

POSTMODERN ANARCHY IN THE MODERN LEGAL PSYCHE

Law, Anarchy and Psychoanalytic Philosophy

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In many a romantic vision of the state dominating the aggressive nature of human beings, the yolk of anarchy stirs. But in our postmodern era, such a vision commits itself to a fundamental legal-epistemological dilemma: once you know the law, you cannot go back to a 'no law' space. This has led some theorists to follow Robert Nozick in seeking the meagre assurances of private property and open markets to regulate in the absence of a state apparatus that is too conflict-ridden, too corrupt to be remedied. However, it is the view of this discussion that such a theoretical purview misses several crucial features of the psyche of the contemporary Australian law revealed by Lacanian psychoanalysis. The purpose of this discussion is to draw on the recent High Court of Australia appeal *Lacey v Attorney-General of Queensland* (2011) 242 CLR 573 and related materials to the end of proposing a commentary on a philosophico-psychoanalytic theory of law's relation to anarchy.

The spectre of anarchy as crisis or boon is a properly structural phenomenon of modern legal systems. And in the contemporary Australian legal context, anarchy has a hidden place in the efforts of the High Court to effect legislative harmony.¹ The discussion in this article proposes a speculative critique of law to the end of unearthing a philosophico-psychoanalytic theory of the dialectic of law and anarchy.

The discussion opens with a brief outline of the contemporary framing of anarchy in current scholarship before moving to an elaboration of the key concepts of Lacanian psychoanalytic methodology that will be applied in the further analysis. The analysis proper begins with an overview of statutory interpretation in an Australian legal context to lay the groundwork for the subsequent discussion of the recent case of *Lacey v Attorney-General of Queensland*.² *Lacey* will then be examined at length to the end of unearthing the rich analytic material to be critiqued subsequently through analytic interrogation, interruption and elaboration. The final substantive section then takes the reader through a dialectical reappraisal of the law and anarchy in light of the conclusions drawn from the discussion of *Lacey* as an example of postmodern jurisprudence. Finally, the conclusion draws together the threads

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¹ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 335.

² *Lacey v Attorney-General of Queensland* (2011) 242 CLR 573.

of discussion with an elaboration of the juridico-epistemological problem for thinking anarchy today in the postmodern Australian legal context.

Traditionally, views on the law and anarchy are split across the general political spectrum from right to left and back again. To the right we find thinkers such as Robert Nozick proposing a type of private property anarchism where property is stripped of government regulation and becomes its own mechanism of social and legal validation. To enforce such a rule of property, one needs a private force at one's disposal. Such a mercenary attitude to law enforcement seems contrary to the utopic liberalism that is the thrust of Nozick's arguments.³ Yet, logically played out, this libertarian scenario commits itself to a collapse of jurisdiction and provisional power. Coincidentally, such a collapse of jurisdiction and power was a feature of the decision of the majority in *Lacey*. As will be discussed, *Lacey* presents some interesting problems for such a libertarian position that treats the literal law as what is to be enforced.

The views of the libertarian right can be juxtaposed to the arguments for a return to the commons by the new left. Following Hardt and Negri's *Empire* (2001) and *Multitude* (2005), and works by other Italian political philosophers such as Roberto Esposito and to a lesser extent Giorgio Agamben, this return to the commons portends to provide a new socio-legal link on the basis of shared power in the space of a common municipality or new communism.⁴ Where the libertarian vision collapses jurisdiction and power by confusing the form of property as its substantial content, the new left's new communism repeats and reinvents the very political apparatus that it critiques. In the new commons, we do not escape law; rather, law once again becomes a fiction of the shared social world: in no one person do we find the seat of law's power, but projected as a totality together, in their being-with-one-another-in-common, the subjects of the commons function as if the law-in-common exists.⁵ In critical terms, the new left's vision of a new communism of the commons highlights an all too familiar deadlock between the shared common experience and the difference between this experience and the subjective perspective upon the rule of law that insists on such egalitarian sharing, rendering the latter a legal fiction that legitimates social order.⁶ Such fictions are today the hallmark of any society claiming legal authority, and how a population behaves in accordance with the law or not is perhaps a sign of the psychic problem of believing in or distancing oneself from these fictions.⁷

³ Nozick (2007), pp 193-217.

⁴ I rely here on discussions with Professor Timothy C Campbell (Cornell University) after his keynote at the 2009 Trans(l)egalité conference hosted by the Law and Literature Association of Australia and the Law and Society Association of Australia and New Zealand, and also on transcripts from the Commonalities: Theorizing the Common in Contemporary Italian Thought conference hosted by Cornell University in 2010.

⁵ Dubreuil (2006), p 94; Esposito (2010), pp 14-16.

⁶ Žižek (2008), pp 337-38.

⁷ Salecl (2010), pp 22-28.

What neither the libertarian view nor the new left vision provides, however, is a method to analyse the garden of manias, fantasies and other structural psychic phenomena created by the psycho-social relation founding both property and the commons. This is not to propose yet another psychology of the law. Rather, the critical point here is to examine how anarchy is a phenomenon of the structure of the law as an aberration, an artificial but nonetheless objective order. To engage this maddening terrain of the law and anarchy, we shall now turn to psychoanalysis.

Psychoanalysis – particularly of the post-Freudian or Lacanian variety – is becoming a more common sight in the contemporary study of law and culture, legal history and legal theory. Unlike philosophies of law, psychoanalysis resists inventing a grand metaphysical totality that secures law's conservatism.⁸ Instead, psychoanalysis is a technique for reading, analysing and interrupting the all too smooth and arbitrary operation of the law.⁹ Because of its fascination with the order of the signifier, Lacanian psychoanalysis is particularly pertinent to this discussion.¹⁰

According to Jacques Lacan, the fundamental point about any law – whether civil or common, express or construed – is that it is composed of signifiers.¹¹ At its base, the law is a signifier. But what does this mean? Here it is instructive to recall that Lacan's return to the work of Sigmund Freud heralded not only a reinvigoration of psychoanalysis but also a response to deconstruction and what the Anglophony dubbed 'post-structuralism', a vague amalgam of many different continental European schools of thought from the 1960s to the 1990s that includes, among others, the work of Roland Barthes (semiotics), Jean-François Lyotard (aesthetic postmodernism), Gilles Deleuze (immanent postmodernism), Jacques Derrida (deconstruction), Edward Said (postcolonial studies), Michel Foucault (historical genealogy) and Julia Kristeva (semiotics and psychoanalysis).¹²

This philological point is significant because it provides a context for the way Lacan emphasises the signifier as shifting, fragmented, metaphoric, metonymic and chained. For Lacan, signifiers exist in a chain of signification wherein a given signifier refers to the other signifiers in the chain to generate its meaning.¹³ This network of signification, or 'symbolic order', operates through endless differentiation.¹⁴ In this space, a name or symbolic title is alienated through the misrecognition of the symbolic order: it never says what something is, only what it is not. What is meaningful is

⁸ Goodrich (1995), pp 240–47.

⁹ MacNeil (2007), p 10.

¹⁰ Goodrich and Carlson (1998), p 6; Lysy-Stevens (2009), p 79; Miller (2003), pp 88–89.

¹¹ Lacan (2006), p 240.

¹² This arbitrary amalgamating of thinkers and methods is epitomised by Yale French Studies (1975).

¹³ Lacan (1998), pp 210–12.

¹⁴ Lacan (2006), pp 682–83.

thus always shifting, always a point of difference, always portended by the signifier but never equivalent to the signifier.¹⁵

This symbolic game of difference signifies the meaning of a signifier. For example, the context of other signifiers generates signified meaning through difference – for example, 1, 2, 3, 4, etc – but as this symbolic context does not exist in a particular signifier, it must always be inferred ‘as if’ it is present through association. For this game of difference to succeed, the subject of language must submit to a symbolic belief in metaphor whereupon something is something else: Signifier₁ is Signifier₂.¹⁶ For example, the law is just, the act is illegal, the sky is blue and so on; what makes the meaning coherent is the logic of symbolic differences as each signifier is associated with another. The belief in these symbolic fictions infers a ‘body of meaning’ or symbolic Other to whom these beliefs are addressed in language.¹⁷ The grammar of signifiers thus rests not in the subject’s consensual hallucination, but in the submission to a symbolic order that counters subjective needs with symbolic demands.¹⁸ Signification is thus not a matter of wild fantasising or solipsistic reasoning, but instead a negotiated interplay with a shared field of meanings that is always ‘other’ than the subject enunciating a language.

From the Lacanian position, the subject is in some relation to that which is meaningful or desirable.¹⁹ Such desire is symbolic rather than a natural basis of the human animal. The Other of this symbolic order thus appears to ‘know’ what the subject wants, irrespective of what the subject intends. This has its echo in the trial process, where the sentencing judge signifies the meaning of the charges brought before the court in the sentence. The judge functions as not only an audience that hears the charges but also as an arbiter or Other who brings the charges into a new symbolic arrangement and fundamentally alters their meaning by associating them with a sentence, another signifier, that refers back to the ‘symbolic content’ of the charges to manifest a decision in a juridico-legal context. The judge is dehumanised through their symbolic place in the court as the arbiter who decides what the charges-qua-signifiers mean and where this decision is believed to be what it is by the legal profession and broader community. The important point is that without this game of symbolic fictions – that is, if the judge simply espoused random decisions that did not inhere to the contextual rules of legal context – the judge would be unbelievable; *law would be unbelievable*.²⁰ Hence the letters of the law, its messages composed of signifiers, ‘always’ arrive at their destination – their legal sense.²¹ If they do not, then the

¹⁵ Zupancic (2006), pp 160–61.

¹⁶ Miller (2007), p 7.

¹⁷ Dolar (2006), pp. 16–17.

¹⁸ Chiesa (2007), p 48.

¹⁹ Lacan (1998), p 108.

²⁰ Žižek (1999), p 219.

²¹ Žižek (2001), p 12.

symbolic misrecognition fails and the court ceases to retain its juridico-legal meaning as accepted by those who are subject to, for and by the court.²² Yet is this collapse of symbolic misrecognition an avenue to think anarchy in psychoanalytic terms? Or, to rephrase, can the subject desire anarchy?

To answer this question, we must turn to the delimiting question of desire: ‘What do you want?’ (*Che vuoi?*). The form of this question iterates upon the metaphoric structure of meaning wherein sign₁ is sign₂. But to whom is ‘*Che vuoi?*’ addressed? It is to the big Other of the symbolic order, a symbolic apparition of the order of differences between signifiers who proffers commands and prohibitions? In the symbolic form of the signifier, such questions of desire take aim at the Other’s satisfaction to the extent that they are reliant upon the belief in the symbolic order and what it renders meaningful.²³

Because the order of the symbolic is one of difference, all further differences offered in reply to ‘*Che vuoi?*’ amount to the same symbolic lack touched upon by the question of desire. The Other’s answer is thus restricted to the identical inverse form of the subject’s own question of desire, ‘What do you want?’²⁴ This point is a further renovation of the concept that for a signifier or part of law to become meaningful, it must draw the subject into a symbolic space that then reflects meaning – *vis-à-vis* the subject’s message – back to the subject.²⁵ Yet the meaningfulness of this reply requires a minimal difference be established between the subject and the Other. The repetition of the question’s symbolic form suggests that the question of desire must rest on something extra, beyond the substantial content of the message.

This something extra in the question of desire (*objet petit a*) can be observed in the basic question that underlies discussions of law and anarchy: addressing the law, the subject asks ‘Do you want anarchy?’ and the law responds, ‘Do you want anarchy?’ The minimal difference here flags the fantasy coordinates that are involved and yet are not part of the empirical symbolic content of the message. Reading the question positively, the question of anarchy propounds the overthrow of law, as though in its reply the law flays itself, sunders its own condition by tempting the subject with its dissolution. In the negative, the question of anarchy is much more orthodox and familiar: the subject admonishes the law and the law tyrannises the subject’s questioning. Both thinly fantastic readings demonstrate how a simple adjustment in the fantasmatic coordinates of the message drastically alters the status of law as such and always imputes an intention to it.²⁶

²² Žižek (2001), pp 16–17.

²³ Lacan (1993), p 48.

²⁴ Žižek (2008a), p 74.

²⁵ Lacan (2006), pp 228–29.

²⁶ This discussion targets the speculative construction of anarchy by the law’s own operations in *Lacey*. Unfortunately, space is too limited here to trace a comparative account of the philosophy of anarchy of Victor Yarros, Henry David Thoreau, David Miller and others, and how it inflects this question of desire.

A further point here is that, to unreflective reasoning, the equating of law with anarchy is impossible or ‘mad’ unless one is willing to suggest a pre-legal space by retroactively establishing a minimal difference between the legal order of today and a past to which we only have fantasmatic access.²⁷ The view that repealing legal order invites anarchy establishes the fiction that anarchy is always lying in wait. More strongly, if repealing the law is said to lead us to back to a non-legal space, we again commit to a fiction that we can somehow escape the law’s conditioning of our view of ‘not law’.²⁸ The Lacanian formula for the arrival of the letter in its inverted form thus demonstrates the always-already symbolic nature of anarchy if it is taken in a non-legal sense – that is, anarchy is always part of the law.

This symbolic interplay of anarchy’s meaningfulness recently manifested in the Australian legal context with the appeal case of *Lacey v Attorney-General of Queensland*.²⁹ In this appeal, the High Court of Australia repealed a decision by the Queensland Court of Appeal that decided that the provision in section 669A(1) of the *Criminal Code* (Qld), which allowed the Attorney-General to appeal sentences, provided some general power to vary sentences simply because the Attorney-General chose to appeal. Both the decision of the majority French CJ, Gummow J, Hayne J, Crennan J, Kiefel J and Bell J and the dissenting opinion of Heydon J focus on the interpretation of section 669A(1), but do so in divergent ways that elaborate differing operations of belief in the law and the place of anarchy in legislative harmony.

Lacey provided the High Court with an opportunity to once again observe the presumptions of statutory interpretation in the Australian legal context.³⁰ Moreover, the interpretation of statute functioned to maintain a

²⁷ Lacan (2011), p 70.

²⁸ Hourigan (2011), pp 10–12.

²⁹ *Lacey v Attorney-General of Queensland* (2011) 242 CLR 573; hereafter *Lacey* in the text.

³⁰ As summarised by Pearce and Geddes (2011), the presumptions of statutory interpretation in Australia include:

- the presumption against surplusage
- the presumption against retrospectivity
- the presumption against the interfering with fundamental rights
- the presumption against the abrogation of the privilege against self-incrimination
- the presumption against the denial of access to the courts
- the presumption that the re-enactment of previous legislation constitutes an approval of previous interpretations of this legislation
- the presumption that legislation does not bind the Crown
- the presumption that property rights cannot be taken away without compensation
- the presumption that all law has territorial effect
- the presumption that Australian law will conform to international law.

It is useful to note that the fortunes of these presumptions vary, and some become of greater value or relevance than others, depending on the makeup of the court, the nature of the matter before the court and the social, political and historical context of the court.

symbolic economy of the law. The presumptions that structure statutory interpretation provide a set of fantasmatic coordinates through which statutes can be interpreted desirably in light of the matter before the court. They also form an unwritten code that quilts together the fragments of discretionary power of construction in matters of statutory interpretation, as exercised by the High Court of Australia in particular. These presumptions are fantasmatic in the psychoanalytic sense that they make the law believable and simultaneously coordinate the desire of the legal subjects recognised by the court's symbolic regime – that is, the judges, council, appellant and so on. Without these presumptions, statutory interpretation would appear to lack the necessary distance from the wild fantasising of judges' subjectivity and create a psychotic order that is without law.³¹ Yet, as we shall see, there is a particular type of psychoanalytic construction that fits well with the purposive construal of statutes now favoured by the High Court.

While these presumptions may provide the fantasmatic background for statutory interpretation, the process of interpretation itself has undergone notable shifts across legal history. In the modern Australian legal context, what are known as the literal and purposive approaches stand as different polarities across the spectrum of judicial interpretation and decision-making. Put simply, the literal rule emphasises the meaning of the words used in legislation and may only vary its course to avoid absurdity, a tactic elsewhere phrased as the golden rule of statutory interpretation.³² On the other hand, the purposive rule looks to the context of the legislation and the mischief that the legislation is intended to remedy.³³ However, while the purposive rule can only expand its domain in the absence of clear and precise wording in the Acts of Parliament, the literal rule treats all law as expressly meaningful and unambiguous although capable of absurdity. For a literal repose, such absurdities are not the fault of law but of the shifting social context in which the 'true' law finds itself. While the literal rule was the traditional method used to interpret statutes, today the purposive rule is *de rigueur* and has express mention in section 15AA of the *Acts Interpretation Act 1901* (Cth) and the *Fair Trading Act 1999* (Vic), for example, and – more pertinently to our discussion – in the majority decision in *Lacey*.

At a glance, anarchy seems far from the presumptions and interpretative methods of the law. But even a mild questioning of why these presumptions can operate to provide the law with some measure of coherency reveals the orderlessness of a certain type of fantasmatic anarchy lying in wait, and hints at the forced choice to view anarchy as being outside the order of law when it is

These presumptions are not hard law but their importance should not be underestimated. As highlighted by the psychoanalytic approach, it is the fantasmatic status of these presumptions that grants the interpretation of legislation some measure of coherency by giving them a fantasmatic frame the coordinates the desire for law to 'happen'.

³¹ Lacan (1993), pp 53–56.

³² *Adler v George* (1964) 2 QB 7.

³³ *Heydon's case* (1584) 3 Co Rep 7a.

given this purposive coherency. What the orderlessness of such anarchy indicates is not only an absence of order but also an absence of legal purpose.³⁴

It is this loss of purpose that so threatens law with the decay of its fantasmatically sustained reality. The path to anarchy in this theoretical problem is through subjecting law to a premodern legal science that seeks the rational truth of law as the only valid criteria of judicial decision-making. This truth is rejected for its irrational and arbitrary enforcement, and thus we arrive at what the definition thinks as anarchy *per se*. However, such a legal science overlooks that when the fantasmatic coordinates of the law are suspended, the reality of law is suspended as well. The result is not the truth of law but rather nothing at all – ‘no law’ rather than ‘not law’.

The fantasmatic content of the law grants legal context/symbolic sense to *Lacey*. But further than this, such legal fictions prompt the question of where to position the possibility for anarchy in the frame of a desire for law. The majority’s decision in *Lacey* shows a concern with different forms of legal anarchy that may ensue from the appeal process.³⁵ *Lacey* is uniquely positioned, as it brings to light the polymorphous tension that exists between the symbolic differences of statutes, their fantasmatic construal and the fantasmatically sustained reality of the common law.

This tripartite tension creates a point of difference between the opinion of the majority of French CJ, Gummow J, Hayne J, Crennan J, Kiefel J and Bell J and the dissenting opinion of Heydon J. This difference centres not only on points of law but also on the principles of statutory interpretation as they were applied by the majority in *Lacey* in direct response to the jurisdiction of the appellate court and the powers of the Attorney-General of Queensland. This pivoting point also raises the spectre of anarchy on several connected fronts: the reconstruction of history by the majority when they examine what the law was before the statutory remedy of the Court of Appeal was invented in English law; what dangers lie in wait for the Attorney-General’s collapsed jurisdiction and powers as perceived by the High Court; the tension between the fantasmatic support of the presumptions of statutory interpretation by the majority and Heydon J’s dissenting judgment; and the elision of the question of anarchy by the evaporation of jurisdiction and power from the vantage of Heydon J.

The artifice of legal fictions that sustain the reality of law, even in its history, are present in the decision of the majority in *Lacey*: ‘an appeal is not a common law remedy. It requires the creation by statute of an appellate jurisdiction and the powers necessary for its exercise.’³⁶ The historical narrative delivered by the majority of the High Court expounds the development of the English Court of Appeal at some length at the outset of their judgment. This recounting of the legal history of the Court of Appeal reconstructs the law to emphasise not only Australia’s legal inheritance but

³⁴ Laurent (2007), pp 42-43.

³⁵ What is ‘legal’ here is defined by its fantasmatic content, its symbolic difference.

³⁶ *Lacey v Attorney-General of Queensland* (2011) 242 CLR 573 at 577.

also the inheritance of a legal purpose, and therein signals not only an imparting of signifiers of the law but also their signified meaning:

There was, at common law, no jurisdiction to entertain appeals by convicted persons or by the Crown against conviction or sentence. In 1892, the Council of Judges of the Supreme Court of England and Wales recommended to the Lord Chancellor that a Court of Criminal Appeal be established with jurisdiction to entertain appeals against sentence and to assist the Home Secretary, at his request, in reconsidering sentences or convictions ... The legislature did not act on that proposal ... It was not until 1988 that the Attorney-General was empowered to apply to the Court of Appeal (Criminal Division) for leave to refer a case to it for undue leniency in sentencing.³⁷

The retelling of the historical manifestation of the Court of Appeal provides a basis for the majority's subsequent rendering of a verdict in *Lacey*. That is to say, the way in which the purpose of the Court of Appeal is signified in the chain of signification creates a view of legal temporality, a past that is not anarchic but instead is undergoing constant ordering. The original intention of the Council of Judges thus becomes the measure for the contemporary state of affairs in the High Court of Australia and the Court of Appeal in the Supreme Court of Queensland, where it is possible for both the convicted felon and the Crown to appeal. In critical terms, the reconstruction or retelling of the legal history of the Court of Appeal shows the majority installing the order of law through a retroactive logic that consequently posits the contemporary appeal process through its deferral to an earlier purpose.

It is a critical issue that once we are within law, such a reconstruction of legal history operates to identify a gap in the law where the history of law stands outside the law but simultaneously works to associate this historical moment with the politic of the law in the present. This reinforces the previous point that once we are within the chain of signification, within the law, we cannot commit a transcendental suspension of the law to get to some hypothetical beyond of law. Rather, because a subject is constituted in the symbolic space of signification, they will always-already be entwined with this existing symbolic framework. The reasoning of the High Court envelops the legal history being recounted within the present arrangement of law precisely because not to do so would make the law incoherent and expose the law to a kind of non-sense that is intrinsically 'legal' because it is only concerned with the decay of the fantasmatic associations that give law meaning.

This concern with the decay of fantasy in its psychoanalytic sense as the artifice of the symbolic order is a central concern of the outcome of *Lacey*. The problem that is decided in *Lacey* is the legality of the Attorney-General's appeal to enliven a sentence in the absence of an error by the sentencing judge. Allowing the Attorney-General to alter sentencing because of a desire to exercise the provisional right to appeal mistakes the signifiers

³⁷ *Lacey v Attorney-General of Queensland* (2011) 242 CLR 573 at 577–78.

of the law for the symbolic differences that maintain the ordering of the law's symbolic universe. Put simply, the majority note how the legislation securing the Attorney-General's provision to appeal is couched in a legal historical narrative that establishes a minimal difference between the writ of statute and the interpretation of the provision. This suggests that, rather than favouring the signifiers in their barest, technical form, the majority in *Lacey* prefer maintaining fantasy in parallel with reality rather than in a hierarchical orientation of dominance.

This lateral parallel of statutory fantasy and legal reality is further queried by the unfettering of discretion expressly demanded by section 669A of the *Criminal Code* (Qld) that provides the Attorney-General with the provision to appeal a sentence. The majority argue that this provision is a matter of discretionary power arising from a procedure that is seen to be in tension with the stated purpose of the Court of Appeal and the Attorney-General's express statutory power to launch an appeal in the Court. Here, the signifiers of legislation appear to be at odds with the desire that is expressly stated in by the Minister for Justice's Second Reading Speech:

The Bill is being amended to make it clear that the Court of Criminal Appeal has an unfettered discretion to determine the proper sentence to impose when the Attorney-General has appealed against the inadequacy of the sentence.³⁸

While the minister's speech identifies the intention of Parliament, it also elides the necessity of an erroneous construction or improper deployment of principle by a sentencing judge to give grounds for appeal as distinct from the express function of appeals by the Crown:

The Attorney-General may appeal to the Court against any sentence pronounced by:

- (a) the court of trial;
- (b) a court of summary jurisdiction in a case where an indictable offence is dealt with summarily by that court, and the Court may in its unfettered discretion vary the sentence and impose such sentence as to the Court seems proper.³⁹

The majority herein identify an oblique figuring of section 669A(1), where the wording of the statute is too restricted to oblige the Attorney-General of the power to enliven a sentence – or, more strongly, to even entertain the possibility of enlivening a sentence *a priori* to the appeal process because the conditions of the jurisdiction forbid it in their express statutory construction. What is rejected by the majority here is the decay of the fantasy sustaining symbolic reality. Specifically, the majority reject what

³⁸ Queensland, *Parliamentary Debates* Legislative Assembly, 23 April 1975 at 993.

³⁹ *Criminal Code* (Q) s 669A(1).

they view as a collapse of the jurisdiction of the Court of Appeal and the powers of the Attorney-General.⁴⁰

The decision of the Court of Appeal to enliven Mr Lacey's sentence at the suggestion of the Attorney-General thus opens up a problem of how to approach the meaningfulness of the signifiers of legislation. This problem centres on how one is to construe the express wording of section 669A(1). Responding to this dispute, the majority turn to the *Acts Interpretation Act 1954* (Qld) – apparently neglected by the Court of Appeal – and how the Act ought expressly to have guided its construal of section 669A(1). It is curious that this forms a bone of contention between the dissenting Heydon J and the majority as the majority favour extrinsic materials to resolve any possible ambiguity⁴¹ and provide a consistent construction, whereas Heydon J, as we shall see, is disenchanted with the way that the purposive inclusion of such extrinsic material leads away from the clear and precise language of the statutes, both the *Criminal Code* (Qld) and the *Acts Interpretation Act 1954*.

The purposive approach of the majority in *Lacey* reads a unifying thread through the legal history of the Court of Appeal and the facility of the Attorney-General, as a representative of the Crown, to appeal a sentence and the legislative history of section 669A. This purposive approach to statutory interpretation invites and deploys cognate legislation throughout the decision, namely the *Acts Interpretation Act 1954*, which is buttressed by the legal history of the Court of Appeal offered at the outset of the majority's decision. The legislative history of section 669A is used to define, limit and construe a purpose upon the Court of Appeal, the *Criminal Code* (Qld) and the powers of the Attorney-General. Yet the legal and legislative histories and the *ratio decidendi* indicate certain assumptions regarding the intended audience of the statutory enactment of the Court of Appeal, section 669A and the Attorney-General: the audience is the judiciary rather than the executive or the legislature, distancing the majority's construal from political readings.

The purposive construction of the majority shows a tendency to read down the 'unfettered discretion' conferred upon the Court of Appeal by the statute. This reading down operates by linking the relevance of section 669A to the jurisdiction that gives the Attorney-General the power to appeal, rather than placing section 669A ahead of the statutory origin of the Court of Appeal. In a general non-legal sense, the majority here construes the decision of the Court of Appeal as always being fettered by the constraints of the law. But within the juridico-legal framework within which the court operates, this fettering specifically pertains to judicial discretion rather than the possibility of *ratio decidendi* made in a preceding judgment somehow conditioning the final decision of a case at hand *a priori*. The majority elaborate the view that possible *ratio decidendi* made in a preceding judgment to an appeal case ought to be seen as part of the act of judicial discretion, or even after the fact of the judicial discretion as such, *a posteriori*.⁴²

⁴⁰ *Lacey v Attorney-General of Queensland* (2011) 242 CLR 573 at 588.

⁴¹ The problem of construal is manifest due to the inclusion of the Minister's speech.

⁴² *Lacey v Attorney-General of Queensland* (2011) 242 CLR 573 at 601-602.

The collapse of jurisdiction and power in *Lacey* is born of the Attorney-General's insistence on a construction of section 669A that, in the view of the majority, gives no 'jurisdictional content to the term "appeal"'.⁴³ But what are the dangers that lie in wait for such a collapse of jurisdiction and power as perceived by the High Court majority? Here it may be instructive to understanding the dilemma counter-intuitively.

Naïvely, we can assume that all law that exists has some substantial content to it, a legal meaning or purpose and so forth. As noted early on in this discussion, such meanings are sustained by symbolic differences: the law as it is composed by different elements that are all unlike each other but that seem to circulate and function according to an order that no one element of law can be unto itself. These associations are fictions in the strict psychoanalytic sense that they stage an objective fantasy that operates independently of the human subjects who encounter the law but can only be accessed through the imaginative symbolic capacity of legal subjects. The law is thus not humanistic but rather radically anti-humanistic: it does not negate the humanity of legal subjects so much as such humanity will only matter to the law if it can be 'named' by a signifier common to its signification as law. This naming does not describe anything, but instead delineates what is named from other elements in the symbolic network of legal meanings and legal fictions. The concern of the High Court is that this symbolic difference that separates jurisdiction from power is lost. In an appeal process, this is intensely problematic as it voids the different interpretative capacities and purposes of Courts of Appeal and the High Court. Here, the principles binding the sentencing judge become the only constraints upon the courts, inviting a type of anarchy insofar as it removes the distinction between the original and appellate jurisdictions where the subject matter of a jurisdiction 'must be discernible from some source'.⁴⁴

The key point of difference for dissenting Justice Heydon is how to approach statutory interpretation in its fantasmatic entanglement. Heydon J's more literalist and traditional approach to the writ of statute highlights the problematic judicial creativity that underlies the elegant reasoning of the majority.⁴⁵ Heydon J's critical reproach to the decision of the majority gives grounds for His Honour to claim that the appellant's appeal is artificial.⁴⁶ But what can this dissenting (symbolic) difference also tell us about anarchy and the desire for law?

The juxtaposition of law and anarchy as 'no law' rests on Heydon J's insistence on the 'natural construction'⁴⁷ of terms supposed to be ambiguous by both the appellant and the majority, such as unfettered discretion. Natural construction is, however, problematic for a view of law as an artifice. For Heydon J's jurisprudence, natural construction supposedly overcomes the

⁴³ *Lacey v Attorney-General of Queensland* (2011) 242 CLR 573 at 588.

⁴⁴ *Lacey v Attorney-General of Queensland* (2011) 242 CLR 573 at 588.

⁴⁵ *Lacey v Attorney-General of Queensland* (2011) 242 CLR 573 at 595.

⁴⁶ *Lacey v Attorney-General of Queensland* (2011) 242 CLR 573 at 596.

⁴⁷ *Lacey v Attorney-General of Queensland* (2011) 242 CLR 573 at 596.

symbolic differences that enable legal language. Yet such supposedly natural constructions are a literalist, *Ursprung* approach to the logic of the provision of section 669A, yet at the same time avowedly appeal to the symbolic differences maintained by the commons, whom such plain language is supposed to also benefit. Heydon J's vantage from within the law, with knowledge of the law, clearly delineates the possibilities present in his interpretation as against those who have no specialist legal knowledge or training, the commons. The salient psychoanalytic point at play here is an epistemological one: once you know the law, you cannot go back to a time 'before' law – that is, natural language devoid of any reframing by legal discourses – because the perspective one has on the law is part of the law itself. This emphasises the technical nature of legal discourse, its emphasis on mastering the legal craft that seems to be lost on the all too technical approach of the literalist Heydon J.

The judicial process under appeal comes in two parts *vis-à-vis* the possibility of fettering judicial discretion for Heydon J. The first part, says Heydon J, 'is to decide whether it is open to the Court to consider varying the sentence at all'.⁴⁸ Heydon J states that if an error of judgement is found at this stage, then the matter proceeds to the second part: 'to what extent should the sentence be varied?'⁴⁹ Heydon J surmises that the discretions of each stage are connected, and therefore discretions that exist in the later stage and not at the first are not unfettered.⁵⁰ It may be suggested that Heydon J dismisses the appeal because the appellant's case erroneously excludes the expression of the *Criminal Code* (Qld) as part of a legal discourse, emphasising a purposive construal that is favoured by the majority rather than dealing with what is literally worded in the Act itself. This is a curious, critical point for *Lacey* because it highlights the difficult position of the dissenter as at once between both the matter before the court and the remainder of the court itself. But more than this, the division between Heydon J and the majority reveals a tension between the fantasmatic support of the presumptions of statutory interpretation by the majority and Heydon J's dissenting judgment.

The tension between the majority and Heydon J is a symbolic one. Restricted merely to the technicalities of jurisprudence and statutory construction, we might suggest that the difference is merely one of purposive against literalist construal. But let us ask a naïve question here: in what element or part of purposive or literalist statutory interpretation and construction do I find this purpose or literature? The answer is clearly the law itself. Yet this law appears to be separate from the judge's consciousness and judicial discretion, and therein beyond the rationality and reasoning that we may call purposive or literal.

While the presumptions of statutory interpretation may come to bear on all the judges presiding in the High Court during *Lacey*, the critical matter of

⁴⁸ *Lacey v Attorney-General of Queensland* (2011) 242 CLR 573 at 592.

⁴⁹ *Lacey v Attorney-General of Queensland* (2011) 242 CLR 573 at 592–93.

⁵⁰ *Lacey v Attorney-General of Queensland* (2011) 242 CLR 573 at 596.

note is that the access to the law itself is barred or veiled by these presumptions: statute operates as the object-cause of the desire for statutory interpretation. The elaboration of Heydon J and the majority's differing approaches to statutory interpretation highlights different entry points into the chain of the law's signification. If the presumptions of statutory interpretation were suspended somehow, their fantasmatic coordination of reality for the subject of law would crumble. The point is that both the purposive and literal approaches commit to a certain objective existence of the law in its fantasmatic – that is, interpretable or symbolic – aspect. The tension between the majority and Heydon J is thus a difference of how to approach fantasy.

In a literal way, Heydon J constructs a clinical and technical analysis of the law that plays the game of the signifier by staging the desire for the law. This staging of desire is the *desire for law*, but it is fantasmatically elaborated by the legal fictions of natural language, as if the law is talking to us and it is our choice whether or not to listen. In the purposive way, the majority's construction devolves the law from the status of an Other that has unknowable desires to that of a small 'o' other, an alter-ego that has purposes and desires that can be assumed.⁵¹ While the literal position may function as a formalist interpretation of law to the letter, it remains unable to answer the question of what the law wants. Hence the law itself is fantasmatic, objectively capable of taking care of itself. The purposive approach compositely veers instead towards treating the law as though it knows what this other wants. Where Heydon J stages the desire for law, the purposive majority know the desire of law, but at the price of law becoming a diffuse symbolic socio-political mass. The majority are thus more 'postmodern'⁵²: the Other is shot through with enjoyment, the law is an all-too-human, almost fleshy mass of real people, real bodies and real things.⁵³ To rephrase this difference in the terms of some psychoanalytic tropes: Heydon J's construction figures as that of an obsessive neurotic who enjoys in the structure of the law, but only insofar as it is an artifice or structure rather than a living thing. Conversely, the majority's construction figures as that of the paranoid psychotic who knows the Other knows too that the law enjoys a life beyond what it says in its writ – that is, the intention of parliament, mischief that the statute is intended to remedy, and so on; it is an alter-ego or small 'o' other to compete with rather than a symbolic fiction to interpret.⁵⁴

While the above offers some insights into the desire for law and interpreting statutes, what might this tell us of law's relationship to anarchy?

⁵¹ Žižek (2008), p 35.

⁵² Emphasis is here used to highlight that these bodies are the other side of the 'official' language of postmodern jurisprudence's emphasis on plural representation and interpretation as discussed by Murphy (1991). These bodies are closer to the emphasis of psychoanalysis and postmodern feminisms discussed by Patterson (1992).

⁵³ Žižek (1999), p 219

⁵⁴ Goodrich and Carlson (1998), p 6.

In the case of *Lacey*, this relation is figured in a very particular way. The demands of statutory interpretation and judicial construction play out in two apparent ways for anarchy's relation to law in *Lacey*: either we may follow Heydon J and productively obsess over the technical expression of the law, ideologically coded as 'natural language' as though what is 'natural' is eternal and unchanging – thus anarchy is what is persistently deferred through a constant return of law's signifiers; or we may follow the hermeneutic reasoning of the majority that is potentially endless and visceral insofar as the dead letter of the law comes alive with purpose and therein desires something from us all. In the latter, anarchy is not outside the law as it is in Heydon J's construction. Instead, anarchy is constitutive of the legal order itself; the law is 'mad', more than the law alone or in itself, out of its 'legal' mind and instead in a plurality of para-legal or extra-legal voices. Here what the law frames as 'order' is in fact yet another species of 'disorder' claiming to be *the* Order. These approaches to anarchy are not extraneous to the previous discussion, but instead are part of the elaboration of their approaches to the law.

Yet are the majority and dissenting judgments in *Lacey* so different? Can we view them instead as two sides of the same fantasmatic legal coin since they both clearly emphasise the law as a thesis, a starting point that installs an order of meaning. If the law is a thesis, from what is it differentiated? How might anarchy function as its antithesis? Given the arguments elaborated above, it may appear that anarchy returns to the law not as an organised movement but rather as an indivisible remainder that lingers on in the wake of synthesis of the purpose of law and the structure of law. Anarchy is an interminable symptom of the legal frame in *Lacey*.

The case of *Lacey* is instructive in showing that the position of the law is not merely expressed across statute, case law and common law *stare decisis*, but is also posited as thinkable in very particular ways. The majority and the dissenter in *Lacey* highlight two possible approaches to law's thetic positing. The first is the construal of the majority wherein law is a quilting of substantial legal and para-legal fragments that function as a type of normalised disorder or anarchy that is given normative value by the quilting of purpose that is, in strict clinical terms, a 'delusional metaphor' for what the law is and does.⁵⁵ The second view of law is that of the dissenter, Heydon J, whose judgment differs in terms of its basis, outcome and approach to law as such. In what we might term a kind of jurisprudential modernism, Heydon J's literalist approach to law in *Lacey* rejects para-legal materials or metaphors of purpose in favour of what is literally 'there' in the formal writ of the law itself. Heydon J's fidelity to the law as signifier maintains the Otherness of the law that prohibits disorder or anarchy entirely; anarchy is out of the question, unthinkable – there is only the law and what the law says. In both instances, what can be ascertained is a certain psychic economy of access to the law.

⁵⁵ Fink (1997), p 107.

If the law is thus posited as either normalised anarchy or the symbolic order, what does this tell us about its relation to anarchy? In its vulgar definition as the absence of order or a type of mayhem, anarchy stands out as an antithetical negation of both positions discussed thus far. For the purposive construal of the majority, anarchic mayhem is a mischief against which the law protects by incarnating powers, jurisdictions and the difference between the two: power comes from jurisdictions; jurisdictions come from the purpose of having law. Anarchy is everything that does not inhere to this delusional order. Conversely, for the more literal reasoning of the dissenter, anarchic mayhem is a diffuse phenomenon among many phenomena that occur outside the law. The law operates to protect us from this dark continent of grotesque things that obey no law. In its stronger definition, anarchy is the rejection of law. This emphasises the thrust of anarchy as the antithesis of law, it is law's negation but it is also ultimately without substance in the absence of a legal order to reject. Thus the law must always tarry with its negation by anarchy insofar as it is a remainder of law that stands for what law is not.

The constant mediation and negotiation of anarchy by the law is perhaps only possible insofar as the law exhibits a reflective dimension that makes it aware of its conditions and limits. What is curious is how the postmodern logic of purposive construal such as that of the majority in *Lacey* elaborates a synthesis of anarchy. Synthetically, the law is generated by its negation of anarchy through attending to some purpose. Here, the law retroactively posits anarchy as some mischief to be remedied by something that is avowedly part of this anarchic pre-legal space. The law is thus to be read as a normalised disorder, a type of 'pre-order' that attempts to regulate all other disorders; a radical anarchy as the rule. Yet if we take the argument that anarchy is precisely what the law is not, even in its radical anarchic mode, where does this leave the distinction between what is legal and para-legal?

The dialectic of law and anarchy elaborated above appears to be deployed by the majority's construction in *Lacey*. It does not, however, assist the literalist reasoning of Heydon J that is instead mired in the elaboration of endless differentiation, endless negations of what is and is not in the law. What changes between the vantage of Heydon J and the majority is not the law but rather the perspective on the law – how the law is apprehended by and involves the nomological psyche of the judge or other legal subject.

For law to function as a synthetic construct, the anarchy that is normalised as legal order must lose its anarchic tinge. It does this through the well-known arbitrary gesture of enforcing its order with negotiations that will always have an end-point. Arbitration and construction offer an important glimpse of the negation of anarchy by law disappearing from view: we all know there is law and that which is not law, but the point is that when we talk about the law, this mediation between the legal and the para-legal vanishes. This vanishing is not an elision in the same way that Heydon J's reasoning portrays the law as endless negations of the anarchic thing-without-law to be

constantly arranged and specified; rather, the reasoning of the majority in *Lacey* presents an extremely different view of the law with a purpose.

In proper dialectical fashion, then, it must be asked what negates this new thesis of law as construed by the majority in *Lacey*? Where exactly is anarchy in this arrangement, and what are the negations that operate as invitations to anarchy therein? The first point to which to return is that the law here is a normalised anarchy. This effectively means that any approach to anarchy in other than its normalised form as the law is not beyond the borders of the law but at its very core. If anarchy is not the law, incomprehensible to the law, but is at the same time part of the law, it is otherwise to be known as a symptom of the law. As verified by the majority's purposive construal in *Lacey*, anarchy today is a symptom of the law. The task of law is thus to enjoy in this symptom in a legal way, to give it legal meaning and legal definition, to make socio-legal sense of it.

Demands for anarchy as no law are thus thoroughly legal demands insofar as they reinstate the order of law by inviting its negation. Calls for anarchy in this way are not absolutely free in the sense of philosophical idealism, but are instead tyrannies to yet another universal legal ordering. This is the modern twist to the dialectic of the law: once you know the dialectical form of law, you cannot go back.

From the above, it is supposed that anarchy today must handle a fundamental epistemological problem: once you know the law, you cannot erase it. There is no meta-language for anarchy theorists to rely upon in the postmodern jurisprudence of the Australian High Court majority in *Lacey*. The species of anarchy that is ruled by the market is of a species of anarchist thought that fits with a modern rather than postmodern frame. The useful psychoanalytic insight here is that the law is all too capable of disrupting itself as though its order is in fact a disorder. In the important precedent set by *Project Blue Sky*,⁵⁶ the High Court identified that the legal subject must work towards establishing legislative harmony. The same can be said of the finding in *Lacey* insofar as what the majority's judicial reasoning is really chasing down is the purpose or desire for law.

This is an admittedly speculative critique of the law, but it is at the same time an important avenue to explore because it renders visible a range of complex structural issues for modern legal knowledge. Anarchy in the present is not outside the law. Radically normalised, anarchy is 'the law' and the repression that forgets this in Heydon J's modern literalist construal in *Lacey* risks repressing this traumatic encounter with disorder at the heart of the modern Australian legal system.

⁵⁶ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 335.

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