jump forward’ in time and perceive events before they happen, though one can make contingent predictions. Similarly, criminal and tort doctrines of causation – which Chapter Three pointed out are specific to the form of capitalist law – also depend on notions of linearity. Property rights are often underpinned by linear temporalities, as in, for example, the period for which a lease might be granted or for which a rental agreement might run, along with easements and other legal principles that assume a stable flow of time. Contracts often stipulate dates of delivery of their subject matter, along with, as above, the periods of time in which an employer is entitled to the labour power of their employees. Intellectual property rights are limited to a set of years: 20 in patents, 70 *post mortem auctoris* in copyright. These work, of course, because time is an abstract, standardised construct, that, like a formally autonomous legal system governed by the rule of law, manifests as an ‘objective, impersonal compulsion exerted on individuals’ that ‘is not static but is itself continually reconstituted historically’.¹¹⁷

¹¹⁵ Friedrich Engels, *Condition of the Working Class in England* (Panther, 1969) 129.

¹¹⁶ *Ibid.*

¹¹⁷ Moishe Postone, *Time, Labour, and Social Domination* (Cambridge University Press, 2003) 301.

Indeed, fortune-telling was not the only example of a practice wherein the subversion of linear temporalities was treated as unlawful. Prior to the Gambling Act 2005, for example, contracts involving gambling and wagering were regularly treated by the common law as void at law, those being contracts wherein the parties ‘professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of that, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake.’¹¹⁸ The specific reason the contract was void was that the inherent uncertainty in the wager meant that it could not form the subject matter of a contract *a priori*, following similar logic as the problematisation of paranormality. These are distinguished from, say, insurance contracts, which have long been bounded and certified by reference to expectation-stabilising doctrines like the doctrine of insurable interest, which requires the insured to ‘stand in a recognised legal or equitable relationship to the subject matter.’¹¹⁹

Overall, then, the law’s consistent, implicit conception of time is time in its linear, abstract, and standardised form. More generally, one can extrapolate that the legal subject constituted within this systemic rationality would be seen to operate according to the premises of clock time, too. At the very least, the legal subject is presupposed to understand, accept, and behave as such. For example, as mentioned, doctrines that ride on what constitutes ‘reasonable expectations’ fundamentally assume that any legal subject forms those expectations on a linear basis, as opposed to a processual, multi-factorial, cyclical one, or otherwise. In other words, when an individual’s concrete beliefs and practices are abstracted away in the process of their conversion to a legal subject, those beliefs and practices are epistemically substituted (or assumed to be substituted) with the shared understanding of clock time that permeates law.

Fortune-telling represents a deviation from the notion of clock time in the sense that it subverts the presumption of unidirectional linearity. To perceive the future by means of reading a client’s palm, examining their horoscope, consulting Tarot cards, and so forth, the fortune-teller goes beyond the construction of ‘reasonable expectations’, which emphasises ‘rational’, probabilistic calculability and thus proceeds within the chronological rubric that the law

¹¹⁸ *Carlill v Carbolic Smoke Ball Company* [1892] EWCA Civ 1.

¹¹⁹ James Davey, ‘The Reform of Gambling and the Future of Insurance Law’ (2004) 24(4) *Legal Studies* 507-515, 512.

presupposes. Rather, the fortune-teller posits a mechanism for subverting time's unidirectionality that may exhibit some internal logic but is nevertheless contradictory to the tenets of natural-science and thus is antithetical to the formalisation of precedent and the definitional boundaries expected for property exchange. The substance of fortune-telling is therefore contra-legal. In that sense, fortune-telling may be seen as axiomatically irrational within the framework of capitalist legal rationality, such that it can be distinguished from acceptable methods of prediction without even needing to make that distinction explicit.

A second example in this vein is mediumship. Just as the prohibition on fortune-telling strikes at the heart of capitalist law's presuppositions about time, mediumship prohibitions presuppose certain conditions of possibility relating to capitalist law's biopolitical (or, rather, thanatopolitical)¹²⁰ categorisations of the body, life, and death.¹²¹ As Section 4.3.2 explained, the courts – and law more generally – were categorically opposed to the possibility of communing with spirits, indicating binary assumptions concerning death and life. Personal juridical agency is extinguished upon death, contingent as that agency is on consent and voluntarily assumed responsibility, and so the possibility of spirits with communicative agency represents a significant disruption to the axioms of legal reasoning.¹²² That is, a corpse cannot give consent to enter into a contract or own property, but rather transfers his or her property upon death by means of will or otherwise. Duties regarding the wellbeing of the corpse may be imposed by the state, but for the purposes of creating new contracts and fresh exchange of property, the corpse becomes juridically inert.

Yet, such a conception of a life/death binary was not so prevalent in early modern law. For instance, the WA 1604 carried prohibitions against necromancy – summoning of spirits of the dead. Early modern law, therefore, reified the possibility that the dead could, in some sense, be communicated with and therefore effect their 'agency' on the world. Such a possibility would be less conceivable within the rubric of capitalist law: attempting to prove one could speak with spirits via séance would entail a general, *abstract* challenge against the legal system's

¹²⁰ On thanatopolitics, or the political conceptions of death, see Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press, 1998).

¹²¹ On biopolitics, or the political conceptions of life and the species body, see Michel Foucault, *The History of Sexuality Vol 1* (Robert Hurley (trans), Pantheon Books, 1978) 139-141.

¹²² The requisite for the legal certainty of death contrasts with death's biological ambiguity. To resolve the potential uncertainty, English law today assumes that brainstem death constitutes legal death. See Elizabeth Wicks, 'The Legal Definition of Death and the Right to Life' in Shane McCristine (ed), *Interdisciplinary Perspectives on Mortality and its Timings: When is Death?* (Palgrave Macmillan, 2017) 119-132.

structural assumptions conducted within the narrow, *concrete* environment of the courtroom.¹²³ The presumption of its impossibility, therefore, may have functioned as a path of least resistance for the courts to pursue while minimising disruption and negative feedback to the rest of the legal system. The *a priori* assumption that paranormal practices were deceptive became a ‘natural’ judicial corollary, and, more widely, the law’s conception of what constituted a ‘legitimate’ religious belief (that is, one that was formally desegregated from market exchange) had become so deeply entrenched that the courts felt no need to present itself as adjudicating the ‘acceptability’ of competing spiritual beliefs.

Other elements of paranormality express contra-legal qualities. Astrology, for instance, alleges that the future can be discerned by examining the positions of stars and planets. As mentioned earlier, in *Penny v Hanson*, the courts treated astrology as impossible ‘*res ipsa loquitur*’.¹²⁴ This may have been (implicitly, or sub-consciously) influenced by the possibility of conflict that could arise between a belief in the over-determination of human free will by the position of celestial objects and the law’s central assumptions of the autonomy of the legal subject, particularly in his or her capacity to own and dispose of property. As Federici writes, paranormality of this kind ‘undermined the principle of individual responsibility, as magic placed the determinants of social action in the realm of the stars, out of their reach and control’ and so ‘prophecy was replaced with the calculation of probabilities’ such that ‘the future can be anticipated [within capitalism] only insofar as the regularity and immutability of the system is assumed.’¹²⁵ This, then, connects the deprivation of autonomy represented by astrology with the incompatibility between law’s conception of clock time and the practice of fortune-telling alluded to above; how could contracts and property rights be enforced by a system that also endorsed the possibility that ‘human’-driven practices related to calculation and prediction could be overridden by supernatural forces?

Flowing from these examples, one can see how capitalist law’s central abstractions and organising principles are not co-ordinated such as to encourage the reification of paranormal practices within the juridical sphere. In other words, the substance of astrology, mediumship, and fortune-telling are not readily computable within the rubric of capitalist legal rationality.

¹²³ The court’s *a priori* rejection of the existence of ghosts can be seen in other criminal trials, as in the so-called Hammersmith Ghost case of 1804, where the defendant shot a man believing him to be a ghost and was convicted of murder.

¹²⁴ *Penny v Hanson* (n 89) 480.

¹²⁵ Federici (n 109) 143.

A potential rejoinder to this observation is that 19th and early 20th century law *did* provide legal space for the operation of mainstream religions. The law did not clamp down on, say, the practices of Christian churches. Yet, the law's reluctance to marginalise those religions does not imply that the existence of God, saints, angels, or the efficacy of prayer would be appropriate subject matters for a courtroom discussion. Undoubtedly, they would not be. Permitting religious institutions to operate *as religious institutions* does not necessarily require the law to ascertain whether their beliefs are empirically supportable, not least because those institutions generally differentiate themselves from market relations.

Exploring this is beyond the scope of this chapter, and will be returned to in Chapter Five. But, in summary, this is to say those institutions do not necessarily seek to make the subjects of their beliefs also the direct subjects of commercial exchange. The frameworks structuring those institutions often formally disentangle them from the market, reducing their chance of impinging on property rights; their financial collections were, and are, often positioned as charitable donations, rather than commercial transactions. Further, their ideologies were, and are, often seen as conducive to capitalist markets, as in Weber's classic assessment of the Protestant work ethic,¹²⁶ while their practitioners were, and are, usually professionally trained, rather than proceeding on an atomised, unlicensed basis. Moreover, many mainstream religions function in support of the family unit, legitimising and supporting marriages for instance, and are therefore in fact conducive to social reproduction, and thus production, under capitalism.¹²⁷ To theorise the church, then, as a threat to public order as would be appropriate for prosecution under vagrancy law could easily be perceived as unthinkable.

With that said, to summarise this analysis of the *actus reus* of fortune-telling, mediumship, and other paranormal practices in law, the legal system did not generally provide the conceptual architecture that a paranormal practitioner might be able to draw upon to defend their practices in court. Those practices were, in this sense, contra-legal. As such, an exchange of paranormal services could not be characterised as legitimate because commercial exchange axiomatically presupposes that the subject matter of that exchange exists, or at least *can* exist. Thus, paranormality was positioned as deceptive, and therefore criminal, in and of itself; in Cleasby

¹²⁶ See Max Weber, *The Protestant Ethic and the Spirit of Capitalism* (Routledge, 1930).

¹²⁷ See Federici's conception of the 'enclosure' of women's bodies for the purposes of social reproduction and its relation to paranormality in Federici (n 109), especially at 165 and 220.

B's terms in *Monck v Hilton*, the offence 'includes all persons who pretend to tell fortunes (which imports that deception is practised by doing so)'.¹²⁸

For this reason, defendants were forced to rely on contesting the prosecution's account of their *mens rea*. Yet, because the law explicitly treated their practices as empirically impossible because of its implicit ontology, this meant that, to maintain claims regarding their own good faith, a defendant would effectively have to present themselves as delusional. That is, they would have to enter a legal space, agree to participate in legal discourse, acknowledge and accept that legal discourse treats their beliefs as irrational, and then argue that their belief is nevertheless still sincere. Thus, perhaps counter-intuitively, defendants would have to consciously recognise and defend their beliefs as delusional, which would imply they 'subjectively' believed something that they were aware the system viewed as lacking grounding in 'objective' reality. This struggle and its preconditions form the subject matter of Section 4.4.

4.4 Paranormal Practices, Good Faith, and Responsibility

Given the courts' predisposition to assuming the impossibility of paranormal practices, practitioners accused of vagrancy, fraud, or obtaining money through false premises would often shift their defence towards intentionality, arguing that they were not 'dishonest' because they sincerely believed in their capacities and thus did not *intend* to deceive. This section explores how the courts interpreted such attempts – and, principally, how, and why, such 'good faith' defences were generally rejected.

To reiterate, the offence under the VA 1824 involved 'pretending or professing' to tell fortunes. In *Penny v Hanson*, mentioned earlier, the defendant placed advertisements in newspapers, offering to provide advice based on astrological interpretations.¹²⁹ The defendant was convicted under the VA 1824. At appeal, the defendant argued that he did not have intent to deceive, because he sincerely believed in the efficacy of astrology. The court rejected his good faith defence on the grounds that, according to Denman J, '*res ipsa loquitur*. It is absurd to suggest that this man could have believed in his ability to predict the fortunes of another by

¹²⁸ *Monck v Hilton* (n 73) [276]

¹²⁹ *Penny v Hanson* (n 89).

knowing the hour and place of his birth and the aspect of the stars at such time.’¹³⁰ Denman J continued, ‘We do not live in times when any sane man believes in such a power.’¹³¹ In other words, the court impugned intent on the defendant, overriding the defendant’s own argument of good faith and instead presupposing dishonesty, implicitly converting the offence into one of strict liability.

This logic was repeated in several cases of fortune-telling and mediumship. In *R v Entwistle*, Darling J maintained that he *could* envisage scenarios in which a person engaging in fortune-telling would not also be automatically performing deception – principally, when done for ‘amusement’, akin to a performer in a play.¹³² However, the act of claiming one was a fortune-teller *simpliciter* was held to satisfy the words ‘to deceive and impose upon’ and thus would amount to intentional dishonesty. This contrasted with Darling J’s later approach in *Davis v Curry*, which represented a temporary aberration from this trend. In that case, Darling J accepted the possibility of good faith on the defendant’s part, arguing that ‘some people may still believe that the world is flat. If they state their beliefs and attempt to prove them they ought not on that account to be charged with an intention to deceive.’¹³³

Dissenting in *Davis*, Avory J argued that fortune-telling ‘especially when done for gain’ was impermissible under the statute, ‘which imports that deception is practised thereby irrespectively of the actual frame of mind of the person so pretending or professing.’¹³⁴ Once again, then, a member of the court sought to conceptualise the offence in terms of strict liability. Indeed, Avory J’s approach would later be vindicated, and the position in *Davis v Curry* did not last. In *Stonehouse*, in response to the allegedly earnest belief of the defendant, Darling J repudiated his position in *Davis* and rejected the possibility of good faith: ‘all such things’, he contended, were ‘mischievous nonsense.’¹³⁵ In agreement, Lawrence CJ stated he could not ‘imagine anybody holding himself out to tell fortunes for money who does not perfectly well know that he is deceiving and that he intends to deceive.’¹³⁶

¹³⁰ Ibid [480].

¹³¹ Ibid.

¹³² *R v Entwistle* (n 96) [850].

¹³³ *Davis v Curry* [1918] 1 KB 109 [116].

¹³⁴ Ibid [113].

¹³⁵ *Stonehouse v Masson* (n 101) [827].

¹³⁶ Ibid [824].

The court's overall approach to *mens rea* in these cases begs several questions about the preconditions that led to such framing. Firstly, what do these cases reveal about the meaning and function of the legal concept of *mens rea* within capitalism? Secondly, what do they reveal about the epistemology the court used to justify the denial of good faith defences and the impugning of intent on fortune-tellers, mediums, and other paranormal practitioners?

On the former, Pashukanis, in characterising the logic of the criminal law as mirroring that of private law premised on equivalence, exchange, and the formal legal subject, argues that the conception of fault as expressed through *mens rea* in 'modern criminal law... corresponds to the radical individualism of bourgeois society.'¹³⁷ He contrasts this introduction of a 'psychological element into the concept of liability' with the 'law of antiquity' that 'was permeated by the principle of collective liability', such as how a father might be held responsible for the actions of his wife and children.¹³⁸ This evolution was the product of, as Rabin contends, a 'legal system [that] depended on a true and coherent self that could be held responsible for its behaviour and misbehaviour.'¹³⁹

In this light, one can see how criminal fault and *mens rea* flow from the notion that an individual must be conceptualised, in law, *qua* a subject whose liability principally derives from legal decisions constituted through his or her autonomous will. Just as a legal subject can be expected to uphold contractual duties to which they freely assented, so too can the subject generally be held to account for criminal harm intentionally, or negligently, inflicted. That said, in feudal and early modern law, traces of discourse regarding the 'intent' of an offender can be detected, as in the work of Bracton and traceable to the works of St Augustine.¹⁴⁰ Yet, the meaning and significance of feudal and early modern 'intent' differed from capitalistic notions of autonomy, intention, and responsibility. Sayre notes that intent in its modern sense was scarcely a component at all of law before the 12th century.¹⁴¹ When law's object 'was to restrict and supplant the blood feud, the mental factor was of importance insofar as it determined the provocative nature of the offence.'¹⁴²

¹³⁷ Pashukanis (n 53) 178.

¹³⁸ Ibid.

¹³⁹ Dana Y Rabin, *Identity, Crime, and Legal Responsibility in Eighteenth Century England* (Palgrave Macmillan, 2004) 10.

¹⁴⁰ Eugene J Chesney, 'Concept of Mens Rea in the Criminal Law' (1939) 29(5) *Journal of Criminal Law and Criminology* 627-644.

¹⁴¹ Francis Bowes Sayre, 'Mens Rea' (1934) 45(6) *Harvard Law Review* 974-1026, 981.

¹⁴² Ibid 1016.

Beyond that, the emphasis of early conceptions of intention and *mens rea* were generally focussed on the conscience, and the moral or even spiritual ‘evil’, of the defendant, given that the emergence of intent as an element of offences was received from Roman and, more importantly, canon law.¹⁴³ From that point on, moral blameworthiness gradually came to be applied as a pre-requisite in more on more crimes, and ‘by the second half of the seventeenth century, it was universally accepted law that an evil intent was as necessary for felony as the act itself.’¹⁴⁴ Yet still, it was primarily ‘based on general moral blameworthiness’ and ‘the conception [of *mens rea*] was an exceedingly vague one.’¹⁴⁵ It had not yet congealed along with the web of concepts that constituted a capitalist legal rationality to imply autonomy and individualised agency.

When *mens rea* was conceptualised in later cases, however, the emphasis shifted to a focus not on ‘evil’ or ‘morality’ but, simply, intentionality and responsibility in a thinner, perhaps more ‘empirical’ sense. This is visible, Noyes argues, in ‘the growing differentiation between crimes and torts’ as well as ‘in the defences of infancy and insanity which were to have more and more weight given to them’ in the 17th and 18th centuries.¹⁴⁶ As Sayre contends, ‘our modern objective tends more and more in the direction, not of awarding adequate punishment for moral wrongdoing, but of protecting social and public interests.’¹⁴⁷ This shift, and the interests in question, can be seen as reflecting a deeper-level emphasis of capitalist legal rationality on the voluntary assumption of responsibility by the legal subject and the wider objective of securing and enforcing private property relations.

While the division between private and criminal law, and the emergence of distinctive doctrines on the same matters between the two, may give rise to the appearance that the constitution of the legal subject might diverge between the two legal disciplines, the abstract legal subject at the heart of both remains, broadly, the same. That being the case, the emphasis on the subject’s intentionality and consent can be seen to emerge from similar axioms in different legal fields. This should not suggest the meaning of criminal liability was directly ‘caused’ by changes in

¹⁴³ Chesney (n 140) 629.

¹⁴⁴ Sayre (n 141) 993.

¹⁴⁵ Ibid 994.

¹⁴⁶ Anne Noyes, ‘Early Causes and Development of the Doctrine of *Mens Rea*’ (1945) 33(4) *Kentucky Law Journal* 306-311, 306.

¹⁴⁷ Sayre (n 141) 1017.

contract and property law. Rather, the law's inconsistent, gradual, dialectic evolution and consolidation into an autonomous, coherent system resulted in a rationality with an abstract legal subject whose fundamentals – autonomy, responsibility, and so on – became formally consistent across various species of juridical norm.

Thus, the law's notions of responsibility and intention in paranormality cases should not be analytically disentangled from the conditions that gave rise to its notions of impossibility and deceptiveness. Rather, both belonged to the same formal legal rationality, to the same matrix of norms and reasoning. For this reason, observations about the law's conceptual toolkit *in re* the offences' *actus rei* apply similarly here. The law's refusal to accept the possibility that some defendants might possess sincere belief in their paranormal abilities served as a reflection of the law's 'ontological biases,' expressed through its conception of the subject's own epistemology.¹⁴⁸

In other words, the legal system's configuration of conceptual reasoning may be predisposed not only towards the assumption that paranormal practices are impossible and thus deceptive, but also that *practitioners* share the ontology that the law implicitly, and necessarily, imputes upon the legal subject. As such, the epistemology of the law – its approach to knowledge – may be understood in the fortune-telling and mediumship cases as hegemonic. The law's impugning of intent on defendants flowed from the process of converting an individual into a legal subject, a process which substituted many of their concrete qualities for the subject's abstract qualities. This was particularly possible within the juridical methodology employed by courts in the 19th and early 20th centuries, which frequently impugned intent via strict liability, especially in the industrial context, admittedly more so in tort than criminal law.¹⁴⁹

That is, even if the extent of strict liability offences in 19th-20th century criminal law can be exaggerated, one can observe how the law imputed to the legal subject its implicit epistemology – an epistemology that complemented natural-scientific logic and, thus, in Darling J's terms, considered paranormality to be 'nonsense.'¹⁵⁰ In this sense, if the subject is a legal construct,

¹⁴⁸ Charles McCrary, 'Fortune-telling and American Religious Freedom' (2018) 28(2) Religion and American Culture 269-306, 270.

¹⁴⁹ See Francis Bowes Sayre, 'Public Welfare Offences' (1933) 33(1) Columbia Law Review 55-88. Singer, however, argues that the proliferation of strict liability in criminal law in the 19th century can be overstated: Richard Singer, 'The Resurgence of Mens Rea: The Rise and Fall of Strict Criminal Liability' (1989) 30(2) Boston College Law Review 337-408, 340-363.

¹⁵⁰ *Stonehouse v Masson* (n 101) [827].

then it follows that the law may presuppose that such a construct, an extension of itself, is comprised of the same constellation of premises that the legal system exhibits. It would not be until the emergence of a more concretely pluralistic conception of faith with the development of human rights discourse in the 1940s and 50s that such a hegemonic epistemology would face sustained challenge, and the range of possible beliefs the law would tolerate on the part of a defendant would expand.

4.5 Conclusion

This chapter has argued that law's construction of paranormal practices between 1736-1951 was facilitated by conditions of possibility immanent to a capitalist legal rationality, and that the positioning of paranormal practices as deceptive vagrancy was (partially) conditioned by the logic of capitalist law. However, the law's construction of the paranormal was also contingent on a specific class-conflictual historical progression that was occurring *within* capitalism, as outlined in Section 4.2. As Chapter Five explores, the law would go on to allow trade in paranormal practices insofar as they were 'bounded' in certain ways, such as with disclaimers that they were for 'entertainment purposes.' In that sense, how the law constructed the paranormal was both informed by capitalist legal rationality but not determined by it, and was profoundly related to wider socio-economic conditions and political struggles.

Indeed, in 1951, the legal status of paranormal practices in English law would shift, even if the underlying rationality largely persisted, adopting a new mode of expression. With the ratification of the Fraudulent Mediums Act 1951, the legal system developed certain safe harbours for paranormal practitioners willing to engage in practices that assumed a form more consistent with the normative, legally constituted commodities that comprise capitalist exchange. Thus, Chapter Five examines the repeals of the WA 1736 and the fortune-telling provision of the VA 1824, considering their place within broader shifts in the legal system – including post-WWII human rights analyses, and the introduction of supranational EU norms to the English legal system.

5. Commodifying Paranormal Practices: Religious Freedom and Consumer Protection, 1951-Present

5.1 Introduction

Chapter Four explored how the Witchcraft Act 1736 ('WA 1736') repealed the anti-witchcraft statutes while criminalising the practice of 'pretending' to have magical abilities. It also discussed how the Vagrancy Act 1824 ('VA 1824') supplemented the WA 1736, and how both were interpreted and applied judicially to cases involving paranormal practices. The chapter also contended that juridical conceptions of those practices were influenced, though not determined, by the capitalist social relations and imperatives that had become increasingly entrenched over the 18th-20th centuries, particularly as those relations were constituted, and enforced, by the legal system.

Chapter Five continues the genealogy of law's treatment of paranormal practices by looking at the legislation that repealed the WA 1736 and the elements of s 4 VA 1824 pertaining to fortune-telling and mediumship, namely the Fraudulent Mediums Act 1951 ('FMA 1951'). That legislation created exceptions for entertainers and religious practitioners to lawfully engage in mediumship, fortune-telling, and other similar practices. This development, occurring after the atrocities of the Second World War and the correlative surge in human rights discourse at both the national and international levels, reflected an apparent paradigm shift in the regulation of paranormal practices. The FMA 1951 reconstituted paranormal practices not as *per se* forms of deception, but as acts that could, in limited circumstances, amount to commercial entertainment or non-commercial expressions of religious belief.

In analysing this evolution, this chapter builds on arguments made in earlier chapters to show how this transformation can be understood as a distinct expression of the same underlying (capitalist) rationality that underscored earlier juridical reasoning as it pertained to paranormality. It also explores to what extent this serves as an expression of a tendency within capitalist legal rationality towards commodification of even that which exhibits many qualities that stand in tension with transactive exchange.

The chapter will then examine the legislation that repealed the FMA 1951, namely, the Consumer Protection from Unfair Trading Regulations 2008 ('CPR 2008'). The CPR 2008 derived from an EU directive, and as such was infused with the rationality of the single market: the elimination of barriers to exchange, the expansion of financialised capitalism, and so on, achieved in part by securing the expectations of consumers in commercial exchange. Against this backdrop, and reflecting its EU origins, the CPR 2008 integrated paranormal practices into the rubric of consumer protection law. This process engendered a new legal construction of paranormality, no longer isolating paranormal practices as 'unique' practices in need of specific regulation, but rather as concrete expressions of transactive exchange to be regulated, in principle, as any other. Gone were the labels of 'fortune-teller' or 'medium': now (commercial) practitioners were abstracted as 'traders', and their clients as 'consumers'. This chapter interrogates this evolution within the context of capitalist legal rationality. It argues that such a progression drew on (capitalistic) notions of private property ownership and exchange, particularly with regards to the abstraction of the subject matter of property rights and the legal subject themselves.

Section 5.2 establishes the legal history of the FMA 1951, providing context for Section 5.3 to explore the Act and its associated rationality. Section 5.4 then explores the history, effect, and logic of the CPR 2008. Section 5.5 concludes.

5.2 The Legal History of the Fraudulent Mediums Act 1951

Section 2 FMA 1951 repealed the WA 1736 and the aspects of s 4 VA 1824 related to fortune-telling and mediumship. In their place, s 1(1)(a) FMA 1951 provided that operating 'as a spiritualistic medium' or exercising 'any powers of telepathy, clairvoyance, or other similar powers' insofar as the individual acted 'with intent to deceive' was a criminal act. Section 1(2) clarified that a conviction was contingent on the individual acting 'for reward', meaning cases where 'any money is paid, or other valuable thing [is] given.' Further, s 1(4) maintained that prosecution for these practices could only occur with the consent of the Director of Public Prosecutions ('DPP'). Finally, s 1(5) provided s 1(1) would not 'apply to anything done solely for the purpose of entertainment.'

By moving away from the framework of vagrancy embodied by the VA 1824, these provisions carved some legal space for paranormal practitioners to conduct their affairs, creating a cleaner

distinction between the practices themselves and the status of the subject performing them. Since s 1(2) stipulated that paranormal practices would not be prosecuted unless done for a financial ‘reward’, any practices that could be presented as independent from market exchange would be exempt from prosecution. Thus, while the statute did not directly allude to freedom of religion (in contrast to parliamentary debates on the bill, as discussed later), it did in practice offer an exemption for non-commercial paranormal practitioners.

In terms of its exemption for those performing paranormality for entertainment purposes, the Act did not define entertainment, a feature that begs several questions – would a disclaimer that the performance was for entertainment suffice, or would certain practices exhibit qualities that objectively rendered them ‘entertaining’? In the absence of case-law commenting on these issues, the answers to these questions will be interrogated in depth in Section 5.3. For now, Section 5.2.1 examines the legal history of the Act, looking to its origins in the Spiritualist religious movement of the late 19th and early 20th centuries.

5.2.1 The Fraudulent Mediums Act 1951 and the Spiritualist Movement

For all its ambiguities, the FMA 1951 stood in contrast to earlier legislation and jurisprudence in relation to the paranormal, which had been largely uncompromising in their prosecution of paranormal practitioners. Indeed, several 19th century astrologers, mediums, and fortune-tellers unsuccessfully agitated for repeal of the laws, including the astrologer Richard James Morrison. Morrison established the British Association for the Advancement of Astral Science and Protection of Astrologers in 1844, possibly the earliest organised reform movement, though the Association ultimately collapsed.¹ Efforts to revise the law were revived following the well-publicised trial of the medium Henry Slade, which prompted several prominent public figures including Sir Arthur Conan Doyle to express displeasure with the state of the law.²

Despite the failure of his Association, Morrison later collaborated with the solicitor and astrologist Christopher Cooke to submit a petition to the government. This was received warmly by his personal acquaintance Lord Robert Grosvenor and William Ewart, who

¹ Katharine Anderson, ‘The Weather Prophets: Science and Reputation in Victorian Meteorology’ (1999) 37 *History of Science* 179-216, 190.

² Matthew Tompkins, ‘He Blinded Us with Séance’ (2017) 234(3130) *New Scientist* 42-43.

submitted a Private Member's Bill in 1852. Like Morrison's Association, this ended in failure.³ There was a class-conflictual dimension to Morrison's efforts: 'these middle-class astrologers,' Davies writes, 'did not necessarily want to abolish section four [of the Vagrancy Act 1824], but to change it in their favour. They were severely critical of common fortune-tellers and pseudo-astrologers ...'⁴ His goal, and the goal of his collaborators, was to maintain those aspects of the bill penalising 'street' or 'vulgar' fortune-tellers while securing legitimacy for propertied astrologers working in a private capacity. This was a movement towards astrological professionalisation, which was perceived to require the marginalisation of any proletarian paranormal practitioners who might threaten the astrologer's reputation.⁵ Such a tendency would re-emerge in later legislative campaigns, but following Morrison's failed lobbying efforts, the energy behind this reform project dwindled.

Nevertheless, in the following years, a new socio-religious movement developed – the Spiritualist movement.⁶ Spiritualism was a belief system that emerged from the mid 19th century onwards, popular in both the UK and the US. The arrival of several popular US mediums in 1852 – including the renowned Maria Hayden, and her competitors – catapulted Spiritualism into the awareness of the UK public, heralding a flurry of newspaper reports across the country.⁷ In their wake, Spiritualism was increasingly received into the middle and upper classes⁸ across the latter half of the 19th century and into the 20th, possibly enflamed by widespread grief following the tragedies of the First World War, though the causal strength of that link remains unclear.⁹

Like paranormal practices in general, the Spiritualist movement covered (and covers) a heterogenous array of beliefs and organisations. Nonetheless, the charter of the Spiritualist National Union ('SNU') offered in 1901 a set of beliefs that continue to characterise the

³ Owen Davies, *Witchcraft, Magic and Culture, 1736-1951* (Manchester University Press, 1999) 62.

⁴ Ibid.

⁵ This mirrored attempts by male authors in the 19th century to establish writing as a legitimate, respectable profession by way of denigrating the authorial work of women and authors of low social status. Zoe Adams, *The Legal Concept of Work* (Oxford University Press, 2022) 199-200.

⁶ A more extensive history of the spiritualist movement can be found in Logie Barrow, *Independent Spirits: Spiritualism and English Plebeians, 1850-1910* (Routledge, 1986).

⁷ John Walliss, 'Continuing Bonds: Relationships Between the Living and the Dead within Contemporary Spiritualism' (2001) 6(2) *Mortality* 127-145, 129.

⁸ Note that the term 'class' here does not refer to the structural understanding of how classes are established within capitalism in relation to production – i.e., labour and capital – but rather, in this instance, 'class' refers to how groups were culturally distinguished at the time.

⁹ This is one of the central theses articulated in Jenny Hazelgrove, *Spiritualism and British Society Between the Wars* (Manchester University Press, 2000).

movement today. These included ‘the fatherhood of God, the Communion of Spirits and the Ministry of Angels, [and] the continuous existence of the human soul.’ While these beliefs appear straightforwardly mystical, several Spiritualists saw themselves as engaging in an exercise as technical as it was theological, insisting on the value of occult research as a previously underexplored scientific endeavour, perhaps to cloak the medium behind the gloss of empirical rationalism so often valued within capitalist society.¹⁰

Many Spiritualist beliefs, especially those centred around London and the London Spiritualist Alliance, ‘complemented’ Christianity, drawing on theologically Christian views of life after death (angels, God, etc) – though an anti-Christian strain of Spiritualism also existed, often drawing individuals who had previously been atheists.¹¹ While initial responses from the Church of England and especially the Catholic Church to the rise of Spiritualist mediums were antagonistic, several high-profile Anglican and Nonconformist priests including Stainton Moses and Reverend Hugh Reginald Haweis eventually expressed an interest in Spiritualism as a logical extension, or branch, of Christian faith.¹² Yet, in contrast to Christian practice, the Spiritualists’ emphasis on communication between living and dead overlapped with the practices criminalised under the WA 1736 and the VA 1824, chiefly with regards to ‘pretending’ to summon spirits, exposing them to potential prosecution as frauds and vagrants.

Despite this risk, the growing popularity of Spiritualism yielded the emergence of several Spiritualist organisations over the second half of the 19th century, the first on record being the Lancashire Association for the Promotion of Spiritualism in New Districts in 1875. Similar regional institutions developed elsewhere, drawing inspiration from the Lancashire Association, many with their own periodicals.¹³ The associations and societies were sometimes informal gatherings, but others eventually incorporated as limited companies, as with the London Spiritualist Association and the SNU. While Spiritualism as a faith attracted adherents from all social strata, prohibitively high membership fees seem to have reserved them for wealthier adherents.¹⁴

¹⁰ Janet Oppenheim, *The Other World: Spiritualism and Psychical Research in England, 1850-1914* (Cambridge University Press, 1984) 63.

¹¹ *Ibid* 86-87.

¹² *Ibid* 63-85.

¹³ Geoffrey K Nelson, *Spiritualism and Society* (Routledge, 1969) 112.

¹⁴ *Ibid* 49.

The emergence of myriad regional associations like those in Lancashire and the Midlands led to conferences in the 1890s aimed at organising a national ‘union’ for promoting their faith and legal reform. Their distinction from earlier reform efforts, therefore, was that they did not outwardly conceive their project in professional or otherwise economic terms but, rather, in pursuit of religious, non-commercial objectives. Organisation was initially challenging because many such societies were ‘handicapped by the fact that as societies they had no legal right to own property... Spiritualism could not acquire legal rights without a declaration of principles, and this was difficult to draw up, since beliefs varied within the movement.’¹⁵ Not only did this heterogeneity produce organisational problems, but so too did the criminal law’s persecution of paranormal practitioners via the VA 1824 and the WA 1735.¹⁶ The SNU, along with several other associations, eventually spearheaded the movement for reform, but, first, they needed to attain legal status for organisational and property-holding purposes.

Serious efforts to consolidate Spiritualist beliefs to produce a memorandum and articles of association took around 5 years, spanning from their inception in 1896 at the associations’ Annual Conference in Blackpool to the charter’s delivery and publication in the Spiritualist journal *Two Worlds* in 1901. Following this publication, the SNU gained legal status as a limited company on 22nd October 1901 via the Companies Act 1862, allowing them to hold property (the SNU were later granted charitable status on 6th April 1981). The incorporation of the SNU was not without controversy amongst their own ranks, particularly over the SNU’s inaugural plans to issue and require certification for ‘genuine’ Spiritualists.¹⁷ The SNU’s accreditation processes promised to afford certain Spiritualist workers (mediums, speakers, teachers, and so forth) examinations, diplomas, and certificates, a project straightforwardly ‘aimed at raising the standard of public speakers and mediums and of ensuring that only qualified persons received the approval of the National Union.’¹⁸ Despite the controversies generated by these exclusionary accreditation procedures, they were gradually accepted throughout the SNU and other Spiritualist societies in the UK over the following decades, concurrent with how the practice of registration practices was becoming a common tactic amongst professional organisations more generally.

¹⁵ Ibid 126.

¹⁶ On the heterogeneity of Spiritualism, see also Geoffrey K Nelson, ‘The Spiritualist Movement and the Need for a Redefinition of Cult’ (1969) 8(1) *Journal for the Scientific Study of Religion* 152-160.

¹⁷ Nelson (n 13) 128.

¹⁸ Ibid 127-128.

The institutionalisation of the SNU proved successful, with the Union rapidly building membership and pursuing its goal of dismantling the laws it viewed as oppressive through publications and parliamentary campaigns. Yet, as mentioned earlier, poorer mediums and fortune-tellers who were so often the target of prosecution under the VA 1824 as ‘rogues and vagabonds’ could not generally afford membership. While, Davies writes, legalisation of fortune-telling and mediumship was ‘rekindled not by a new generation of middle-class astrologers, but by the far more influential spiritualist lobby,’¹⁹ the organisations that ultimately lobbied the government were not representative of all paranormal practitioners. Though it remains true that ‘spiritualism and psychical research were never monopolized by any one class of British society’ in principle, the membership fees and accreditation procedures of formal organisations like the SNU, along with their pseudo-scientific pretences, ultimately operated to exclude ‘vulgar’ fortune-tellers and those who cloaked their practices in the ‘occult artistry and arcane knowledge’ of earlier times.²⁰

While this demarcation, in Kreckel’s sense of introducing market segmentation to delineate institutional boundaries, may have not been explicitly embedded in the charters and constitutions of the Spiritualists, institutional constraints like certification and membership fees in effect suppressed the participation of working class mediums and fortune-tellers – the often unpropertied actors whom the SNU would have allowed to be continually marginalised as frauds and vagrants.²¹ Indeed, the SNU and other affiliated Spiritualists explicitly sought to differentiate themselves from lower-class fortune-tellers in a bid to earn their own legitimacy, both religiously and professionally as speakers, writers, and practitioners, reflecting Morrison’s earlier efforts. This was evident not only in the barriers constructed by accreditation procedures and membership fees but also in their rhetoric, lobbying, and constant attempts to discredit and disprove the abilities of others, as with the famous medium Daniel Dunglas Home, highlighting the ‘scientific’ rigour underpinning their own mediumship and the hostility to scientific investigation, and resultant charlatanism, that they claimed characterised their rivals.²²

¹⁹ Davies (n 3) 63.

²⁰ Oppenheim (n 10) 28; Alex Owen, *The Darkened Room: Women, Power, and Spiritualism in Late Victorian England* (2nd ed, University of Chicago Press, 2004) 4.

²¹ On professional ‘demarcation’ see Reinhard Kreckel, ‘Unequal Opportunity Structure and Labour Market Segmentation’ (1980) 4 *Sociology* 525-550.

²² See Peter Lamont, ‘Spiritualism and a Mid-Victorian Crisis of Evidence’ (2004) 47(4) *The Historical Journal* 897-920.

Such distinctions formed a key dimension of Spiritualist parliamentary campaigns. As part of a deputation of Spiritualists lobbying for legal reform to the WA 1736 and VA 1824 to the Home Secretary John Clynes on July 1st 1930, Ernest Oaten, then editor of the SNU's periodical *Two Worlds* and president of the Spiritualist International World Federation, contrasted the 'sincere' Spiritualist movement to the 'vagrant gipsy who went from door to door (very often back doors) imposing upon the ignorant classes, servants and suchlike, and often instilling into them superstitious fears.'²³ In a speech contributing to the deputation, Arthur Conan Doyle spoke of 'the real medium' and 'the honest medium', a category of practitioner distinct from those who might push 'frauds and tricks' whom he termed 'the greatest enemies we can possibly have.'²⁴

Further, in that deputation to the Home Secretary, most Spiritualists present belonged to formal associations like the SNU, with all their certification processes and membership fee requirements, the Spiritualist International World Federation, and the Christian Spiritualist Associations. The 'independent Spiritualists' present included a Lady M Molesworth and a Miss Lind-Af-Hageby, subtitled as the 'Founder of Animal Defence and Anti-Vivisection Society', upper class actors who could not be said to represent the interests of poorer, 'vulgar' fortune-tellers. 'It is obvious,' argued Oaten, 'that such Acts were never intended to apply... to those who serve a *bona fide and legally registered religious body* [emphasis added].'²⁵ For this reason, Oaten vowed, 'if necessary, the Spiritualists would be prepared to set up some method of control or registration of bona fide mediums... I might suggest... that these various sections and organisations unite to establish a national panel, so that each section may licence its own mediums for working within its own domain'.²⁶

This was no push for universal liberation, despite the claims of the Spiritualist movement at large to represent all classes, genders, races, and peoples. There was an implicit, and sometimes explicit, class-conflictual element to the institutions that platformed the Spiritualist cause, as there was for the 'middle-class astrologers' of the mid 19th century. Of course, many if not most Spiritualists may have held genuine beliefs in their faith, and yet there were economic components to their objectives that perhaps operated both consciously and unconsciously – the

²³ United Spiritualist Organisations, 'Deputation to the Rt Hon J R Clynes MP (Home Secretary) by the United Spiritualist Organisations' (1930) printed in 8(7) *Psypioneer Journal* (2012) 239-255, 244.

²⁴ Arthur Conan Doyle, 'Sir Arthur's Last Speech' (1930) *Two Worlds* July 25th.

²⁵ United Spiritualist Organisations (n 23) 244.

²⁶ *Ibid* 254.

Spiritualists hosted paid classes, released periodicals, opened centres for reading and learning, and performed (or sought to perform) spiritual services in homes for a fee. Further, their arguments against the VA 1824 rested not on the grounds that fortune-telling and mediumship ought to be respected *per se*, but rather that Spiritualist mediums were enfranchised property owners with ‘sincere’ interest in psychical research, and so ought not be considered vagrants for the purposes of the Act. Thus, their lobbying efforts were not aimed at destabilising the capitalist relations that had made their earlier marginalisation possible, but rather at recalibrating the *boundaries* of those relations in their favour – by distinguishing their legitimacy against the illegitimacy of the ‘vulgar’ fortune-teller.

Indeed, the attempts of Spiritualist institutions, conscious or otherwise, to differentiate themselves from lower-class fortune-tellers and mediums offered parallels with other professionalisation movements of the 19th and early 20th centuries.²⁷ For example, the nurses ‘waged long campaigns for state-sponsored systems of registration’ and ‘credentialism’ to achieve legitimacy by transforming their roles ‘into occupations suitable for “educated refined gentlewomen”’.²⁸ Like the nurses, the Spiritualists’ insistence on their own ‘scientific’ or ‘educated’ credentials and their denouncement of lower-class frauds, along with the Spiritualists’ stabilisation of their religious beliefs in institutional and professional form, earned them legitimacy by creating an relational divide between themselves and the supposedly ‘true’ frauds or vagrants. This exclusionary tactic was undoubtedly invaluable in their campaigns for legal reform – it asked not for a revolutionary overhaul of the law that would deny Parliament its capacity to persecute those it perceived as frauds, but rather an exception for Spiritualists and so-called psychical researchers.

The earlier mentioned deputation eventually led to the first real legislative attempt at reform. By the 1930s, a current of Spiritualist belief ran not only through the general public but also the Labour Party, with Spiritualist beliefs exhibited by a number of Labour MPs, including Keir Hardie and Robert Blatchford.²⁹ Ernest Bennett, Labour MP for Cardiff Central, for instance, served for a time as vice-president of the London Spiritualist Alliance.³⁰ Against this

²⁷ Robbie Shilliam, *Race and the Undeserving Poor: From Abolition to Brexit* (Agenda Publishing, 2018).

²⁸ Anne Witz, ‘Patriarchy and Professions: The Gendered Politics of Occupational Closure’ (1990) 24(4) *Sociology* 675-690, 685.

²⁹ Barrow (n 6) 112-124.

³⁰ Keith Gildart, ‘Séance Sitters, Ghost Hunters, Spiritualists, and Theosophists: Esoteric Belief and Practice in the British Parliamentary Labour Party, c1929-51’ (2018) 29(3) *Twentieth Century British History* 357-387.

backdrop, not only did the Labour Home Secretary John Clynes meet formally with the deputation of Spiritualists named the United Spiritualist Organisations on July 1st 1930, but so too did William Kelly, Labour MP for Rochdale, whose sympathies for the Spiritualist cause led him to present the Spiritualism and Psychical Research (Exemption) Bill to Parliament in 1931.

While this bill ultimately failed to become law, its provisions and parliamentary debates are revelatory of a cultural-political shift in favour of Spiritualism and some aspects of paranormal practices more generally. The bill envisaged exemptions that spared ‘mediums from prosecution under the enactments relating to witchcraft and vagrancy’ insofar as they were doing so ‘in religious practice or scientific investigation.’³¹ This foreshadows a key dimension of the 1951 statute – namely, an exemption from prosecution for paranormal practices that did not involve market exchange. In support of the bill, Kelly stated that he considered it ‘amazing that ... this country should still deny religious freedom to certain sections of the community.’³² He went on to critique the mandatory strictness of the associated penalties (a year’s imprisonment, rather than a fine), and would point out that ‘it is the proud boast of this country that it gives freedom, but we can hark claim that we are a freedom-loving people if we still leave hanging over the head of this great organisation, composed of some of the gentlest in our nation, the possibility of these prosecutions and the penalties attaching to them.’³³

For all Kelly’s passionate delivery, the ‘freedom’ he envisaged for paranormal practitioners through this bill was not freedom to conduct a business associated with paranormality of any form. Rather, the freedom he would have extended to paranormal practitioners was religious freedom and freedom of scientific experimentation, conceived as operating in parallel, and thus in a non-oppositional manner, with markets. The religious freedom aspect of these developments will be discussed when examining the FMA 1951. But the exemption the 1931 bill envisaged for scientific experimentation is worthy of specific discussion. So-called psychical research had emerged over the 19th century as an attempt to subject the paranormal to scientific investigation. Spiritualism itself often exhibited a pseudo-scientific dimension, with many adhering to its beliefs being motivated not by faith but by ‘rational’ curiosity, insisting on the empirical nature of their ‘research’ into the existence of spirits and an afterlife.

³¹ HC Deb 26 November 1930, vol 245, col 1320.

³² Ibid.

³³ Ibid 1321.

Indeed, some Spiritualists' arguments for reform of the law lay in the fact that 'the Witchcraft and Vagrancy Acts [were] passed before psychic research was known' and thus were outdated.³⁴ Spiritualism, then, to secure its legitimacy had shrugged off – at least in its rhetoric – much of its occult trappings and exchanged them for a shroud of pseudo-science, an attempt to integrate itself into the rationalistic hegemony of science within capitalist society.

As such, the endeavour of exposing phenomena like fortune-telling and mediumship to scientific analysis did not represent a derogation from capitalist legal rationality, nor a transformation of substantively paranormal practices from contra-legal to legally understandable phenomena. Rather, the Spiritualism and Psychical Research (Exemption) Bill would have repositioned the paranormal as something not fundamentally irrational within capitalist society, but merely misunderstood – or, not yet subjected to satisfactory empirical investigation.³⁵ Thus, even if this bill had been successful, it would not have been a radical deviation from capitalist legal rationality, but a modification of its application.

In any case, the Spiritualism and Psychical Research (Exemption) Bill failed to garner necessary support. In response to Kelly, Frederick Macquisten MP opposed the bill on the grounds of it licencing 'genuine' mediums, stating somewhat esoterically that doing so would reduce 'all spiritualists ... to the state of the canine species' and that any licence issued to paranormal practitioners would be 'preposterous.'³⁶ Ultimately, however, the Spiritualism and Psychical Research (Exemption) Bill failed for procedural reasons. Kelly attempted to push for a second reading of the Bill, only to be vocally rejected by Lieutenant Colonel Fremantle. Fremantle responded to the Bill and the attempt at a second reading with some flippancy, admitting openly that he was 'very ignorant about these things as [he did] not know what a spiritualist is' in one breath while, in the other, arguing with some irony that paranormality was 'associated with a certain perversion of the uninformed mind... and it has had most disastrous effects in many cases.'³⁷ Fewer than 40 MPs showed up for the vote, failing to meet quorum, and so the Spiritualism and Psychical Research (Exemption) Bill dissolved.

³⁴ Earnest Oaten, 'Bound by Legal Tradition!' (1930) *Two Worlds* June 6th 361.

³⁵ This reflected similar developments regarding the liberalisation of trade involving 'alternative' medicines, like homeopathy.

³⁶ HC Deb (n 31) 1323.

³⁷ HC Deb 23 January 1931, vol 247, col 572.

Yet, the Spiritualist quest for legal reform on paranormal practices was not extinguished. In the two decades between the Spiritualism and Psychical Research (Exemption) Bill and the FMA 1951, several high-profile prosecutions of mediums provoked the public's sympathy. The 1944 *Duncan* decision was chief amongst these, inciting public outrage at the optics of prosecuting citizens for 'witchcraft' in the 20th century. References to witchcraft in the courtroom had become so unthinkable within a society that had come to so value empirical approaches to truth that the label alone was enough to cause controversy. In this respect, Winston Churchill himself wrote to the Home Secretary, Herbert Morrison, about what he termed 'obsolete tomfoolery,' requesting a report on 'why the Witchcraft Act, 1735, was used in a modern Court of Justice.'³⁸ Renewed parliamentary attempts to revise the laws were dismissed in the House of Commons, since efforts were focussed on the war. In 1948, however, a committee debate concerning the Criminal Justice Bill saw the Home Secretary proposing reforms to the law as it related to psychics, fortune-tellers, and mediums, which would culminate in the submission of the Fraudulent Mediums Bill to Parliament in December of 1950.³⁹

Walter Monslow, Labour MP, proposed the bill. It stimulated a chorus of debate in the House of Commons, revealing much about the state of politico-legal discourse around paranormal practices at the time. Lord Dowding, speaking in the bill's favour, argued that the bill held two objectives. He did not open with a case for religious freedom or civil liberty. Rather, Lord Dowding maintained that the Bill was 'designed to ensure that there shall exist penalties adequate to deter the practice of fraudulent mediumship.'⁴⁰ At first glance, then, the proposed bill reinforced the marginalisation of paranormal practices. Nevertheless, Lord Dowding went on to state that the Bill's second goal was 'to abate a present injustice,' making explicit reference to the 1944 *Duncan* case, referring to the WA 1736 as 'long-moribund' to undermine its legitimacy in modern prosecutions.⁴¹ At the same time, he did not miss the opportunity to call other vagrants a 'nauseous class of society' with whom Spiritualists did not deserve to be conflated; earlier Spiritualist efforts to differentiate themselves through institutional professionalisation, it seems, had been successful.⁴²

³⁸ Winston Churchill, *Letter from Winston Churchill to Herbert Morrison* (May 3rd, 1944).

³⁹ Davies (n 3) 73-75.

⁴⁰ HL Deb 3 May 1951, vol 171, col 719-720.

⁴¹ Ibid col 719.

⁴² Ibid col 721.

Viscount Simon supported the motion, suggesting that the law should make ‘a proper provision for [Spiritualists’] rights as free men, in a free community’ – given that ‘there are honest and reputable people in this country who hold and teach the doctrines of Spiritualism and believe in communication with the dead through mediums.’⁴³ Viscount Simon – along with the Earl of Perth – couched their language explicitly in terms of ‘religious freedom’ and ‘essential human rights.’ This was a far cry from the suggestions in earlier mediumship jurisprudence that it was inconceivable that anyone could sincerely hold beliefs in communication with the dead or foresight of the future. The defence of paranormal practitioners did come with a caveat, however, with Viscount Simon maintaining that the law should not provide any occasion for an individual to engage in ‘the use of violence or to destroy the foundations of the State No honest person, whatever his opinions, religious or otherwise, would wish to protect fraud and swindle.’⁴⁴

In so doing, Simon’s arguments implicitly reflected a key component of human rights protection: religious freedom is generally conceptualised not as an absolute right, but rather as contingent on consistency with the values and interests of a democratic society and the protection of the rights and freedoms of other legal subjects.⁴⁵ In terms of that protection, even advocates for paranormal practitioners were unwilling to jettison the notion that many such practitioners were opportunistic charlatans or that paranormality was inappropriate subject matter for commodity exchange. Paranormality’s status as contra-legal *when positioned as an unqualified commodity*, thus, remained extant.

The Bill was passed and the FMA 1951 was ratified. The rise of human rights discourse was surely influential in this regard. The *meaning* of human rights as a set of legal norms will be explored in Section 5.3, but, for now, Section 5.2.2 will consider their legal-historical context to the extent this is relevant to the FMA 1951.

5.2.2 The Legal-Historical Context of Freedom of Religion and the Fraudulent Mediums Act 1951

⁴³ Ibid col 723.

⁴⁴ Ibid.

⁴⁵ These criteria are elucidated, for instance, in *Grainger Plc v Nicholson* [2010] 2 All E.R. 253. Article 17 ECHR also provides that the exercise of any human right may not curtail the human rights of other legal subjects, imposing a similar effect in practice.

Freedom of religion in England is a subject of great complexity, far beyond the scope of this thesis. To suggest that religious conflicts and exclusions – specifically, between Protestants and Catholics – characterised a great deal of English, and European, early modern history would be a distortionary understatement. Indeed, as mentioned in Chapter Three, Protestant-Catholic conflict influenced much of the legal history of the Witchcraft Acts themselves. Roughly concurrent with the first Witchcraft Act of 1542, Henry VIII's Act of Supremacy 1534 required all public officials to confirm their allegiance to the King and their respect of his position as the head of the Church of England. While the later Toleration Act of 1688 would grant some religious freedom to Protestant nonconformists, this nevertheless required a rejection of Catholicism and papacy, and indeed the Act of Settlement 1701 still forbade a non-Church of England monarch from sitting on the English throne.

Freedom of religion as a legal norm has sometimes been traced to early modern legal instruments, such as the Union of Utrecht 1579. Yet, as Boogman argues, 'the motion [in the Union] concerning religious peace, introduced at the instigation of the prince of Orange in the States General on 8th July 1578, can be regarded as a desperate attempt on the part of the prince to save the national cause by getting the principle of toleration accepted in the matter of public worship.'⁴⁶ That said, the clause of the Union which promised religious freedom was, in function, a mechanism for relocating responsibility over religious conflicts to the provinces, not the inception of freedom of religion as a human right.

Others have attempted to locate the nascence of freedom of religion in, for example, the writings of John Locke and the thinkers of the French Revolution.⁴⁷ However, the more direct influence of freedom-of-religion discourse in the parliamentary debates around the FMA 1951 was likely the international legal documents that emerged in response to the Second World War. The United Nations' Universal Declaration of Human Rights 1948 represented an unequivocal articulation of the right to freedom of religion at an international level, as did the European Convention on Human Rights 1950, in Articles 18 and 9 respectively. Against this context, and against the horrors of the Second World War in general, perhaps it is unsurprising to see freedom of religion serving as the rhetorical vector through which the reform of laws

⁴⁶ J C Boogman, 'The Union of Utrecht: its Genesis and Consequences' (1979) 94(3) *Low Countries Historical Review* 377-407, 382.

⁴⁷ Russell Blackford, *Freedom of Religion and the Secular State* (John Wiley & Sons, 2012) 34-54; T N Madan, 'Freedom of Religion' (2003) 38(11) *Economic and Political Weekly* 1034-1041.

relating to paranormal practices could pass through Parliament. The SNU had increasingly risen in prominence over the half century since its founding, as had Spiritualism as a faith more generally – both amongst the public and amongst MPs. The institutional grounding Spiritualism had achieved, along with the development of freedom of religion as a cultural and legal norm, were no doubt two key factors in the statute's ratification.

5.2.3 Paranormality as Entertainment

As Section 5.2.1 showed, much of the legal-historical context of the FMA 1951 centred around the Spiritualist cause. However, an examination of the Act would be incomplete without considering the origins of the second exemption embedded within it, the exemption for those engaging in paranormal practices for 'entertainment' purposes. This term is ambiguous, and the Act does little to clarify its meaning. 'Entertainment', in English law, has been directly and indirectly regulated through an array of legal fields, including tax law, gambling law, intellectual property law, contract law, labour law, and land law (such as when licensing property for the purposes of entertaining audiences), and indeed Section 5.3 will investigate the logic underpinning the term, especially with regards to its meaning and significance within the rationality of capitalist English law. This section, meanwhile, will consider, historically, how the exemption became part of the legislation.

'Stage magic' or 'magic shows' are forms of entertainment in which a performer, or troupe of performers, produce tricks or illusions for an audience, mimicking paranormal phenomena like the appearance of ghosts. Performances using technologies, stagecraft, and other tricks to entertain an audience have a long history. The use of illusions, or 'prestige' (from the Latin *praestigium*, the same root as 'prestige' meaning 'respect'), have also been legally regulated independently of witchcraft laws. Medieval and early modern jugglers, for example, were termed *praestigitors* for the visual illusions induced by their performances. They, like fortune-tellers, found their practices controlled by vagrancy laws, including the Vagrancy Act 1744, which sanctioned wandering 'jugglers, bearwards, minstrels, fortune-tellers...'

Principally, then, vagrancy legislation had been deployed against travelling groups of entertainers of many different kinds. The vagrancy laws were, however, only one facet of a network of legal controls on entertainers, and entertainment and leisure more generally – controls that reached back centuries and were originally embedded in the logic of feudalism.

Following the Peasants' Revolt in 1381, for example, Parliament enacted the first Game Law in 1389, followed by a series of subsequent statutes that sought to confine the 'right' to hunt (a notable 'leisure' activity in the medieval and early modern periods) to the aristocratic class. Several of these statutes also constructed boundaries on deer parks and other game reserves, enclosing the spaces further and confining their access to the aristocracy. The objective of these laws was directly political: the upper classes feared that 'leisure' practices furnished the serfs with conspiratorial opportunities for further revolts.⁴⁸

By the 18th century, the logic behind controls on hunting and fishing for leisure had shifted, though the outcome was largely the same. Leisure amongst the poorer classes, through Calvinist discourse, had been ideologically positioned as 'idleness', a deeply undesirable trait within an era of emerging labour markets and imperialistic expansion.⁴⁹ Meanwhile, land enclosures had converted many former sporting fields into private property, with their owners able to exclude unlanded persons, disrupting their ability to participate in sport that had previously been possible when that land constituted part of the commons.⁵⁰ While few statutes were drafted to control the activity of existing alehouses, local authorities used their powers of licensing to prevent the *opening* of alehouses and the perceived anti-social behaviour with which they had been stereotyped.⁵¹ Overall, the 18th century was a period in which 'leisure' was primarily conceptualised as the purview of the bourgeoisie, while laying the path towards idleness in the hands of the working class.

With regards to theatre, the Licensing Act 1737 concentrated the monopoly over 'serious' dramas to two patent theatres, at Covent Garden and Drury Lane (these being the only theatres in London permitted to stage legitimate dramatic performances). Yet, the tensions between, on the one hand, institutional authorities to control the leisure activities of the poor and, on the other, the operations of entrepreneurs wishing to provide commercial entertainment for profit culminated in the winnowing of regulatory restrictions. A statute in 1752, for instance, allowed magistrates to provide licences to entertainment venues in a twenty-mile radius of London for events like singing and dancing. One of the earliest commercial impresarios, the circus owner

⁴⁸ Roger B Manning, 'Unlawful Hunting in England, 1500-1640' (1994) 38(1) *Forest and Conservation History* 16-23, 16.

⁴⁹ Hugh Cunningham, *Time, Work and Leisure: Life Changes in England Since 1700* (Manchester University Press, 2014) 66.

⁵⁰ *Ibid* 71.

⁵¹ *Ibid* 67.

Philip Astley, took advantage of this in the 1770s to kickstart a ‘theatrical revolution’, with more and more theatres opening despite the monopoly of the patent theatres.⁵² A burgeoning theatrical market began taking root in London, stimulating increasing investment and expansion of the entertainment industry, which resulted in the mounting of a legislative reform campaign by various playwrights and theatre managers to expand their opportunities to commercialise dramatic performances. A parliamentary Select Committee reviewed the law in 1832 and, 11 years later, the Theatres Act 1843 was ratified.⁵³

The Theatres Act 1843 disrupted the monopoly of the patent theatres and granted the power to local authorities to licence music halls and other performance venues. In material terms, the entertainment industry had long since proliferated; the Theatres Act 1843 merely ushered in legal liberalisation, stimulating an already flourishing market. The growing entertainment industry along with the increasing interest in Spiritualism in the 1860s produced the ideal conditions within which the magic show could crystallise as a cultural norm, with shows being performed in both licensed theatres and, more commonly, in music halls, a dichotomy constructed by the Theatres Act 1843 itself. Indeed, while theatrical magicians had existed within English culture for centuries, the witch-hunts had dampened enthusiasm for stage magic as a vocation. Nevertheless, many new performance magicians were particularly successful in the emerging theatrical markets, such as John Maskelyne and George Cooke, who in 1873 took up residence in the Egyptian Hall Theatre in Piccadilly, establishing a popular and influential foothold within the emerging culture industry at large.⁵⁴

The success of magic shows continued into the early 20th century and beyond, with those shows becoming increasingly elaborate, driven by the expansion of ‘theatrical’ markets in general and the associated imperative to compete with, and outperform, rivals. Yet, a question remains: how could arguably ‘paranormal’ magic shows thrive while fortune-tellers and mediums found themselves targeted by the law? The answer may lay in the way magic shows *appeared* to invoke the paranormal and yet were not meaningfully paranormal in substance. This will be explored in detail in Section 5.3, but, for now, the commentator During describes the work of performance or stage magicians as ‘secular magic’, a form of performance that draws on the

⁵² Jane Moody, ‘The Theatrical Revolution, 1776-1843’ in Joseph Donohue (ed), *The Cambridge History of British Theatre, Vol 2 1660 to 1895* (Cambridge University Press, 2008) 199-215, 200.

⁵³ Ibid 206.

⁵⁴ Edwin A Dawes, ‘The Magic Scene in Britain in 1905’ (2007) 5(2) *Early Popular Visual Culture* 109-126, 112-113.

aesthetic dimensions of the paranormal without necessitating paranormal belief on behalf of the audience.⁵⁵ As such, this ‘secular’ magic sidesteps any risk of contradicting capitalist legal rationality as the clearly performative nature of the practice circumscribes the possibility of ‘fooling’ observers into thinking that what they witness might be empirically ‘real’.

While convincing, this characterisation is somewhat reductive, as there was always a porous boundary between the performances of stage magicians and paranormality more generally. Stage magicians would often appropriate the language and narratives of paranormality to render their performances intriguing to an audience. Further, as Bell argues, magic shows of the 19th century frequently blended the occult with the scientific, displaying marvels of technology such as electricity and chemistry alongside an aesthetic gloss of paranormal mystery.⁵⁶ In this sense, practices associated with the magical imagination – with paranormality – were not universally marginalised with the emergence of capitalism but rather some components were reconstructed, transformed, and often integrated with technological innovations to produce a distinct experiential commodity. That is, tickets were sold to view and participate in a temporary, willing suspension of disbelief and logic.

That said, the *superficiality* of these paranormal elements broadly cohered with the logic of property rights and legal certainty – i.e., they did not constitute contra-legal practices, as defined in Chapter Four, for they were instrumental aesthetic components of a performance rather than claims meant to be taken seriously. Stage magic created a space within which audiences could indulge in irrational fascinations without performers requiring, expecting, or even endeavouring to convince those audiences of the veracity of any paranormal depictions. This is not to say that the magic show is, or was, an environment within which the demands of rationality could be temporarily relaxed or spatially excluded; rather, the magic show is self-consciously, and self-avowedly, performative, rational by subtly acknowledging that its claims *would* be irrational if they were seriously advanced. In this way, magical stage performances are ‘bounded’ by their disavowal of the empirical possibility of their own contents.

⁵⁵ See generally Simon During, *Modern Enchantments: The Cultural Power of Secular Magic* (Harvard University Press, 2004).

⁵⁶ Karl Bell, ‘Remaking Magic: The “Wizard of the North” and Contested Magical Mentalities in the Mid-Nineteenth Century Magic Show’ (2009) 4(1) *Magic, Ritual and Witchcraft* 26-51, 36-37.

Indeed, this imposition of boundaries on magic shows allowed them to operate lawfully. In short, they were plainly *presented* as theatrical, not ‘real’, a distinction constructed and enforced by legal theatre licensing, a ‘false binary that divides magic from the things that really matter’.⁵⁷ Audiences were invited to suspend rationality temporarily rather than to ‘believe’ in what was occurring before them – this being an essential element of the experience being consumed. That is, stage magic performances assumed characteristics more in common with drama than the fortune-tellers and ‘witches’ the VA 1824 and WA 1736 envisaged. In that sense, they developed dialectically alongside the emergence of the theatrical market described above. Stage magicians often performed in front of large audiences, on a public stage *associated* with theatrical performances, whereas fortune-tellers and mediums would usually operate covertly, with fewer observers, with no stage and ticketing communicating a context of entertainment. Yet, though working-class interest in the theatre was on the rise, lower-class fortune-tellers and mediums, stereotyped as ‘gypsies’ even in parliamentary debates, were ultimately excluded from performing in these stage venues due to a constellation of factors, including audience expectations, ticket prices, investment costs, licencing fees, and, at times, unwillingness to characterise their practices as performances.⁵⁸

Overall, then, fortune-tellers and mediums could be marginalised because structural conditions ensured that they were perceived as making ‘serious’ claims about their abilities in a way that stage performers were not. The reasons behind the breakdown in this presupposition are unclear; though what is clear is that Parliament began to reconceptualise the fortune-teller and the medium as potentially entertaining, too, at least by 1950. Indeed, they became linked to the theatrical performances of stage magicians, and it may have been this cognitive connection that facilitated the entertainment exemption.

This is visible in the parliamentary debates on the bill that became the FMA 1951, in which Labour MP John Parker questioned whether fortune-tellers at fairs would be criminalised despite being ‘not taken very seriously but rather as a form of amusement, although fortune-telling has been punishable in the past’.⁵⁹ His query was answered by Conservative MP Arthur Colegate, who referenced the safeguard provided by requiring the consent of the DPP to initiate

⁵⁷ Lawrence Hass, ‘Life Magic and Staged Magic: A Hidden Intertwining’ (2008) in Francesca Coppa, Lawrence Hass, and James Peck (eds), *Performing Magic on the Western Stage* (Palgrave Macmillan, 2008) 13-31, 28.

⁵⁸ See Michael R Booth, *Theatre in the Victorian Age* (Cambridge University Press, 1999), especially 2-20.

⁵⁹ HC Deb 1 December 1950, vol 481, col 1478. This aspect of the bill is discussed in Davies (n 3) 74-75.

prosecution. The DPP, Colegate claimed, would not ‘act so frivolously as to allow prosecution of ... people of that kind.’⁶⁰ The Home Secretary later supported this by pointing out that recent prosecutions taken under earlier legislation had generally not targeted entertainers.

More directly, at the second reading, Lord Dowding commented that ‘if there is a stage show which either claims to be mediumistic, or leaves it open as to how these tricks are done, and it is purely in the line of entertainment, the person concerned will not be liable to prosecution.’⁶¹ Lord Dowding thus linked this provision to the illusionists and magic shows performed before audiences that had become increasingly commonplace in music halls, fairs, and theatrical venues. Perhaps this assimilation was inevitable: theatrical magic had always drawn from paranormal practices, just as Spiritualist beliefs may have at times been inspired by the performances of stage magicians. The two shared a cultural-cognitive link that tethered them to one another, even as one was treated as performance and the other as fraud. As such, it is arguable that the entertainment exemption embedded in the FMA 1951 – despite the bill’s primary lobbyists being Spiritualists rather than entertainers – owed its origins at least in part to the expansion of stage magic in the 19th and 20th centuries.

Ultimately, then, both Spiritualists and ‘entertainers’ were able to operate lawfully with the ratification of the Act. But that Act did not extend the same freedom to those it still perceived as ‘frauds’. With that in mind, let us proceed from the legal-historical level of the analysis to the more abstract question of what the Act signifies – that is, let us consider more closely its rationality and conceptual conditions of possibility.

5.3 The Rationality of the Fraudulent Mediums Act 1951

The FMA 1951 afforded space for mediums, psychics, and fortune-tellers to operate lawfully insofar as their practices were formally restricted to religious expression or were presented to consumers as entertainment. This section explores the conditions of possibility for this outcome, along with its significance and meaning, from the perspective of the underlying rationality of the law. That is, where Section 5.2 canvassed the legal history of the FMA 1951 and its provisions on entertainers and religious freedom, Section 5.3 investigates what these

⁶⁰ Ibid col 1479.

⁶¹ HL Deb (n 40) col 722.

provisions *signified*, beginning with the root concept of ‘fraudulent mediumship’ followed by the specific exemptions in turn.

5.3.1 ‘Genuine’ Mediumship Recognised?

This section interrogates the distinction between ‘genuine’ and ‘fraudulent’ mediums. From the perspective of the overall genealogy this thesis has presented, the FMA 1951 at first glance seems a radical overhaul of earlier laws on paranormality. For the first time since the Witchcraft Act 1542, certain paranormal practices had been statutorily enshrined as lawful. For this reason, the Act may appear a far-cry from its antecedents, entailing a deep-level shift in the rationality of a legal system that once presupposed the empirical, and contractual, impossibility of paranormal practices, and as such positioned those practices as deceptive.

Yet, though the Act did construct some safe harbours for practices that might be described as paranormal, this did not indicate a shift in the fundamentally capitalistic logic of the legal system; its axiomatic structures, assumptions, and positions remained unaltered by this solitary piece of legislation. A system’s rationality simply conditions outcomes, offering a framework within which agential decision-making, and the resolution of social conflicts, can occur. Two outcomes, apparently contradictory, may in fact share axiomatic premises. Indeed, the FMA 1951 still reproduced the notion that at least some paranormal practices constituted fraud, constructing a categorical binary between ‘genuine’ and ‘fraudulent’ mediums. Even so, from the perspective of some legal scholars, the very name of the Act represented an almost revolutionary reconfiguration of the law’s treatment of paranormality. That is, if some mediums are ‘fraudulent’, and thus some others are ‘genuine’, does this suggest that the law began to ‘believe’ in the efficacy of empirically unproven psychic abilities?

On this basis, Clements and Morris argue that the FMA 1951 was ‘an absurd Act ... there is no roll of accepted mediums. The Act amounts to professional recognition of such people and presupposes an afterlife; if there is no afterlife, there can be no genuine mediums.’⁶² However, this perspective and others like it are misguided, misinterpreting the underlying logic of the FMA 1951 and how it conceptualised paranormal practices. Commercially exchanged

⁶² Luke Clements and Rachel Morris, ‘Fraudulent and Incompetent Mediums’ (1996) 146(6766) New Law Journal 1574-1576, 1575-1576.

paranormal practices that were not self-avowedly performative and fictitious were still positioned as fraudulent, contradictory as they were to the law's fundamental conceptions of empirical probabilism as embodied by doctrines of causation, foreseeability, and so forth. 'Genuine' mediums, within the logic of the FMA 1951, specifically covered actors who were either: (a) not engaging in commercial practices, i.e., those whose practices have a specifically religious and therefore non-commercial character; or (b) using the aesthetic gloss of paranormality for entertainment purposes, both of which will be evaluated in subsequent sections. Despite the qualifications of these provisions, Clements and Morris ask, with some sarcasm, 'If there is an after-life, and communication with it is a possibility, what is the difference between a fraudulent medium and an incompetent one? Should there be an indemnity fund for mistaken mediums, entitling the victims of negligent psychics to automatic compensation; or would this lead to an unhealthy over-cautiousness in psychic advice?'⁶³

Their causticity towards the Act may derive from a misconception regarding its ontological and historical foundations. The implication of 'genuine' mediumship under the FMA's rationality did not constitute some signification that certain individuals could see into the future or communicate with the dead. Rather, the 'fraudulence' the Act envisaged was that of *intentional commercial or proprietary dishonesty*, evidenced by its emphasis on financial 'reward'. An entertainer in this sense is no more 'dishonest' than an author of a fiction novel; the pretence is the entire point of their services, a pretence to which all parties are privy, and so no 'false claims' within the meaning of the law are being made. A religious believer, likewise, is no more commercially 'dishonest' than a Christian priest or vicar, because they are not attempting to pass off a contra-legal practice (such as paranormality) as the subject matter of an exchanged property right. For this reason, to legally prosecute the Anglican or Catholic Church for committing fraud for touting beliefs in God or Heaven would be unthinkable (though, perhaps, selling 'access to Heaven' by way of simony could constitute fraud).

The Act was not truly making a distinction, then, between 'genuine' and 'fraudulent' mediums in the sense of reifying paranormality as empirically possible or normatively defensible. It was clarifying that the basic act of claiming to see spirits or the future was not *per se* fraudulent, even if seriously claiming the ability to do so, while charging money, would be. On one level, the Act reiterated the requirement for intentionality in the commission of a serious crime under

⁶³ Ibid 1576.

a capitalist legal rationality. The sincere practitioner may have been delusional, but they were not dishonest, in line with capitalistic conceptions of the legal subject, and how that subject's responsibilities (generally) arise in accordance with *voluntary* will. But beyond that, the Act emphasised that the problematic aspect of paranormal services was the attempt to market a practice that was empirically impossible *and thus incapable of in fact being exchanged* as deliverable and feasible (a precondition of commodification). Thus, the law's continuing persecution of what can be termed 'substantive commercial paranormality' – such as claiming to speak to ghosts and charging for the service, as opposed to religious or entertainment-based paranormality – reflected a persistent inability to conceptualise the paranormal through its central lens, that of proprietary exchange.

The question remains of what, in a positive sense, did constitute 'genuine' mediumship? This chapter has already discussed how the Act conceptualised the 'genuine' medium in specific ways by qualifying what was meant by a 'fraudulent' medium – the 'genuine' medium was not a person who could truly speak with ghosts, but rather was an entertainer or religious practitioner. Indeed, Section 5.2 explored the legal-historical circumstances within which those exceptions were drafted. Sections 5.3.2 and 5.3.3 will move the analysis to a higher level of abstraction, considering not the history of those provisions but rather their logic, their rationality. In other words, the following sections ask, what was it about 'entertainment' and 'religious expression' that converted mediumship from a legally problematic practice to a legitimate one? What did these terms mean when expressed within the formal rationality of the legal system?

5.3.2 Paranormality as Entertainment

Little legislative guidance was issued regarding s 5 FMA 1951's exemption for entertainers, though, as mentioned in Section 5.2, Lord Dowding directly connected the provision to 'stage shows.' But what, in substance, did 'entertainment' entail? Was one required to make an explicit disclaimer that they were acting for the purposes of entertainment, or could entertainment purposes be inferred from the material dimensions of the performance – e.g., if it was performed on a stage for an audience, if ticketing was involved, if the venue was typically associated with theatrical productions, and so forth?

To begin with disclaimers, in marketing – generally self-regulated by industry bodies – advertisements tend to be treated as permissible insofar as the advertiser does not materially mislead the consumer, either by omission of information or by presenting that information ambiguously.⁶⁴ The use of disclaimers *can* discharge the risk of being accused of misinforming the consumer, assuming that disclaimer is readily accessible to the consumer and not contrary to wider legal obligations etc. As such, disclaimers may, depending on their deployment, permit the legal actor to refine their obligations and duties within a contractual relationship by communicating, clarifying, and stabilising mutual expectations. The use of disclaimers, then, is directly conditioned or structured by the contractual form of the legal relation, and the voluntary assumption of responsibility as an organising juridical principle.

In this light, the fortune-teller who invokes, and conveys, an ‘entertainment’ disclaimer seeks to create a legal relation that is acceptable within the ambit of the law. If a consumer is duped into believing that the fortune-teller can in fact see the future, then ‘fault’ can be potentially assigned to them, *caveat emptor*. The fortune-teller, after all, has explicitly stated what form of service they are offering – they have, in some contractual sense, communicated that what they are making is a non-empirical claim about the nature of reality – and dishonesty can be less readily inferred.

Beyond the use of disclaimers, however, in what sense could ‘entertainment’ be ‘objectively’ construed? Let us turn to other areas of law that rely on contextual factors to determine the dividing line between a false claim about reality that is *fraudulent* and a false claim about reality that is *not*. Consider the following circumstances. Party A makes a joke, alleging that party B is a thief; Party B retaliates by accusing A of slander. Defamation law does not provide categorical definitions regarding when such a joke would be unlawful. What generally matters is whether that ‘joke’ involving a false statement is conveyed as though it were factually accurate. In a defamation claim made by musical artist Elton John, a journalist working for the Guardian ‘joked’ that the performer did not make certain charitable donations; the court accepted that in the context of the joke being made – namely, the fact the alleged joke was printed in a supplemental part of the paper that was not committed to accurate news reporting

⁶⁴ See, for instance, Committee of Advertising Practice, *The UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (CAP Code)* (2014) 16-25 available at <https://www.asa.org.uk/static/47eb51e7-028d-4509-ab3c0f4822c9a3c4/4869041b-06d3-4745-b209d2a5c37500b3/The-Cap-code.pdf> (accessed 30/10/2022).

– no reasonable observer would assume the claims were factually accurate.⁶⁵ Once again, then, a ‘literally’ false claim may still be acceptable insofar as the context of its presentation communicates that the claim is not being ‘seriously’ made in some objective sense.

Could, then, the question of what defines ‘entertainment’ rely on contextual features indicating whether the claims being made in the performance are to be taken at face value? Tax law may offer insights on this matter. Under the Finance (New Duties) Act 1916 (which operated in parallel with the Fraudulent Mediums Act 1951), entertainment, under s 6, was considered to include ‘any exhibition, performance, amusement, game or sport to which persons are admitted for payment; and the expression “admission to an entertainment” includes admission to any place in which the entertainment is held.’ Excluded from this definition, under s 4 Finance (New Duties) Act 1916, were performances conducted for educational purposes. The Act was not seeking to construct a dividing line between acceptable falsity and fraudulence, but nevertheless, it did suggest that certain cultural factors – the semiotic implications communicated by certain venues, admission, tickets, etc – were key to identifying what was entertainment and what was not in a wider sense.

Thus, what constituted ‘entertainment’ would likely depend on contextual information regarding how the performance was communicated and portrayed to the audience, of which a contractual disclaimer could, in principle, constitute a part. But, more broadly, let us ask what entertainment ‘means’ within capitalism, and capitalist law – not what its tangible characteristics engender, but rather, how entertainment *operates*, how it *functions*, and *why*, with a view to understanding why mediumship *qua* entertainment could be framed as legally permissible, and reconcilable within the rubric of proprietary ownership and exchange where ‘substantive’ paranormal practices were, and are, not.

‘Entertainment’ under capitalism generally assumes the form of a consumer-seller relation, with ‘entertainment’ being a form of experiential commodity. That is, what is being sold is a particular spectacle, an experience. The commodity or service to be consumed, or experienced, can be expressed through myriad cultural formations, and means of consumption can include reading, observation, or direct consumption for purposes that might be loosely called ‘aesthetic’. To draw on Debord’s analysis, entertainment (or ‘spectacle’) constitutes a social

⁶⁵ *John v Guardian News and Media Ltd* [2008] EWHC 3066 (QB).

relation mediated by image – in a broad sense – though the conception of the term ‘image’ employed here is not limited to literal pictures.⁶⁶ Image, here, includes all forms of self-conscious artifice, of performance, in which engagement is predominantly focussed on a wider notion of an aesthetic experience – on a *representation*.

Because of its presupposition of the consumer’s focus on aesthetic and self-conscious artifice, the entertainment relation creates a social space in which certain claims can be made which are not to be measured by the same standards of validity – or ‘rationality’ – as in wider social reality. Entertainment is where the constraints of rationality are in some qualified sense ‘loosened’ and yet remains bounded by that very rationality. By this, one might suggest, the entertainment relation is one in which epistemic claims can be made that would otherwise be strictly treated as ‘untrue’ and yet remain normatively acceptable. This is because those claims are both *known* to be untrue and are desirable for being so, thus constituting the ‘value’ of the experience and allowing that experience to still assume the commodity form.

There is, after all, a distinction between an empirically impossible claim *per se* and deception. Deception, Primoratz writes, involves ‘making a statement believed to be false, with the intention of getting another to accept it as true.’⁶⁷ This is not the objective of the entertainer; the objective of the entertainer is to receive remuneration for a performance that is not directly contingent on the observer embracing certain claims about empirical reality. Entertainment, then, is permissible and even desirable within capitalist society (and capitalist law) because it is given boundaries and stable form and thus may underpin and reproduce property exchange. A theatrical performance, for example, will often have a set running time, with actors assigned specific roles, reading from a pre-written script. As such, in contrast to the narrative associated with paranormal practices in Chapter Four, entertainment can invoke the *gloss* of the empirically impossible, and yet its self-conscious approach to that impossibility allows it to remain bounded, repeatable, and transparent in the process, permitting entertainment to be integrated into relations of private property.

That is, if entertainment constitutes a social relation mediated by ‘representation’, participation does not imply serious engagement with, or reification of, the substance of these practices –

⁶⁶ See Guy Debord, *La Société du Spectacle* (Buchet-Chastel, 1967).

⁶⁷ Igor Primoratz, ‘Lying and the Method of Ethics’ (1984) 16 *International Studies in Philosophy* 35-57, 54.

either by performer or consumer, or indeed the law. Thus, in the case of paranormality, the aesthetic gloss of paranormality can be converted into a commodity *qua* a form of entertainment while its pernicious substantive elements, those that constitute contra-legal phenomena, can be excluded. In other words, the expressly performative dimensions of stage magic allow the performer to extract the aesthetic aspects of the paranormal and create a *representation* of the paranormal without the ‘substance’, or the subversive ‘core’ – the insistence of their own empirical possibility. In this sense, the paranormal practice and the paranormal performance interpenetrate one another as cultural forms, and yet one is not reducible to the other.

For example, a practitioner making a show of speaking with ghosts does not signify necessarily that either that practitioner or her audience do, or should, ‘believe’ in the paranormal; the exchange is not contingent on belief in the empirically unprovable but rather on the entertainment value of the performance itself. The meaning of the claim – as a *mechanism of entertainment* rather than an *empirical argument* – is conveyed by the setting of that claim, which itself is constituted legally and through the price-setting dynamics of the market: perhaps it occurs within a licensed theatre; perhaps the performer’s services have been acquired by an entertainment company with whom the consumer has formed a contract by means of ticket purchasing; perhaps multiple private actors have done the same, coming together to form an audience.

It is in this sense that the FMA 1951 reconfigured the law’s conception of paranormality into one that allowed for the commodification of paranormal performances – a transformative evolutionary moment in some thin sense, but hardly one that presupposed a deep-level shift in the rationality of the law. Merely, it presupposed the empirical, or historical, market developments that contributed to a shift in political conceptions of paranormal performances. Paranormality that could not integrate into this framework – traditional, commercial fortune-telling that continued maintaining its own empirical possibility, for example – and thus adjust its expression into a stable commodity form, into a facet of the burgeoning ‘culture industry,’ continued to be criminally sanctioned; Parliament, and the statute itself, were emphatic on this point.⁶⁸ Law still could not reify those practices through the lens of private property rights.

⁶⁸ The term ‘culture industry’ here derives from Theodor Adorno, *The Culture Industry: Selected Essays on Mass Culture* (2nd ed, Routledge, 1991).

Thus, lawful commercial paranormal practices were those that had largely assimilated into the logic of performance and entertainment rather than magic and occultism.

Again, one must not be tempted to see this shift as revolutionary, as a disruption of the fundamental logic of capitalist law, or as a return to the mystical preconceptions of the early modern legal system, which *could* reify the paranormal as ‘real’ phenomena. Rather, it reveals how a capitalist legal rationality does not prescribe juridical outcomes, but conditions them, allowing multiple legal concepts to co-exist, even those that appear contradictory, according to the empirical results of political conflicts happening *within* the rubric of capitalist social reality that establish where the frontiers of institutional relations and power struggles lie. This legitimisation of stage magicians merely revealed how ‘a charismatic magician could overturn the laws of bureaucracy ... but even this charisma would ultimately become routinised yet again.’⁶⁹ It resulted from a set of structures that could systemically digest and reconstruct elements of even that which appeared to exist beyond their paradigm.

That is, such a legalising transformation was possible insofar as law’s structures offered the conceptual tools – like the notion of entertainment – for the job, and insofar as it was propelled by social actors in turn motivated by overarching dynamics of expansion, competition, and accumulation. Since the law does have the equipment to understand the notion of entertainment, if the paranormal ‘commodity’ is reframed as a performance rather than something that can be empirically ‘achieved’ in its own right, then it can be integrated into the contractual logic of legitimate legal relations. With that in mind, let us examine the second (implicit) exception in the statute, that of religious freedom.

5.3.3 Paranormality as Religious Expression

Accompanying its exemption for entertainers, the FMA 1951 provided that only paranormal practices performed for a (generally financial) ‘reward’ could attract liability. As such, non-commercial paranormal practices would not be treated as fraudulent. In practice, given the legal-historical background of the FMA 1951, its parliamentary debates, and the role of the SNU in getting it passed, this exemption was likely intended to operate in favour of religious

⁶⁹ Jason Ananda Josephson-Storm, *The Myth of Disenchantment: Magic, Modernity, and the Birth of the Human Sciences* (University of Chicago Press, 2017) 301.

practitioners. Non-commercial paranormal practices would not involve the exchange of property – they were formally differentiated from the economy and relocated into the religious sphere – and so the question of their empirical provability became a moot point in determining whether the relevant contract could be performed and, thus, whether fraud could occur. The law, therefore, was not constructing mediumship and fortune-telling as empirical possibilities. Rather, the legal system’s perspective simply shifted to the premise that questioning such matters was not within the law’s remit insofar as those practices were disentangled from contracting and the exchange of private property.

Section 5.2 indicated how this development was informed by the human rights discourse that was, contemporaneously, becoming an integral element of international law-making – that is, human rights not as a general moral principle but, rather, as a positive legal norm encoded within legal instruments with the force of law that had become familiar to decision-makers. The FMA 1951 was aimed at preserving the religious freedom of Spiritualists while balancing the need to ‘protect’ consumers against fraudulent commercial exchange. This, as with the entertainment exemption, was deeply conditioned by the logic of a capitalist legal rationality, and the institutional differentiations the law cleaves between various spheres of social activity – specifically, the market and religion.

Human rights like freedom of religion often present themselves – through their substantive rationality – as natural and timeless, accruing to legal subjects by virtue of their presumed humanity. As such, human rights have come to be naturalised throughout legal discourse as ‘universal’ and ‘inalienable’ time and time again. Yet, this language disguises, or obscures, the way norms like ‘freedom’ and ‘dignity’ are given meaning and form by the formal rationality of the law itself – by its nexus of principles, maxims, and precedents. As Kolakowski writes, human rights are often seen as ‘valid because of the inherent dignity of being human’ and so ‘make up part of the natural order, rather than being established by decree or by positive law.’⁷⁰ The positive normative abstractions that constitute human rights, however, are self-evidently constructions of the legal system, and, further, their preconditions are historically specific, drawing upon certain fundamental axioms of a capitalistic legal rationality.

⁷⁰ Leszek Kolakowski, ‘Marxism and Human Rights’ (1983) 112(4) Human Rights 81-92, 82.

The notion of ‘freedom of religion’ thus receives, and expresses, meaning by virtue of its status as a human right, which in turn presupposes a legal system in which rights inhere in atomised legal subjects, abstracted entities capable of owning and disposing of property.⁷¹ As such, human rights are necessarily individualised and the shield they promise orbits around, and sometimes even specifically protects, a formal equality of property ownership and exchange. Thus, those rights are *individualistic*, quite the opposite of the *communal* form that religions have historically assumed. To return to Kolakowski, ‘both the concept of liberty and the idea of human rights, as defined by Enlightenment thinkers and ideologists of the French Revolution, are specific expressions of a bourgeois society.’⁷² Human rights in this positive legal sense cannot be severed from the conceptual framework of capitalist law, presupposing not only atomised subjects but also the state against whom those subjects stand in relation; again, this refers to not human rights in the moral sense as had been articulated in pre-capitalist societies, but rather human rights as positively enacted legal norms inextricably related to the rights of subjects as property-holders and contractors.⁷³

As alluded to earlier, in several cases, human rights make direct reference to private property, as in Art 17 EU Charter of Fundamental Rights and in Art 1 Protocol 1 to the ECHR, but, also, to a lesser extent, some premises of foundational bourgeois revolutionary documents, such the French Declaration of the Rights of Man and the Citizen. Indeed, Susan Marks discusses extensively the transformation of the language and logic of ‘rights of men’ that occurred at the end of the 18th and beginning of the 19th centuries, a process in which a ‘right to property’ emerged – both in legal and more general moral language – to scaffold and justify ongoing land enclosures and stratifications between property-holders and proletarians.⁷⁴ If all rights derive their meaning from the taxonomic system within which they are expressed, even ‘universal’ human rights could not transcend the contaminating influence of a legal system built on private property, atomised personhood, and voluntary contracting.

Even in those documents that do not directly allude to private property, in practice, many human rights claims often crystallise around some form of proprietary and/or contractual

⁷¹ Evgeny Pashukanis, *The General Theory of Law and Marxism* (Barbara Einhorn (trans), Transaction Publishers, 2003) 93.

⁷² Kolakowski (n 70) 84.

⁷³ For a history of human rights discourse, see Susan Marks, *The False Tree of Liberty* (Oxford University Press, 2019), in which Marks identifies the transformation of human rights as a set of concepts alongside parliamentary land enclosures, industrialisation, and the emergence of capitalism more generally.

⁷⁴ *Ibid*, especially 153-182.

dispute, such as in a discriminatory breach of a labour contract or unlawful state expropriation or destruction of property. Once again, the freedom and equality between legal subjects is a deeply formalistic one, blind to substantive inequalities between social groups; human rights are no exception in this regard. Indeed, as Marx contends, ‘the language of equality and formal guarantees of equal right in fact serve to entrench substantive equality’ since formal rights like human rights ‘can never be higher than the economic structure of society and its cultural development conditioned thereby.’⁷⁵

The specific way in which the FMA 1951 constructed religious freedom for Spiritualists was revealing in this light. If the paranormal practitioner sold their services in exchange for a financial reward, then the Act could be triggered; that is, it did not create an explicit exception for ‘universal’ religious freedom, but, rather, suggested that paranormal practices would be lawful insofar as they were theatrical performances or were conducted outside of the context of market exchange. As such, those wishing to pursue paranormal practices were left with two options: (1) if they sought earn income, they would have to denounce their own beliefs and embrace the ‘entertainment’ label; or (2) if they did not wish to denounce their beliefs, they would have to detach those beliefs from their income. The Act’s substantive rationality, then, was not premised on supporting Spiritualists *per se* but simply clarifying focus and reinforcing formal divisions between social spheres.

Such a constitution of formal divisions within capitalism is not without precedent, falling within Polanyi’s conception of a ‘disembedding’ of non-economic social systems from the economy.⁷⁶ The formality of these divisions mystifies the underlying interconnections between the substance of those systems. Nevertheless, capitalism requires such formal boundaries to be constructed so that market relations can be positioned and legitimised as a neutral, inevitable component of social organisation, thus stabilising and preserving the expectations of private property holders. As discussed in Chapter Four, it was not their empirical unprovability alone that led to the juridical castigation of paranormal practices; owing to historically specific factors, other empirically unprovable belief systems like Christianity survived within English capitalism. Rather, it was their empirical unprovability *and* their (culturally contingent) institutional unboundedness, combined with practitioners’ attempts to enter the market, that

⁷⁵ Karl Marx, *Critique of the Gotha Programme* (Reprint ed, Foreign Languages Press, 1972) 15-16.

⁷⁶ See Karl Polanyi, *The Great Transformation* (2nd ed, Beacon Press, 2001) 48-51.

led to their criminalisation – those factors made them difficult to reconcile with the commodity form. But with the increasing stability of Spiritualist organisations like the SNU, with their accreditation procedures and legal status as limited companies, space could be afforded to paranormal practitioners to engage in their beliefs lawfully insofar as they did so within a framework of religious expression the law could conceptualise as non-commercial, and thus non-threatening.

In conclusion, the reforms engendered by the FMA 1951 did not amount to some deep-level overhaul of the proprietary rationality that underpinned the VA 1824 and the WA 1736. Paranormality in the sense of a set of empirically unprovable and institutionally ungrounded beliefs and practices was still, effectively, treated as irreconcilable with the commodity form, and could only be expressed lawfully in formally non-commercial spheres (such as religion) or by denouncing its own empirical possibility (as when presented as entertainment). As Section 5.4 will now explore, over a half century later, the FMA 1951 was repealed by the CPR 2008. The CPR 2008 yielded the modern paradigm of paranormal practices, one in which a central tension is posited between service-providers and their right to run a business on the one hand and vulnerable consumers on the other.

5.4 The Consumer Protection from Unfair Trading Regulations 2008

Very few cases were prosecuted under the FMA 1951. A letter from the Home Secretary writing in 1979 suggested that five defendants were prosecuted between 1971-1974 and 1976-1977, with only six prosecutions occurring between 1980-1995.⁷⁷ Of those prosecuted, many escaped conviction. For instance, Charles Basham in 1952 was accused of ‘purporting to act as a spiritualistic medium’ by unlawfully using ‘a certain fraudulent device, namely, a length of cheesecloth’ that he claimed was ‘ectoplasm’ (spectral residue); he was not found guilty.⁷⁸ A failed attempt in the 90s to revise the law in Parliament anticipated later fervour for its reform. On 12th September 2007, an online petition to tighten the provisions of the FMA 1951 closed, though the results that ensued were not uncontroversial.⁷⁹

⁷⁷ HB Deb 20 March 1979, vol 64 511W, as referenced in Steve Greenfield, Guy Osborn, and Stephanie Roberts, ‘From Beyond the Grave: The Legal Regulation of Mediumship’ (2012) 8(1) *International Journal of Law in Context* 97-114, 105-106.

⁷⁸ As is quoted in Lisa Morton, *Calling the Spirits: A History of Seances* (Reaktion Books, 2022).

⁷⁹ See Peter Griffiths, ‘Psychics See Big Trouble Over New Laws’ (2008) Reuters, available at: <https://www.reuters.com/article/uk-britain-psychic-for-uk-pack-only-idUKGOR84049120080418> (accessed 24/05/2023).

Schedule 4 of the CPR 2008 quietly repealed the FMA 1951, along with several other statutes implicitly treated as redundant upon the introduction of the Regulations. In doing so, the Regulations reconceptualised paranormal practices as services that could be bought and sold as any other service or commodity exchanged in the market. Paranormal practitioners, no longer regulated directly through specific ‘mediumship’ legislation, were integrated into the abstract legal category of ‘traders.’ Meanwhile, Spiritualists now enjoy protection under equality legislation – itself an act of abstraction, eschewing the concrete dimensions of Spiritualism, and indeed all other faiths, and combining them under the protected characteristic of ‘religion’. However, a full discussion of the connection between discrimination law and capitalist legal rationality is beyond the scope of this thesis, and this section will focus on the CPR rather than the protected status of Spiritualism under the Equality Act 2010.⁸⁰

Under Regulation 5(2) CPR 2008, a commercial practice will be deemed misleading if it ‘contains false information and is therefore untruthful’ or if ‘its overall presentation in any way deceives or is likely to deceive the average consumer,’ and so will ‘cause or [be] likely to cause the average consumer to take a transactional decision he would not have taken otherwise.’ There are several matters with regards to which a paranormal practice could be untruthful or deceptive within the meaning of this provision. Regulation 5(4) offers some examples which could be readily applied to empirically unprovable matter, such as ‘the existence or nature of the product,’ ‘the main characteristics of the product’ including its ‘benefits’ and ‘risks,’ and the ‘motives for the commercial practice,’ along with several others. Traders are also held responsible for misleading omissions of information under Regulation 6. Given how legal discourse has regularly operated on the assumption that many paranormal practices are empirically impossible or unprovable, it seems many paranormal practitioners would be vulnerable in principle to a prosecution under the CPR 2008 depending on how their services were presented and communicated to consumers. In fact, they may be more susceptible to conviction under the CPR 2008 than under earlier statutes, and, indeed, the Regulations did raise questions of whether a ‘psychic crackdown’ might follow.⁸¹

⁸⁰ In short, Spiritualism was held to meet the *Grainger* criteria and thus constituted a protected belief under the protected characteristic of religion in *Power v Greater Manchester Police Authority* [2010] UKEAT/0087/10.

⁸¹ Caroline Davies, ‘Psychic Crackdown on the Cards’ (2008) *The Guardian*, available at: <https://www.theguardian.com/uk/2008/apr/06/eu> (accessed 29/09/2022); Frances Gibb, ‘Fortune-tellers Targetted in New Consumer Protection Regulations’ (2008) *The Times*, available at: <https://www.thetimes.co.uk/article/fortune-tellers-targetted-in-new-consumer-protection-regulations-jwk8ffjpbdz> (accessed 29/09/2022).

Critically, under the CPR, intent to deceive does not need to be shown – the offence is one of strict liability. Nevertheless, paranormal practices are not included in the list of automatically unfair practices under Schedule 1, implying that some will not be unfair under Regulation 5. If the CPR 2008 is interpreted within the context of the FMA 1951 that it repealed, perhaps it would be possible for a trader to escape liability if they made an explicit disclaimer or demonstration that their services are for entertainment purposes only.

In terms of its origins, the CPR 2008 implemented EU law, specifically Directive 2005/29/EC, under the principle of maximum harmonisation. The Directive itself aims to remove distortions in the EU's single market by dismantling barriers to trade, particularly those associated with divergent consumer protection standards. Section 1 FMA 1951 was seen as overlapping with Art 6 of the Directive, concerning misleading or false information that misleads consumers.⁸² Indeed, according to the Department of Trade and Industry, 'the Directive should provide better protections for vulnerable consumers than the [Fraudulent Mediums] Act. It can therefore be safely repealed.'⁸³

As mentioned, the CPR 2008 dissolved the distinction between commercial paranormal entertainers and all other commercial paranormal service-providers, creating a legal framework wherein all paranormal practitioners were reconstituted as 'traders', like other commercial actors. Resultantly, both paranormal practitioners and their clients are abstracted and repositioned as service-providers and consumers without qualification. Thus, under the statute there is no *a priori* legal presumption of deception (even if, in practice, 'non-entertaining' paranormal practices may well still be treated as misleading). The categorical exclusions engendered by earlier legislation, such as the WA 1736, the VA 1824, and, at least with regards to commercial paranormal practitioners who were not operating for entertainment purposes, the FMA 1951, were removed. The sole tension the law must adjudicate under the CPR 2008 when it comes to examining the relationship between paranormal practitioners and their clients is that between the right of traders to engage in commercial exchange and the right of

⁸² Christian Twigg-Flesner et al, *An Analysis of the Application and Scope of the Unfair Commercial Practices Directive* (2005) Report for the Department of Trade and Industry 106.

⁸³ Department of Trade and Industry, *Government Response to the Consultation Paper on Implementing the Unfair Commercial Practices Directive* (2006) 12.

consumers to not be misled. Where that balance falls is likely a question of case-by-case interpretation.

As a first observation with regards to this reconceptualisation, it must be emphasised that the repeal of the FMA 1951 should not be seen as the CPR 2008 ‘condoning’, or reifying, paranormal practices. This was no return to the approach of the early modern Witchcraft Acts, wherein paranormal practices *could* be reified as empirically possible. The law, deriving from the wider logic of the system, remained predicated on capitalistic conceptions of empirical probabilism as grounded in doctrines of causation and removing threats to private property rights. In other words, the substantively paranormal is still contra-legal, is still resistant to legal construction.

Further, the EU origins of the CPR 2008 cannot be overlooked. The EU is an ordoliberal supranatural entity structured around the elimination of distortions to trade, removing inefficiencies that might otherwise disrupt the competitive dynamics immanent to capitalism.⁸⁴ This, one can say, is the substantive rationality of both EU law and many Western legislative developments in general that occurred, and continue to occur, within the form of financialised capitalism that emerged from around the late 1970s onwards. These developments were aimed at, *inter alia*, imposing formal separations between the state and the market and, along with neoliberal shifts in political discourse more broadly, led to a set of social conditions within which state interventions in the market were perceived as legitimate only insofar as they corrected market failures.⁸⁵ That is, within this logic, institutional disruptions of ‘natural’ market operations are permissible so long as they help markets to clear and to continue setting prices ‘spontaneously’.

Yet, in contrast to domestic law-making, though Member States of course form the EU, the formal rationality *of its law* is largely divorced from the path dependent socio-cultural specificities that arise within each Member State’s legal systems as independent jurisdictions. It is not surprising, then, that law promulgated by EU legislators would bring domestic UK law towards a paradigm that embraces abstractive reasoning and applies it pervasively throughout

⁸⁴ On the ordoliberal character of the EU, see Gareth Dale and Nadine El-Enany, ‘The Limits of Social Europe: EU Law and the Ordoliberal Agenda’ (2013) 14(5) German Law Journal 613-649.

⁸⁵ Palermo exposes how theorists and politicians often uncritically accept ‘free’ markets as a ‘natural’ state of human affairs, and how state interventions come to be characterised as ‘unnatural’, in Giulio Palermo, ‘Power, Competition and the Free Trader Vulgaris’ (2016) 40(1) Cambridge Journal of Economics 259-281.

its jurisprudence, overriding the juridical residue of history. The system of private property relations that underpins capitalism is abstractive at its core, as established in previous chapters: juridical reasoning understands, and constructs, broader social reality through the lens of property rights that obviates the concrete qualities of a given good or service while substituting them with the generic qualities of private property, such as to facilitate exchange. This is fundamental to law's legitimacy, and cohesion, as a system supporting the price-setting dynamics of the 'free' market. Often, however, national frameworks of private property ownership, labour markets, and contractual exchange, allow space for the persistence of culturally contingent, and sometimes atavistic, norms produced by the empirical unfolding of history. Yet the EU represents a multiplicity of states, and, in reconciling their legal systems, operates to 'flatten' out the distinctions produced by these contingencies, proceeding through standardisation, through minimum floors and maximum ceilings, such as to realise the eradication of obstructions to free trade.

As mentioned, capitalist social relations in general 'benefit' from the abstract quality of private property rights, since the stabilisation of expectations they facilitate 'smoothen' trade and lowers transaction costs, making exchange more intelligible, and thus more efficiently enforceable, in the courts. Simultaneously, these abstractions are integral to proprietary exchange because they make market actors appear as free and equal agents while obscuring (and indeed engineering) substantive inequalities, such as the *structural*, not merely interpersonal, class inequalities that exist between capital and labour. Indeed, the abstractive reasoning promoted by EU jurisprudence helps to entrench those relations more deeply. That is, its supranational qualities mean that EU law-making is infused with abstraction on every level, and the recharacterization of the paranormal practitioner as a 'trader', and the paranormal practice as a 'commodity', is another expression of this tendency.

As such, the conversion of paranormal practices into commodities, and the integration of paranormal practitioners and their clients into the trader-consumer relation, removed all concrete elements of specific paranormal transactions in favour of a generalised rubric of voluntary contracting, consumer protection, and property exchange, and the assignment of positions to legal subjects as consumers and traders. The assimilation of paranormal practices into this frame of meaning could be taken to imply that, in legal terms, all qualities of paranormality that made them antithetical to commodification for over two hundred years had been stripped away, that paranormal practices had in some sense been 'tamed' by capitalism.

But this would be an incorrect conclusion. After all, the CPR 2008 did not ‘legalise’ paranormal practices; it maintained the possibility that some such practices would be deceptive, save those that did not ‘mislead’ the consumer, most likely including those done for entertainment purposes. Rather, the evolution represented by the CPR 2008 was one of consolidation, replicating, while more deeply embedding, the underlying dynamic first seen in the FMA 1951. Those practices that implicitly claim their own empirical possibility will likely still be conceptualised as forms of fraud, but those that do not can be integrated into the system of private property relations and exchange.

This approach to paranormal practices – that, in principle, abstracts them into the rubric of commodity exchange while still allowing for the prosecution of ‘pernicious’ paranormal practices – may reflect one of Federici’s assessments about paranormality under capitalism. Federici notes that ‘in recent times, we have witnessed a revaluation of practices that’ in early modern witch-hunting campaigns ‘would have been condemned as witchcraft.’⁸⁶ Indeed, Federici continues, this regeneration of paranormal practices ‘is possible today because it no longer represents a social threat.’⁸⁷ In other words, some forms of paranormal practice can be integrated with commodity exchange and private property ownership because ‘the mechanization of the body is so constitutive of the individual that, at least in industrialized countries, giving space to the belief in occult forces does not jeopardize the regularity of social behaviour.’⁸⁸ Paranormal practices can still mislead, but the CPR 2008 in principle pushes the possibility of their commodification as far as it will go, in line with the ordoliberal dynamics of financialised capitalism as expressed through EU law. Paranormal practices can thus be said to fall in line with the capitalist-realist view, revealing how even that which disrupts capitalism, even that which is ‘magical’ and therefore opposed to the capitalist social imperatives that lead it towards continual exploitation of labour and the natural world, generally can and will eventually be dismantled and reconstituted insofar as is possible within the logic of a capitalist rationality.⁸⁹

Conclusions in this regard should be made tentatively – one cannot ‘repeat the experiment’ when it comes to understanding how capitalism unfolds, nor should one downplay the

⁸⁶ Silvia Federici, ‘The Great Caliban: The Struggle Against the Rebel Body’ (2002) 3 *The Commoner* 10.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ Mark Fisher, *Capitalist Realism: Is There No Alternative?* (Zero Books, 2009).

empirical outcome of contingent social (class) conflicts. But it does seem that the dynamics established by capitalist social conditions, as institutionally entrenched by law, seem to *encourage* a (non-linear) movement towards increasing commodification, reflected in this evolution of legal conceptions of paranormal practices. However, it is clear that this tendency must have at least some limitations: law, for instance, is unlikely to succumb to its own commodification, as it must remain ‘neutral’ in order to fulfil its role as an impartial system governed by the rule of law, as a ‘bedrock’ of commodification that operates beyond the boundaries of the economy in order to make market relations possible and prevent some infinite regress of commodification ‘all the way down’. For instance, notwithstanding corporate lobbying, legislative and judicial decisions cannot generally be ‘bought’ on the market; the bribery of lawmakers and judges is often viewed as a form of unacceptable corruption, implying that the commodification of legal norms in capitalism is generally ‘irrational’ from the perspective of its own logic.

Again, one must not be tempted to overstate the case of a capitalistic tendency towards endless commodification, especially insofar as it relates to the observations in this genealogy; structural tendencies will always be mediated by political struggle. Even if paranormal practices have been abstracted into the consumer protection regime, the CPR 2008 can still be deployed against any traders, including those trading in the paranormal, who are deemed to have engaged in activities that would confuse the average consumer. Given the interpretation of earlier laws, it seems possible that the law could be used to criminalise many, if not perhaps even more, instances of paranormal practices as deceptive, should the judicial interpretation of the CPR 2008 sway in that direction.

On the surface, then, the paranormal may now be constructed as a commodity like any other, but, in substance, its character as contra-legal is still likely to bite. As such, this form of legal construction of paranormal practices can be understood as another manifestation of capitalist legal rationality, applied within new, yet still historically contingent, conditions, the conditions of ordoliberal EU law-making and financialised capitalism. In other words, simply because paranormal practices no longer have their own legislation explicitly designating them as such does not alter the fact that the substance of the paranormal contradicts the fundamental axioms that constitute capitalist law, that paranormal practices will often exhibit contra-legal qualities that position them, axiomatically, against the strictures of the legal system. This is especially true for those dimensions of paranormal practices that cannot be ‘easily’ reconceptualised,

reconfigured, or repositioned into a form compatible with the commodity form, for instance, as a theatrical performance.

Nevertheless, the specific legal categories assigned to the paranormal practitioner and their client are revelatory of the underlying lens through which capitalist law tends to understand those who act within its auspices. Having removed the concrete dimensions of paranormality, the CPR 2008 specifically positions the actors as ‘traders’ and ‘consumers’ – their significance to the law begins, and ends, to the extent that these parties engage in market exchange, or non-market religious practice, in the ownership and exchange of property, their social positions emerging as clear manifestations of the abstract legal subject. That is, the law understands paranormality *primarily as it relates to private property and contractual exchange*, through the individualising lens of the legal subject.

As such, the law’s conceptualisation of the paranormal practitioner has become a far-cry from the mystical threat reified by the early modern construction of the witch. Now the paranormal practitioner is not even assigned a unique label, their identity intelligible to the law only insofar as it interfaces with property ownership and consumption. Thus, a central dynamic of capitalist legal rationality is put on display: to not merely abstract the identity of the agent who acts within its rubric, but to construct a juridical identity in that one’s place – that is, the identity of a property holder, a contract maker, a market actor.

5.5 Conclusion

In conclusion, paranormality in UK law has been, at least in a surface-level sense, fully integrated into the relations of private property that constitute the legal system, terminating over 450 years of legal history that began with the Witchcraft Act 1542. In this light, since the WA 1736, the law saw an evolution from outright criminalisation as fraud to (limited) commodification, and yet its underlying rationality remained broadly predicated on similar tenets of private property and voluntary exchange of securely defined commodities and, thus, firmly within the broad contours of the capitalist ‘logic’ of law. This expresses a crucial element of capitalist legal rationality: while that rationality may *condition* juridical reasoning and decision-making, it does not determine the outcomes at which that reasoning arrives, which will often be determined by political struggle, cultural contingency, and other factors associated with the dynamics empirically exhibited by a given set of historical relations.

Chapter Six will look back on the genealogy developed in Chapters Three to Five with a view to drawing conclusions regarding the construction of paranormal practices in law throughout history. In so doing, it will evaluate the significance of the genealogy for understanding capitalist legal rationality more generally, and for assessing how that rationality conditions legal discourse and the evolution of the law, while commenting on the original contributions this thesis has offered.

6. The Paranormal and the Boundaries of Legal Rationality

6.1 Introduction

This chapter will reflect on the genealogy developed in Chapters Three to Five, with a view to articulating the objectives and original contributions of this thesis. One of the central questions at the heart of this thesis was: what is the underlying ‘rationality’ or ‘logic’ of the law, and how do law’s various constructions of paranormal practices throughout history express, or reveal, the emergence of this rationality? This chapter will revisit these themes in light of the observations and arguments made throughout the genealogy while discussing how they may contribute to evolutionary perspectives on the law, and the relationship between law and capitalism, more generally.

The chapter will begin by situating the thesis against its theoretical backdrop to reiterate why a genealogical method is useful for addressing questions related to legal rationality. This discussion will also reiterate the field of scholarship to which this thesis contributes. Secondly, the chapter will consider why the genealogy of paranormal practices in law offers valuable insights for studying the law and its historical relationship with capitalism. Thirdly, the chapter will consider the implications of this genealogy’s findings for practical understandings of law and legal reform – that is, it will investigate not only how this thesis’s central questions were addressed, but also the practical significance of their answers. Finally, it will consider future opportunities for research in this area.

6.2 Theoretical and Methodological Context

At a general level, the contribution of this thesis lies in how it explores the relationship between law and capitalism, using the case study of the paranormal to exemplify the emergence, and impact, of law’s capitalistic rationality. In so doing, it provides a new perspective on legal evolution, showing how the rationality of the law affects legal reasoning and impacts the developing construction of legal concepts. To examine these issues, the thesis developed in Chapter Two a theoretical framework inspired by the view of the relationship between law and capitalism articulated in a range of scholarly fields, which, broadly speaking, understand that relationship as co-constitutive. While those strands of scholarship diverge in their understanding of the form, substance, and purpose of law’s constitutive role, they generally

contend that the legal system provides the normative architecture of capitalist social relations.¹ Law achieves this by enshrining contractual and private property relations, among other norms, like the centralised state with a monopoly on violence and the individualised legal subject, and supporting them with institutionalised enforcement.

The legal constitutive viewpoint opposes an array of naturalistic perspectives that reduce law to a ‘neutral’ or ‘empty’ tool whose content is exclusively determined by, for instance, political struggle, operating ‘autonomously’ in the sense that it runs in parallel from other systems within social reality. By *historicising* law, rather than *naturalising* it as an inevitable component of social reality, some legal constitutive approaches see the legal system as endogenous to, and co-emergent with, capitalism.² That is, modern law cannot be disentangled from capitalism, nor can capitalism be disentangled from modern law. Drawing on Marxian-inspired legal theories, this thesis has maintained that modern law is fundamentally predicated on the legal form, that is, a form that parallels, and supports, commodity exchange by positing that legal subjects construct relations based on freedom and equality to own and dispose of property.³

This underlying form of law has been understood as shaping, and constraining, the meaning, values, and functions of whatever substantive legal norms are conceptualised within a juridical context. By extension, that form is viewed as integral to capitalism, a historically unique social formation within which factors of production, including labour and land, are mediated and allocated by competitive market forces and the price mechanism. That production is reliant on a specific form of exploitation of labour, and the continual extraction of resources from the environment, by capital. This exploitation takes the form of a formally equal market exchange – in which labour and capital are seen as equal market actors – while remaining nevertheless reliant on the structural exclusion of labour from direct access to the means of subsistence,

¹ See Simon Deakin, David Gindis, Geoffrey Hodgson, Kainan Huang, and Katharina Pistor, ‘Legal Institutionalism: Capitalism and the Constitutive Role of Law’ (2015) Centre for Business Research, University of Cambridge Working Paper No 468 1-2. See also Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press, 2019).

² Masahiko Aoki, ‘Endogenizing Institutions and Institutional Changes’ (2007) 3(1) *Journal of Institutional Economics* 1-31.

³ Evgeny Pashukanis, *Law and Marxism: A General Theory* (Barbara Einhorn (trans), Transaction Publishers, 2003); China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Pluto Press, 2006); Zoe Adams, *Labour and the Wage: A Critical Perspective* (Oxford University Press, 2020); Robert Knox, ‘Marxism, International Law, and Political Strategy’ (2009) 22(3) *Leiden Journal of International Law* 413-436.

necessitating the sale of their labour to capital so they can attain basic life necessities – food, shelter, etc.

This, in turn, presupposes that the direct producers – the workers – are dispossessed from the means of production, an outcome that emerged historically through a (non-linear, but nonetheless ‘cumulative’) series of violently accumulative processes like the land enclosures, all of which were backed by the state, and thus the legal system. Indeed, law continues to facilitate these productive relations by safeguarding capital’s private-proprietary ownership of the means of production to the exclusion of the direct producers, juridically constructing, and preserving, capitalist class relations – i.e., a division between *owners* and *producers* of commodities. Owing to the entrenchment of the legal form, no juridical concept can be understood without contextualising it against this constitutive role within capitalism.

Indeed, the thesis has termed the juridical cognitive framework that emerges from these conditions a ‘capitalist legal rationality’, a historically contingent way of producing meaning and determining the validity of given assertions in a particular system, namely law. Within a capitalist legal rationality, law’s foundational, paradigm-setting premises are abstract legal norms that include: private property rights that allow the owner to exclude all other use of their property; voluntary assumption of legal responsibility (or, contract); individuated legal subjects; a division between persons and things; a technical doctrine of precedent that allows the legal system to respond to, and learn from, social conflicts, at least in common law systems; among others. Further, law, in systems-theoretical terms, is self-referential, or autopoietic; many legal concepts, even those that appear distinct from contractual or proprietary relations, will be informed by these axiomatic norms, and, in this way, are given meaning by law’s constitutive relationship with capitalism.

Again, this autopoietic rationality is distinct to a set of social relations mediated primarily by the market, undergirded by the structural exclusion of producers of commodities by the owners of the means of production, and functions to both stabilise and entrench the expectations of market actors. That is, as discussed above, such a legal system emerges endogenously within, and thus is specific to, capitalism, and yet cannot be said to be ‘produced’ by capitalism in any linear sense; it is a system, and a rationality, that *co-evolved* with capitalist social relations, both now presupposing the other for their functioning and meaning. The specific content of laws may often be predicated on lower-level historical specificities like political or cultural

contingencies – and what Nancy Fraser terms ‘boundary struggles’ between different institutions and systems, occurring ‘where production meets reproduction, economy meets polity, and human society meets non-human nature’⁴ – but nevertheless, that content assumes, and draws on, the preconditions prescribed by its structuring logic – its rationality.

As Section 6.3 will show, the purpose of this thesis’s genealogy has been to test these premises within the context of how law understands, constructs, and responds to concepts which are in some sense antithetical to its focus on classification and the stabilisation of expectations held by market actors. To this end, it has traced the emergence of a capitalist legal rationality through the lens of witchcraft and paranormality, showing the crystallisation of its capitalistic autopoiesis and formal differentiation as a system through an array of wider historical developments, using a genealogical methodology. Indeed, the genealogical method, which involves tracing the evolution of a concept over time, allowed the thesis to examine how changing, deep-level conditions of possibility in the law affected its varying constructions of certain cultural forms that it reconstructed under the umbrella of ‘paranormal practices’.

The genealogical method thus facilitated a focus on the logic or rationality of law by allowing one to perceive its effects across history, alongside shifting material conditions related to dominant modes of production. While others have noted the connection between early modern witchcraft laws and modern laws related to fraud and consumer protection, this thesis uniquely positions this link within the evolutionary framework of law as constitutive of, and constituted by, capitalist social relations. Section 6.3 will illustrate how and why this focus is valuable by analysing some key observations presented by the genealogy.

6.3 Theoretical Contributions

To summarise the genealogy, the historical progression of how law constructed the paranormal demonstrates a shift from a paradigm within which paranormality was reified as witchcraft, to one in which paranormal practices were problematised as manifestations of fraud, to one in which those practices were abstracted into a wider consumer protection framework. This evolution can be seen as demonstrative of a deep-level revolution in how the law functions – as reflective of a constellation of historical developments that collectively constituted the

⁴ Nancy Fraser and Rahel Jaeggi, *Capitalism: A Conversation in Critical Theory* (Polity Press, 2018) 118.

emergence of law as a formal, capitalistic system. That is, this genealogy does not merely reveal a movement from ‘superstition’ to ‘enlightenment’ vis-à-vis the question of whether witches and spirits empirically exist, but, rather, it evinces an evolution that occurred within the mechanisms that allow legal discourse to delineate truth from fraud, reality from non-reality, normality from paranormality. Those mechanisms express a significant degree of incompatibility between the content of paranormal practices and the form of the law, thus requiring the legal system to characterise paranormality through juridical categories that capture practices that do not ‘fit’ elsewhere and in fact may undermine other legal relations.

In this light, the genealogy developed in Chapters Three to Five offered answers to some key questions of this thesis: (1) how was it *possible* for early modern English law to conceptualise paranormality through the lens of witchcraft between 1542-1736; and (2) how was it *possible* for English law to conceptualise paranormality through the lens of fraud and, later, consumer protection law after that period? What does it *mean* to conceptualise a paranormal practitioner through the legal category of trader rather than the legal category of fraud, or vagrant, or indeed witch? What ontological preconditions are assumed by a legal system that can construct a category such as ‘the witch’, and why do these preconditions tend not to persist within capitalism? By responding to questions like these, this thesis contributes to scholarship concerning the evolution of law’s constitutive role within capitalism by using the evolution of witchcraft and paranormality in law to trace the emergence of the ontological premises legal rationality applies to determine what it means for something to *be*, or how something is able to *be*. In so doing, it illustrates how the way law deals with paranormal practices is historically preconditioned, but not prefigured; it is shaped by a capitalist legal rationality, but not determined by it.

Against this backdrop, this thesis has made three central contributions to discourse regarding law’s constitutive role within capitalism. Firstly, it has provided evidence of the emergence of law’s systemic qualities and, relatedly, its self-referential aspects, *along with the form that self-reference takes* through the case-study of witchcraft and paranormal practices more generally. Again, the genealogy showed a historical development from an early modern legal framework within which paranormal phenomena like witchcraft could be reified to one in which those phenomena tended to be constructed as inherently, or at least frequently, fraudulent (and, implicitly, empirically impossible according to natural-scientific schemata). The thesis showed how this was linked to, and therefore conditioned by, the emergence of several of law’s

systemic qualities: private property, voluntary contracting, and the legal subject as its central abstractions, but also the reformulation of the forms of action, the emergence of a meta-rule of precedent, and the crystallisation of the rule of law, amongst others.

Alongside the material changes in social conditions related to the emergence of capitalism, these co-evolutionary developments enabled law to become a self-referential system of normative reasoning; they congealed to facilitate law's formal autonomy. By virtue of law's autopoietic differentiation *qua* a system, legal norms were transformed in form and content, repositioned not as an array of vaguely linked concepts and competing jurisdictions but rather as components of a coherent conceptual web, within a distinctive rationality, inevitably defined by its high-level, private-proprietary abstractions. That is, legal norms were assimilated and ordered within a capitalistic cognitive matrix, forced to adapt to a 'new' role within capitalism, and within this broader transformative progression, paranormal practices were abstracted into a system predicated on the logic not of formal status and theology, but of private property rights; they were swept up in the wave of autopoiesis.

Accordingly, law could no longer, generally, conceptualise paranormal practices as though they were empirically real. It lacked the conceptual tools to do so; its intellectual environment became hostile to the cultivation of paranormality. Indeed, by virtue of how the empirical impossibility, and ambiguous heterogeneity, of paranormal practices stands in tension with private property relations, and the network of doctrines those relations presuppose, those practices faced an axiomatic clash with the fundamental, operational tenets of the legal system – and, by extension, the imperatives of capitalism itself.

The concept of contra-legality has been helpful for demonstrating this shift and is unique to this thesis. This notion proposes that certain (non-legal) practices detected by the law struggle to be reconciled with law's logic; the legal imagination lacks the capacity to conceive of them in terms that 'approve' of, or reify, their potential existence. Thus, these practices tend to be constructed in ways that assert, and even criminalise, their non-existence – as fraudulent, potentially misleading, unreasonable, and so forth – on account of the threat they inevitably pose to contracting and proprietary exchange. Indeed, the fact that some phenomena may be 'computable' by feudal law while being treated as contra-legal in capitalistic law allows us to investigate novel questions about the implicit ontology immanent to capitalist legal rationality.

That is, private property rights and contractual obligations generally presuppose that their subject matter ‘exists’, or at least *can* ‘exist’ according to some metric of legal certainty.⁵ Such a prerequisite is fundamental to how capitalist markets operate as the central mechanisms co-ordinating production and allocation of resources. They allow market actors to have some sense of security when engaging in market activity. In particular, these norms permit capital to invest with some assurance of future profits and that they will not have their property expropriated, damaged, or stolen.

Juridical reasoning rarely makes law’s capitalistic ontology explicit, however; such an axiom of legal decision-making – that phenomena are judged according to how they cohere with relations of private property – is so fundamental, and so pervasive, that its strictures are rarely questioned, or even acknowledged. That is, when the law detects a practice, it tends to interpret that practice according to its entrenched epistemological framework, a framework often naturalised and portrayed as logical according to some transhistorical, universal metric of ‘reason’. But such a framework is not transhistorical. As emphasised above, it is historically positioned against, and was formed within, a wider set of capitalistic social relations, which embedded, and embeds, within that framework capitalistic assumptions regarding the importance and function of private property rights. This framework is hegemonic, and unforgiving: should a practice be ‘unintelligible’ to the law, and thus incompatible with commodity exchange, it will be problematised as such.

This is not to say that some elements of paranormal practices cannot be ‘digested’ by capitalist law if those (select) components can be abstracted into some more legitimate juridical category. The Fraudulent Mediums Act 1951, for instance, allowed certain paranormal practices to operate as commercial ‘entertainment’ or as manifestations of religious beliefs. Even so, these exemptions only function because they ‘circumvent’ the problematic aspect of some paranormal practices – that is, their insistence on their own efficacy in a contractual exchange. Those exemptions do not ‘challenge’ the proprietary logic underpinning the central conception of paranormal practices as commercially problematic, but, rather, reinforce it. They allow the paranormal to exist within the juridical sphere insofar as a practitioner disavows the empirical

⁵ This does have some exceptions, for instance, as in financial markets, which trade in profits that are *expected* to exist at some point. However, the distinction between the commodities driving financial markets and the paranormal is that the law nevertheless accepts that expected, or anticipated, profits *can* exist; by contrast, it generally lacks the conceptual tools to construct mediumship, psychic abilities, fortune-telling, etc, as existing under any conditions (outside of a theatrical performance or non-market-based religious practice).

possibility of their practices, or only engages with the paranormal in a system formally differentiated from commercial exchange (i.e., religion).

As such, while the various ways through which the law has conceptualised paranormal practices may offer a unique example of legal evolution, they nevertheless reflect dynamics central to the evolution of the law at large – namely, dynamics that speak to the integral role law plays within capitalism, and how that role tends to condition the way juridical concepts are developed, interpreted, and enforced. The genealogy of paranormal practices in law presented in this thesis therefore allows us to see these ontological preconditions emerging across history, and their effects, in a way that systems-theoretical scholars like Luhmann did not attempt to chart. In this light, this thesis has argued that law's treatment of the paranormal is not the result *per se* of natural-scientific observations that 'revealed' the empirical impossibility of paranormal practices. Rather, it posited that, through the lens of contra-legality, one can see that the fundamental tension is between the paranormal and the structures, and rationalities, immanent to capitalism. Natural-scientific models of reality may be 'useful' in facilitating capitalist processes of commodification. Nevertheless, while natural science – itself a historically specific formation that co-emerged with capitalistic social relations – may challenge the empirical possibility of the paranormal, it is capitalism, operating specifically through capitalistic legal concepts, that then problematises paranormal practices, for instance, as fraud.

Secondly, within the context of that first contribution, this thesis has used the evolution of legal constructions of the paranormal to show the relationship between certain foundational legal doctrines and their roles within capitalism that are rarely analysed from this viewpoint. These are doctrines that gain meaning and significance by how they presuppose, and implicitly reference, more fundamental concepts like private property and contracting. For example, as discussed in Chapter Three, doctrines like causation were unlikely to have emerged in the early modern period because of the lack of wider norms of property, contract, the atomised legal subject, and precedent, and this was crucial to law's reification of witchcraft, a practice that stands in stark tension with the empirical probabilism, and natural-scientific precepts, modern causation doctrines often draw upon. In this sense, modern legal doctrines of causation are both specific to the form of law the legal system became following the reformulation of the forms of action, but, also, these doctrines play a central role in capitalist social relations at large, allowing harm to property rights to be (relatively) easily identified and predicted.

Other contributions made by this thesis that draw on the notion of contra-legality include Chapter Four's exploration of law's linear approach to time and how this presupposition would have made the reification of fortune-telling challenging for the law to accomplish, if not impossible, without severely disrupting the legal system at the level of its ontological preconceptions. Another example is the relationship between law's binary conception of death and life, which flows from its deeper emphasis on voluntarily given consent as the principal means through which legal relations are constructed – and through which law, and its monopoly on violence, is legitimised. As a result of law's self-reference to its underlying conception of life and death, and by extension its concept of contract and consent, that chapter argued, law would have struggled to reify concepts like 'ghosts' and 'spirits' in a way that was far more possible under, say, the Witchcraft Act 1604. This connection between law, life, death, and capitalism is one that is rarely drawn in the literature. The lens of contra-legality allows us to interrogate these preconditions: it offers a prism through which to detect ontological incompatibility on a wider scale, and thus to explore the origins from which that incompatibility flowed.

Thirdly, as discussed in Chapter Five, the evolution of the law's construction of the paranormal *within capitalism* – from treating it as fraudulent to abstracting it into a consumer protection framework – may, arguably, indicate a wider tendency of capitalist legal rationality. That is, the adaptive properties of law and the legal form enable a 'tendency' towards continual intensification of commodification to coalesce – a tendency that is uneven and non-teleological vis-à-vis the outcomes of political conflicts, but nonetheless remains an observable tendency. Thus, this stage in the genealogy showed the adaptivity of capitalist law, illustrating how the legal system has achieved such hegemonic status that it can take practices which appear to subvert its axiomatic premises, and strip away their subversive dimensions in order to cannibalise the components of those practices which *are* capable of commodification – for instance, the *aesthetic* or *representative* aspects of the paranormal, which can be commodified insofar as they are embraced as performance.

The structural conditions of law may, therefore, give rise to a dynamic that tends towards commodification, but that commodification may not always be realised in practice. Historical processes, and the activities of socially positioned agents, always mediate how the dynamics engineered by structural conditions empirically unfold. Nevertheless, this thesis has offered a

case-study illustrating how this dynamic has played out historically in a particular form within English law. With that said, these theoretical observations regarding law and capitalism have crucial, practical significance for how legal actors might approach legal reform, a subject discussed in Section 6.4.

6.4 Practical Contributions

Legal evolution in general is a valuable subject for legal scholars, practitioners, and decision-makers to appreciate because it can reveal the historical factors shaping legal change, and thus encourages one to situate one's own efforts, and goals, for reform within their historical circumstances. Regardless of the objectives held by those agitating for legal reform, the example of paranormality offers a case-study showing the impact of systemic qualities of the law on the development of certain legal concepts – how, and broadly when, those qualities emerged, and their contingency. Understanding how these systemic qualities operate can assist legal actors in conceptualising, and effecting, legal reforms by drawing their attention to the impact of a capitalist legal rationality.

In particular, the systemic constraints this thesis has interrogated can impose limitations on political actors attempting to use the law towards ends that are disruptive or subversive to capitalism, or the sub-structures and practices that constitute capitalism. The concept of contra-legality is valuable in demonstrating this principle. It suggests that even relatively minor legal reform campaigns – such as an attempt to fully ‘legalise’ paranormal practices – will face more juridical barriers and constraints than less disruptive efforts where they mount an explicit or implicit challenge to the legal axioms that undergird capitalist relations. Crucially, this is not simply because such a campaign may have less political ‘will’ behind it. Rather, it is because such a campaign would run against the fundamental, proprietary logic of the law, which generally lacks the conceptual tools for constructing and reifying that which is incompatible, or in tension, with private property, contract, and so on. Reforms that involve modifications to how the law deals with contra-legal practices therefore risk distortion when processed through capitalist legal rationality.

That is, conscious attempts at provoking legal evolution in one direction or another should, this thesis suggests, be at least aware of the legal system's constitutive role context within capitalist social relations. Law's capitalistic rationality conditions the conceptualisation of all

phenomena that enter its paradigm, including the contra-legal, including the paranormal, and so, by extension, any projects aimed at using legal reform, or the legal system in general, to challenge the legitimacy and hegemony of capitalism, or any of capitalism's facets, should be aware of the significant limitations such a project will face. At a fundamental, epistemological level, the legal system as it currently manifests may simply not offer sufficient cognitive machinery for conceptualising a practice, structure, or reality itself in ways that are helpful or useful for anti-capitalistic ends. Thus, using the law to 'solve' social problems created by capitalism – and, possibly, the law's fundamental premises – may face significant difficulties.

In this sense, a capitalist legal rationality may construct barriers to critical social projects while reproducing the problematic relations that produced the conflicts, and crises, necessitating those projects in the first place. Legal reform campaigns, therefore, must contend with, and make explicit, the ontological boundaries placed on legal discourse by the limitations of the law and its rationality. Otherwise, they risk reproducing these ontological assumptions without critical examination.⁶

But these contentions should not be restricted to negative formulations. The genealogy of paranormality in law developed in this thesis helps to show that when law faces a set of practices that do not cohere with, and in fact challenge, its central tenets, the legal system is calibrated in such a way as to construct those practices as *per se* deceptive, fraudulent, misleading, unreasonable, and so forth. Yet, this calibration need not go unchallenged. It is true that this thesis has highlighted how some practices that clash with the paradigm established by the legal form will generally come to be conceptualised as unreasonable, even if they might be positioned as perfectly reasonable outside of the rubric of law's entrenched ontological premises. Nevertheless, by reflexively engaging with the limitations of law's rationality, one might draw attention to, and challenge the assumptions conditioning, the *a priori* categorisation of certain practices as 'unreasonable' and so forth, thus allowing us to at least reconsider their reasonableness, especially in contexts where drastic social change is warranted and unhelpful obstacles to that change must be confronted, if not outright dismantled.

Indeed, by indicating the contra-legality of certain practices, political actors, particularly those seeking legal reforms subversive to capitalism, can reveal the historical specificity of the law

⁶ See Adams (n 3) 255-268 and Knox (n 3).

and its rationality, confronting the hegemony of its embedded logic. In that sense, it is precisely their resistance to assimilation that lends contra-legal practices their emancipatory potential: they offer a tool for denaturalising the law's supposed 'reason', for unveiling its depoliticised, but nevertheless operative, constraints, exposing legal rationality to disruption. That is, juridical assumptions about unreasonableness and impossibility are not inevitable, but, rather, are historically contingent; they have changed before, and can change, as needed, again.

6.5 Future Research

This thesis strived to observe, and interrogate, the emergence of certain tendencies that characterise law in its constitutive role within capitalism, and legal rationality. Future research in this area could enrich understandings regarding capitalist legal rationality in several ways. Indeed, while the genealogy developed in Chapters Three to Five concentrated on the evolutionary thread between the witch-trials and modern laws on fraudulent psychics, mediums, and fortune-tellers, the approach established throughout this thesis opens several avenues for future research that could build on its theoretical and practical contributions.

In terms of the axioms that characterise legal rationality, this thesis has shown how the relationship between law and capitalism manifests not only through the legal subject, contract, and private property rights, but also other doctrines that are not often considered in this way, such as those of causation, evidence, time, death, and so forth. In this respect, research could explore more doctrines that are not generally theorised in terms of law's relationship with capitalism. Meanwhile, regarding the specific subject of paranormal practices, other expressions of paranormality run through the history of English law and are visible in other jurisdictions. Explorations of both could illustrate different facets of capitalist and early modern legal rationalities, exemplifying other aspects of how those rationalities function.

To begin with other strands of paranormality in English law, the laws governing the alchemists, for instance, were not examined in this thesis, yet the connections between historical alchemy and the emergence of modern natural science could offer fruitful opportunities to perceive the development of a capitalist legal rationality. In brief, Henry IV passed his Act Against Multipliers 1404, banning alchemical *chrysopoeia*, or the creation of gold either *ex nihilo* or through transmutation of a base metal. While some argue that this was an effort to suppress

gold counterfeiting, others contend that the king was concerned that such a practice might pose a threat to the authority and wealth of the crown, or the religious teachings of the church.⁷

Despite the law, some alchemists earned the patronage and legal protection of wealthier aristocrats and royals, such as Queen Elizabeth I's magician, alchemist, and spymaster John Dee. Thus, if some alchemists were conceptualised by the law as counterfeiters, that did not mean *all* alchemy was legally positioned as such.⁸ Indeed, the 1404 Act was repealed in 1689 following a lobbying campaign by the natural scientist John Boyle, though this did not herald the 'liberation' or 'expansion' of alchemical practice. Rather, conflicts between the alchemists and other branches of the sciences like chemistry in an effort to achieve legitimacy saw the eventual victory of the latter and the castigation of the former as 'fraudulent' or 'non-scientific' to effectuate 'strategic redefinitions of science', in ways mirroring conflicts between Spiritualists and 'vulgar' fortune-tellers and mediums, referenced in Chapter 5.⁹ Examining how these developments dovetailed with, and were expressed within, the shifting rationality of the law could be valuable in exhibiting the ways through which the legal system developed a logic coherent with the tenets of natural scientific method rather than the more esoteric, spiritual practices that often underpinned alchemy. Developing a genealogy of the legal treatment of alchemy could, therefore, provide comparative opportunities with the genealogy of paranormality established in this thesis, thereby allowing for stronger conclusions to be made with regards to the emergence and role of a capitalist legal rationality.

Another avenue for research could be an investigation of how the 'cunning folk' – many of whom presented themselves, and acted practically, as popular healers – struggled to be accommodated within emerging medical regulatory frameworks in the 19th century.¹⁰ This could provide an additional lens on the relationship between capitalism and medical law specifically, and how the professionalisation of medicine was inextricably related to the development of a capitalist legal rationality, visible in how that rationality prejudiced those practitioners whose paranormal healing practices contradicted its emerging rubric. Further, this research could enrich the model of capitalist legal rationality developed across this thesis with

⁷ Michael White, *Isaac Newton: The Last Sorcerer* (Fourth Estate, 1998) 115.

⁸ On John Dee, see Peter French, *John Dee: The World of the Elizabethan Magus* (Routledge, 1987).

⁹ William Newman and Lawrence M Principe, *Alchemy Tried in the Fire: Starkey, Boyle, and the Fate of Helmontian Chymistry* (University of Chicago Press, 2005) 12; Lawrence M Principe, 'Alchemy Restored' (2011) 102(2) *Isis* 305-312, 312.

¹⁰ See Owen Davies, 'Cunning-Folk in the Medical Market-Place During the Nineteenth Century' (1999) 43 *Medical History* 55-73.

an understanding of the interplay between that rationality and the dynamics of class relations under capitalism, an aspect touched on, yet largely beyond the scope of, Chapters Four and Five.

Moving beyond an English framework, future studies might adopt a comparative lens to investigate the transplant of English legal norms related to paranormality into other jurisdictions. One instance of this is the Witchcraft Suppression Act 1957 of South Africa, a statute heavily influenced by the Witchcraft Act 1736, with more detailed provisions. The Witchcraft Suppression Act 1957, ratified during South African apartheid, also criminalised the ‘pretence’ of magic, along with the practice of consulting ‘witch-doctors’ and ‘witch-finders’. An examination of this transplant would introduce questions of postcolonial theory to the overall consideration of legal systemic rationality, allowing us to perceive one dimension of how imperialistic cultural hegemony was embedded into the legal systems of colonised nations, importing and imposing not only specific legal norms but also the rationality that those norms presupposed, conflicting with and ultimately disrupting local belief systems.¹¹

Evaluating the development of laws relating to paranormal practices in other jurisdictions may also be valuable for helping to illustrate and distinguish the culturally contingent dimensions of paranormality in English law, and those dimensions that are common to paranormality as a contra-legal phenomenon across jurisdictional boundaries. That is, one could investigate how paranormality developed in other common law systems to highlight to what extent the evolution in English law was a matter of cultural contingency. For instance, discussions could be held regarding the witch-trials that emerged in North America, such as the infamous 1692-93 Salem trials, and how their conditions of possibility included the absence of certain formal defendant-based legal rights and protections that evolved alongside the ‘transition’ to capitalism – the hearsay rule, the presumption of innocence, and so forth.¹² Indeed, such a study could also examine whether the laws that followed the repeal of anti-witchcraft statutes in various US states were, like in English law, anti-fraud laws related to paranormal practices, and how this might cement, or challenge, arguments made in this thesis concerning the emergence of capitalist legal rationality and law’s treatment of the paranormal.¹³

¹¹ See Hallie Ludsin, ‘Cultural Denial: What South Africa’s Treatment of Witchcraft Says for the Future of its Customary Law’ 2003) 21(1) Berkley Journal of International Law 62-110.

¹² Peter Charles Hoffer, *The Salem Witchcraft Trials: A Legal History* (University Press of Kansas, 1997) vii.

¹³ See Christine Corcos, ‘Seeing it Coming Since 1945: State Bans and Regulations of Crafty Sciences Speech and Activity’ (2014) 37(1) Jefferson Law Review 39-114.

Further, developing a genealogy of paranormality in a civil law system would be valuable for investigating similarities and points of contrast between how a capitalist legal rationality operates in different forms of legal system, namely civil and common law systems. Indeed, a genealogy of legal approaches to paranormal practices in a civil system could contribute to scholarship on legal origins, and the contention that the historical roots of a given legal system as civil or common law serves as a significant indicator of economic development.¹⁴ Given how legal origins theories exert a strong influence on theoretical conceptions of the constitutive relationship between law and capitalism, such a genealogy would be deeply relevant for developing an understanding of capitalist legal rationality.

On this point, the repeal of witchcraft laws in France, for instance, also mirrors the evolution of English law's treatment of the paranormal, such as the replacement of anti-witchcraft statutes with laws criminalising the pretence of witchcraft in the Parlement of Paris in 1682.¹⁵ These, too, have been connected to certain developments that could be understood and framed within the rubric of emerging capitalist legal rationalities. The emergence of a centralised state with a monopoly on violence that could control local juries and standardise trial procedures, for example, has been theorised as a key element of the decline of witch-trials in France and other European countries.¹⁶ The centralised state has been identified in this thesis and elsewhere as an integral element of a capitalist legal rationality. As such, one can speculate that the legal history of witchcraft, fraud, and paranormality in general in other European jurisdictions may follow comparable evolutionary and systemic patterns to that of English law.

6.6 Conclusion

By tracing the evolution of English legal approaches to paranormality, this thesis has probed the contours of a capitalist legal rationality. It has shown how the origins of the modern consumer protection paradigm regulating paranormal practices can be traced to the Witchcraft Act 1542. More widely, it has illustrated how the stages of the genealogy's development reflect

¹⁴ See Rafael La Porta, Florencio Lopez-de-Silanes, and Andrei Shleifer, 'The Economic Consequences of Legal Origins' (2008) 46(2) *Journal of Economic Literature* 285-332.

¹⁵ Edward Bever, 'Witchcraft Prosecutions and the Decline of Magic' (2009) 40(2) *Journal of Interdisciplinary History* 263-293, 284.

¹⁶ Brian Levack, 'The Decline and End of Witchcraft Prosecutions' in Brian Levack (ed), *The Oxford Handbook of Witchcraft in Early Modern Europe and Colonial America* (Oxford University Press, 2013) 429-446.

changing conditions of possibility tied to wider sets of social relations, principally the decline of feudalism and the emergence of capitalism. That is, it has provided a case-study that reflects the entrenchment of several qualities of law that relate to its constitutive role within capitalism: the apotheosis of private property rights and voluntary contracting; the crystallisation of a legal subject; the consolidation of the forms of action along with the emergence of a meta-rule of precedent and law's autopoietic mode of evolution; the development of doctrines related to causation, life and death, and linear time; and so on.

Collectively, these developments engendered a co-constitutive ontological shift in how law conceptualised, and continues to conceptualise, reality. In this light, the case of paranormality allowed us to interrogate the rational by way of the irrational, to investigate legal presuppositions of the value of the empirical and the certain by investigating law's marginalisation of the non-empirical and the undefined. In so doing, this thesis has unearthed the often-submerged boundaries of the law's implicit logic, the criteria legal reasoning relies on for determining validity and interpreting 'external' facets of social reality for the purposes of delivering normative outcomes.

Thus, from its genealogy, this thesis has extracted the premise that the legal system's rationality has its limits, and that those limits are historically produced – which is to say they are produced within, and generally to the advantage of, capitalism. By allowing us to perceive the outer reaches of those limits, and how the law responds to that which tests the boundaries of its rationality, this thesis has offered insights regarding the dynamics of legal evolution from a theoretical perspective. Further, it has suggested practical and political implications for legal reform as a limited means of resolving social conflicts under capitalism. That is, in adopting a critical perspective of legal rationality, the thesis has questioned to what extent the legal imagination can envisage what is *possible* by examining how law responds to the *impossible*.

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