Institution

critical histories of law

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COOPER FRANCIS & DANIEL GOTTLIEB

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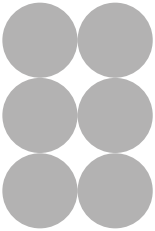

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INTRODUCTION

Institution and its discontents

COOPER FRANCIS

> It is in relation to history that, where real freedom proved incapable of maintaining its promise, aesthetic autonomy falls into its consoling surrogate. The image of a liberty incapable of liberation then fatally throws its shadow back over the past [and] the moment is lost – just a moment – in which in antiquity the freedom of form was opened up, in the midst of the enslavement to the ancient powers of myth and the new domination of history.
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> Gianni Carchia, *Orfismo e tragedia*

This collection presents contributions from the two-day Techne symposium, 'Philosophy and Law: Transdisciplinary Approaches to the Institution of Subjects', held at the CRMEP in Kingston in January 2023, along with translations of related, contextualizing materials. The symposium sought to establish the contours of the essentially contested concept of 'institution';[1] a concept that has in recent years become a central object of analysis and, moreover, a problem across different disciplines and linguistic contexts. While the centrality of the question of institution is only just coming to the forefront in English-language discussions of the history of politics and law, this volume should be understood in a lineage of similar conferences and anthologies over the last five

1. W.B. Gallie, 'Essentially Contested Concepts', *Proceedings of the Aristotelian Society* 56 (1955), pp. 167–98.

years across several Western European languages, making up a remarkably open, transnational and transdisciplinary labour of problematization.

In 2017 the Italian press DeriveApprodi published a volume, *At the Limits of Law: Powers, Institutions and Subjectivity,* that questioned the problem of institution in contemporary Italian philosophical debates over 'constituent' and 'destituent' power, struggling to think its precise relation to the social 'movements' or 'non-movements' that since 1989 – from Tiananmen Square through the Zapatistas and the Arab Spring – had proliferated yet without effecting an instituting or de-instituting dynamic.[2] In 2018 the problem was taken up in a major French anthology that began from the 'ambivalence' of the notion of institution – all at once an object of self-preservation, defiance and liberation – in order to consider possible non-denominational sources of clarity in legal theory and philosophy, from Merleau-Ponty's late lectures to the institutional vitalism of Maurice Hauriou and post-analytic philosophy.[3] If these reflections were all characterized by a productive intermixing of history and philosophy with open political challenges, 2020 represented a closure or bifurcation of discussions, as several authors attempted to mark the concept as their own. Publishing an 'institutional' trilogy in addition to three separate Italian and Spanish journal issues, Roberto Esposito substituted open problematization with attacks on his 'pessimistic' enemies. By closing any historical discussion (with no space allowed to consider the historical delegitimation of our institutions qua institutions) he evacuated the notion of any philosophical productivity.[4] This is the paradox of a philosophy

2. Francesco Brancaccio and Chiara Giorgi, *Ai confini del diritto. Poteri, istituzioni e soggettività*, DeriveApprodi, Rome, 2017; Endnotes, 'Onward Barbarians by Endnotes', endnotes.org.uk/posts/endnotes-onward-barbarians.
3. Collectif et al., *Les Équivoques de l'institution: Normes, individu et pouvoir*, Classiq Garnier, Paris, 2021.
4. 'Restitution · Ill Will', 28 November 2021, illwill.com/restitution; Roberto Esposito, *Instituting Thought: Three Paradigms of Political Ontology*, trans. Mark Epstein, Polity

singularly defined by its insistence that our institutions are good not just now, and driven through history by the noble aim of 'instituting life', but that any discontent signals only a barbaric desire to 'live without' institutions entirely. This is a philosophy published in the year marked by the George Floyd revolts in the United States, the largest in the country since Martin Luther King's assassination in 1968, and ensuing conversations about the past, present and future of our institutions.[5]

We insist nonetheless that the problem of 'institution' is proper to our time. Yet it remains haunted by the sense that it took on in the wake of 1968, reflected in the article by Jacob Taubes[6] that gives this introduction its title: discontent with 'institution' could signal only an ultimately childish 'revolt against the establishment'; which is to say, 'the institution' understood as legal-political reality at a certain level of generality and immutability through those 'anthropological' instances that we know as the Family, the School, the Market, the Hospital and so on. This introduction and the contributions that follow attempt to *work* the concept of institution anew driven by a twofold aim. On the one hand, we attempt to move beyond the generalities of any philosophical anthropology, towards the singular, technical artefacts with which the history of institutions as much as our politics must be concerned. On the other hand, we reflect on a certain *crisis* or becoming-doubtful of not just our own institutions, but of the very concept of institution and especially of the verb 'instituting'.[7] For the approach to institution that we pursue here starts from

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Press, Cambridge, 2021; Frédéric Lordon, *Vivre sans? Institutions, police, argent, travail…*, Fabrique, Paris, 2019.

5. Idris Robinson, 'How It Might Should Be Done', in Vortex Group, ed., *The George Floyd Uprising*, PM Press, Oakland CA, 2023; Frank B. Wilderson III, *Afropessimism*, Liveright, New York and London, 2021.

6. Jacob Taubes, 'Das Unbehagen an der Institution', in *Apokalypse und Politik*, Brill Fink, Paderborn, 2017, pp. 218–30, doi.org/10.30965/9783846760567_021. Taubes's essay discusses the work of Arnold Gehlen in the context of student struggles in the 1960s and 1970s.

7. Xenia Chiaramonte, 'Instituting: A Legal Practice', *Humana.Mente: Journal of Philosophical Studies*, vol. 15, no. 41, 2022, pp. 1–23.

the factum of, and the imperative to study, an institutional unconscious and a social morphology that, more than any purported symbolic order, defines any possible politics – critical or otherwise – and that, as the history of institutions tells us, does not wither away when 'unnecessary'. The contributions gathered here, despite disciplinary and other differences, lend themselves to such an undertaking, positing a primacy of politics in history – not a necessary 'autonomy' of state mediation, but agonistic judgment of the common forms of our life, so a social process that does not distinguish between an art of instituting and a science of de-institution. It is not a 'philosophy of institution' from any living or dead author that interests us, but the present need for an open, transdisciplinary project of institutional inquiry between art, philosophy, the historical sciences and the movements.

Vitam instituere

The most opportune way to view the common perspective of the contributions to this volume is via the innocuous Latin expression *vitam instituere*, instituting life. Ostensibly a fundamental category of Roman law, it has become a watchword tying together French psychoanalysts and self-professed 'anti-modern' jurists protesting the recognition of gay marriage, as well as biotechnologies in the 1990s, with left progressives such as Alain Supiot, and Roberto Esposito's writings in the 2020s.[8] For both factions in these debates, it is the work of the psychoanalyst and jurist Pierre Legendre that serves as a linchpin, sketching a philosophical account of the manner in which a generalized notion of 'law' fulfils the necessary anthropological function of 'instituting life'.[9]

8. See the interview with Yan Thomas in this volume for an engagement with Pierre Legendre about the French moment of this history. Alain Supiot, 'Foucault's Mistake', *New Left Review* 132, 22 December 2021, pp. 125–39; Roberto Esposito, 'Vitam Instituere', in *Coronavirus, Psychoanalysis, and Philosophy*, Routledge, London and New York, 2021; Roberto Esposito, *Institution*, trans. Zakiya Hanafi, Polity Press, Cambridge, 2022.

9. Pierre Legendre, *De la Société comme Texte: Linéaments d'une anthropologie*

Indeed, the jurists, philosophers and psychoanalysts in question – whatever their political persuasion – are all concerned with the present dissolution of, or exception to, society's 'symbolic order'. On their account, life must be instituted into such an order and the human animal, first born naturally into the world to its mother, must subsequently undergo a second birth into language and a symbolic order as the ground of political existence, providing this biological being with a 'historical horizon' and 'shared world' amidst institutions that always serve to 'conserve life', whether natural or cultural.[10] For all, the contemporary moment is an exceptional interruption of this *vitam instituere* and its transhistorical logic, whether due to neoliberalism, the modern reign of the subject or Covid. For all the parties, should they consider themselves reacting to a threat or pushing for a new 'progressive alliance', there is a common structure of argument: a timeless anthropological order to life that, though seemingly beyond historical justification, requires legitimation through a purported ancient Roman institution, but whose exceptional absence in the present must be lamented.[11] Exemplifying this reasoning, Esposito's most recent book proposes that, everywhere but our present and then nowhere at all, '*vitam instituere* is at the same time the remote matrix from which we come and the still indistinct goal towards which we move'.[12]

The adversaries of progressives and reactionaries alike would be those 'pessimists' who supposedly view 'institution in its totality' as necessarily alienating or argue that law and institutions are 'mere techniques of power', due either to a nihilistic 'autonomy of the political' constitutively detached from norms and life or to

dogmatique, Fayard, Paris, 2001; Pierre Legendre, *L'inestimable objet de la transmission: Étude sur le principe généalogique en Occident*, Fayard, Paris, 1985.

10. Roberto Esposito, 'Vitam Instituere', *European Journal of Psychoanalysis*, 26 July 2020, web.archive.org/web/20200726071827/www.journal-psychoanalysis.eu/vitam-instituere; Roberto Esposito, *Vitam Instituere: Genealogia dell'istituzione*, Einaudi, Turin, 2023.

11. Supiot, 'Foucault's Mistake', p. 125.

12. Esposito, *Vitam Instituere*, p. 1.

the repressive acts of domination.[13] On the contrary, history is, Supiot will argue, primarily the development and perseverance of a lasting rule of law, while exceptions such as Nazi Germany have always ended 'naturally' as the expression of their own limits in catastrophe.[14] For all of these parties, history remains that of the state, while its subjugation to the economy is not just the unfortunate continuation of a historical tendency we have understood for centuries, but an unexpected anomaly after the transformations of 1989: 'neoliberalism' attacks the dignity of social justice and economic rights; 'America' carries out the 'subjugation of law and states to the spontaneous order of the market'.[15]

With some irony, it is a former colleague of Pierre Legendre and frequent source for the above authors (as well as many contributors to this volume), the philosopher and jurist Yan Thomas, who absolutely opposed this myth of an anthropological significance to the *vitam instituere.* Rejecting the idea that it could symbolize a timeless essence of institution in general, or teleologically remote-control the development of our institutions, he demonstrates that the expression, in fact, had no juridical sense in its origin and was employed only pedagogically to describe a teacher educating their students. When the Roman jurist Marcianus of the second to third century CE inserted the phrase into *Digeste 1, 3, 2*, it served only to insist that those who inhabit a city live according to its laws. The use of this phrase remained constant in the canonist glossators of the Middle Ages as much as the Renaissance humanists: it was not that the legislator must dutifully institute life, but that the citizen of a city must live according to the laws to which they are subject. Thomas – an author who only partook in polemics against those incapable of

13. See Norman Ajari's philosophical defense of pessimism in Norman Ajari and Tommy J. Curry, *Noirceur: Race, genre, classe et pessimisme dans la pensée africaine-américaine au XXIe siècle*, Divergences, Paris, 2022.
14. Supiot, 'Foucault's Mistake', p. 126.
15. Ibid., p. 135.

viewing history but from the 'safety railings' – concludes that the authors who invoke the slogan seem driven into the past only to find legitimation not knowledge: 'The study of texts remains a necessary safeguard against certain missteps, taken up in chorus as a primary truth, without any care for oversight.'[16]

Addressing Thomas's critique in his latest book, Esposito will concede that the 'overly formal' Romans, unlike the Greeks, were in fact unable to realize the syntagm *vitae institutum*, which nonetheless expresses their essence. Their problem was that they did not 'understand' that nature is a limit to law. Indeed, we learn that the difficulties in at least the history of the West are that its institutions have *not been natural enough* and have still yet to be 'reconciled with life': slavery was not de-instituted politically but defeated philosophically as 'unnatural' by the moderns, who no longer bare the shame of having been the first to institute a 'natural' slavery by birth. Most notably and incessantly Esposito will insist against his unspeakable Italian rival (Giorgio Agamben) that human life, *pace* Spinoza, cannot be 'naked of any formal element' and that it is 'constitutively institutional', such that to give up one's rights or allow an institution to diminish one's power is impossible and would no longer be human.

Yet we must insist from the outset that the question at stake does not belong to a particular philosopher and that it is only from a common perception of historical reality that philosophers have felt compelled to testify, not against mediation in general, but to a life that is instituted as 'bare' (Benjamin), 'naked' (Marx), 'damaged' (Adorno) or, not least per Spinoza, in 'human servitude'. For all these, it is precisely as Spinoza will argue that 'no one

16. Yan Thomas, 'Droit romain et histoire de la science juridique en Occident', *Annuaire de l'EHESS. Comptes rendus des cours et conférences*, 1 January 2008, pp. 554–6; Yan Thomas and Maurice Godelier, *La Mort du père: Sur le crime de parricide à Rome*, Albin Michel, Paris, 2017, p. 286. Indeed, one of the only changes to the republication of his seminal essay 'Vitae neciesque potestas' is a footnote that reads 'The extravagant thought of an "institution of life", promoted by Pierre Legendre and reproduced by the hands of essayists convinced by his idea, and who have only a second-hand access to Roman Law, is not rigorously attested in any text.'

unless overcome by external causes neglects to seek what is useful to them or preserve their being' and that we ought call 'evil' only that which 'hinders us from approaching' the 'exemplar of human nature we set before ourselves'.[17] That is to say, as Theodor Adorno articulated it in *Minima Moralia*, as well as in the conversation we have included in this volume, it is a question of those singular but not at all exceptional institutions that have prevented human beings from 'living their possibilities' and so present the cruel spectre of a life in its entirety rendered 'superfluous' and 'futile' from outside itself.[18] Such historical problems cannot be solved in thought. However, in addition to any suggestion that they be 'merely an ideological mask of power', reflections on institution cannot turn away from this great and certainly not unspeakable difficulty that singular instances of the latter might be 'evil'.

The contributions to the 'Proceedings' in this volume set out from the insight that institutions will never reflect nature or pre-existing norms, but that, maintained or made anew by each generation at the crossroads of a living history of political conflict and a natural history of forms, they are rather singular artefacts that compose the physiognomy or morphology of our social world. Institutions in their totality do not express an 'objective spirit' or a 'symbolic order', always out of reach if not in the heavens, but a structure entirely in view, communicable and subject to judgement. Surely we are beyond the situation in which an abstract concept of the 'state' is the only institution in town.[19] We need to

17. Benedict Spinoza, *The Ethics*, trans. George Eliot, University of Nebraska, Lincoln NE, 1981, p. 170. See Étienne Balibar's contribution for a more charitable and open, but no less critical, discussion of 'inoperosita' in Agamben's work precisely through the question of the latter's use of Spinoza.

18. There are few reflections more insightful on the problem of institution and 'damaged life' than Ronald Judy's on Ben Ali's manuscript of Islamic jurisprudence, written in Arabic from a Georgian slave colony. Ronald Judy and Wahneema Lubiano, *(Dis)forming the American Canon: African-Arabic Slave Narratives and the Vernacular*, University of Minnesota Press, Minneapolis MI, 1993.

19. Esposito invokes Marx only as one who sought to be rid of the state and not as an analyst of our institutions. Thus he cannot pose even to dismiss the question that must haunt his account and its always deferred *vitam instituere*: is it not economic institutions that have slowly but inexorably rendered 'futile' the well-intentioned lives of many

become conversant in inheritance law and territorial control, for example, as a way of better orienting our inquiries into what, as Xenia Chiaramonte explores here, an 'instituting praxis' could mean *now*. In his essay, Gerardo Muñoz provides an ample demonstration of this institutional poetics, attentive to the transformations of the moment: America, country of 'constituted power' par excellence, becomes, as explicitly theorized at the highest levels of juridical practice, a constitutive and formal battle to transform previously marginal and 'administrative' procedures into a new non-electoral principle of sovereign executive power. A characteristic of the conception of history implicit in such analyses (well captured in the autobiographical comments we have translated from François Tosquelles' instituting *life*) is not melancholic resignation in front of an endless history of domination, but the certainty that institutions 'are the fruit of a historical development whose causes are transparent, and which can possibly be subject to change', thus of a present that always presents a new opportunity.

Marx contra (philosophical) anthropology

In sum, there simply does not exist a division between sober, pragmatic institutionalists and those 'pessimists' who would prefer to 'live without' institutions entirely. Rather, a more charitable and productive division is that between, on the one hand, philosophical anthropological accounts of institution that ground their analysis in a symbolic order of sense, subject and self-preservation, which we must struggle to preserve or realize; and, on the other, those who view institutions as a constellation of artefacts, products of a politically driven morphogenetic process without end that do not dissolve 'naturally' when unnecessary, but only through an always singular social process of

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noble institutional engineers of the welfare state, who sought that no human being should starve?

de-institution, involving as much courage as ingenuity.[20] It is true, as Esposito remarks, that Hegel is in many ways *the* philosopher of institution: yet where the former position is most often detected through a positive, neo-Hegelian invocation of 'objective spirit' without the Absolute ('sociology'), thus by a blind drift of institutions without transcendence, the latter will rather follow Marx into his variety of post-Hegelianism, insisting that the present, however unjust, is always the site of a (de)instituting praxis that we might allow each generation to judge the institutions suitable to human 'flourishing', rather than sacrifice itself to their perfection or preservation. For Marx, in fact, the question of 'naked life' is raised as a critique of the institutions that have made human beings give up the days of their life as 'time's carcass'. It was this historical reality that he saw reflected in Hegel's conception of 'immediate life', as an empty transition rather than the unending 'regeneration' of pure mediacy, no longer subjected to the past (the institutions of private property) or mortgaged on the future (institutionally dependent on a wage to survive).

This is not to imply that the reference to Marx and Marxism is unambiguous. The problem of 'institution' might be understood to have brought together several traditions, once disparate if not opposed, in the space left open by the foreclosure of historical materialism. So we find, on the one hand, a sustained critique on the part of lifelong Marxists of how their tradition has too naturalistically articulated the problem of law and

20. Even where such a doubt within a community has been translated into judgement, history shows that, while institutions quickly thrown together or appropriated out of necessity can last millennia, it is the *undoing* of institutions that often requires the most scientific precision and creativity. The French *Code Noir*, legally regulating colonial slaveholdings, lasted past the Revolution, to say nothing of the persistence of wages past the Russian Revolution. For an example of the creativity required to de-institute the legal subject, see Michele Spanò's contribution to this volume. For distinct critical views on the notion of 'destitution', see Étienne Balibar's '*Inoperosità*' in this volume and Idris Robinson's recent attempt, presented at our symposium, to separate the problem of destitution posed by social movements from the Italian theory of 'exodus' or 'withdrawal'. Idris Robinson, 'The Destituent Urge is also a Destructive Urge: Agamben, Aristotle, and Benjamin on the Potentiality for Destitution', *South Atlantic Quarterly* 122, 2023, pp. 137–56, doi.org/10.1215/00382876-10242714.

institution as a mere superstructure: Étienne Balibar confesses in these pages that 'structure' is not to be understood as a symbolic order but rather an institutional and most likely legal matter. On the other hand, we find from the Continental tradition of Critical Legal Studies, which always looked with great disdain on the 'safety railings' that were once the rigid 'modes of production', a certain perhaps unexpected re-emergence of a direct reference to Marx. Xenia Chiaramonte and Michele Spanò, respectively, ask how we ought now reconsider the notion of 'praxis' and how we might understand law as a mode of 'real abstraction' thus as infrastructure of the economy.[21] The reference to Marx no longer implies authors struggling to fit everything into an assortment of inherited concepts whose use has long been forgotten, and includes those of an anti-naturalist bent committed to following the concreteness of history wherever it leads.

One need only consider the resonance of Theodor Adorno's and Yan Thomas's reflections on the institution of the family, included here. However ultimately distinct their methods and objects, we can view their contributions through a combined *natural historical* imperative to demonstrate the pseudo-natural substantiality and 'non-freedom' of our present social forms, so as to find on the side of nature the conditions of freedom – certainly not a natural 'fullness at the origin' of the *Gemeinwesen* and its living institutions before a modern as/or Roman historical decadence, but an always effaced autonomy and politics of form.[22]

At such an 'anthropological distance', we can begin to look with an allegorical gaze on the present and see at once how long the forms of our world have been in formation, how determined they are by those conditions of emergence, and yet how provisional and transient they really are. Where many of the bizarre contours

21. Michele Spanò, *Fare il molteplice: Il diritto privato alla prova del comune*, Rosenberg & Sellier, Turin, 2022.
22. Gianni Carchia and M. Ferrando, *Immagine e verità: Studi sulla tradizione classica*, Storia e Letteratura, Rome, 2003.

of our social life appear as a puzzle to those who would separate 'logic' from 'history' as merely the question of genesis or a sociological history of extra-logical 'norms', they appear as no less structured but in little need of explanation for those who consider these forms as essentially historical, which is to say as institutions. What has been called dialectics – this inverted history of really-existing contradictions – is best understood as the conscious conceptual mediation of such a history of institutions, the reception and transmission of Roman law above all, certainly as it was for Marx and Hegel. From such a standpoint, there is no need for explanation of the fact that the history of private property, which is to say of classes and exchange value, has for two thousand years had to do not least with: (1) the spread between 'ruling classes' of the post-imperial Roman inheritance, whether through colonialism, conquest or friendly technology transfers; (2) managing and optimizing the accumulation and patrilineal transmission of ever-growing 'patrimonies' within a binary division of the sexes, instituted as such without reference to, for example, the womb; (3) the progressive regulation of human beings as private property qua slaves, whose reified and abstract labour could be leased, until, through one of the few properly modern contributions to 'civil society', slavery is not just racialized but legally defined as an ontological property of 'blackness'. This requires that we no longer view the glacial movements of institutional structures, these 'fictional mechanisms that regulate all social life', as equal to or as an expression of ever-changing social practice but rather grasp the singular logic of their form or *morphology*.[23] As Paolo Napoli argues, the very concepts *institutio* and *instituter* are 'genealogically inseparable from the structural need of Roman society to identify those through whom the father's patrimony will continue to live

23. Yan Thomas, 'The Division of the Sexes in Roman Law', in Pauline Schmitt Pantel et al., *A History of Women in the West: From Ancient Goddesses to Christian Saints*, vol. 1, rev. edn, Harvard University Press, Cambridge MA and London, 1994, pp. 93, 84, 89.

after his death' – not a general 'symbolic ordering' of life, but a formal operation to resolve the political problems posed not least by the demands of economic accumulation.[24]

Institutional analysis and transdisciplinary inquiry

The present volume is intended as an intervention into the ongoing 'institutional' turn in the hope that it might represent the need for more open and transdisciplinary investigations into the shifting social structures of our time, beyond many of the divisions that have up until now defined intellectual life. If the name Yan Thomas is to circulate productively it must not represent ideas to be parrotted or a classicist aesthetic to be mimicked, but an example for researchers today: an impersonal yet excessive and impassioned pursuit of the concrete that, taken to the limit, could always find a critical potential in even the most well-rehearsed tradition – everything, that is, we find missing in what is left of the modern university. Thomas represents not another 'Parisian intellectual' but one of many productive contributors to the transdisciplinary research institutions formed in the aftermath of 1968.

Thomas's primary scholarly contributions were not books but papers, often part of large collaborative projects with colleagues and mentors such as Pierre Vidal-Naquet, Nicole Loraux and Jacques Chiffoleau. One of the other paths of a collective project of institutional analysis is that begun by François Tosquelles, an interview with whom we include in the present volume. His life represents another exemplary model of an institutional life, defined by its receptivity to and engagement with the world, both

24. Paolo Napoli, 'Le père, un invisible institutionnel. À propos de Yan Thomas, *La mort du père. Sur le crime de parricide à Rome*, Paris, Albin Michel, 2017', *Grief*, vol. 6, no. 1 (2019), pp. 89–96, doi.org/10.3917/grief.191.0089; Paolo Napoli, 'The Meaning of Institution: The Deposited Sense', *Humana.Mente / Journal of Philosophical Studies*, vol. 15, no. 41, 2022, pp. 25–46.

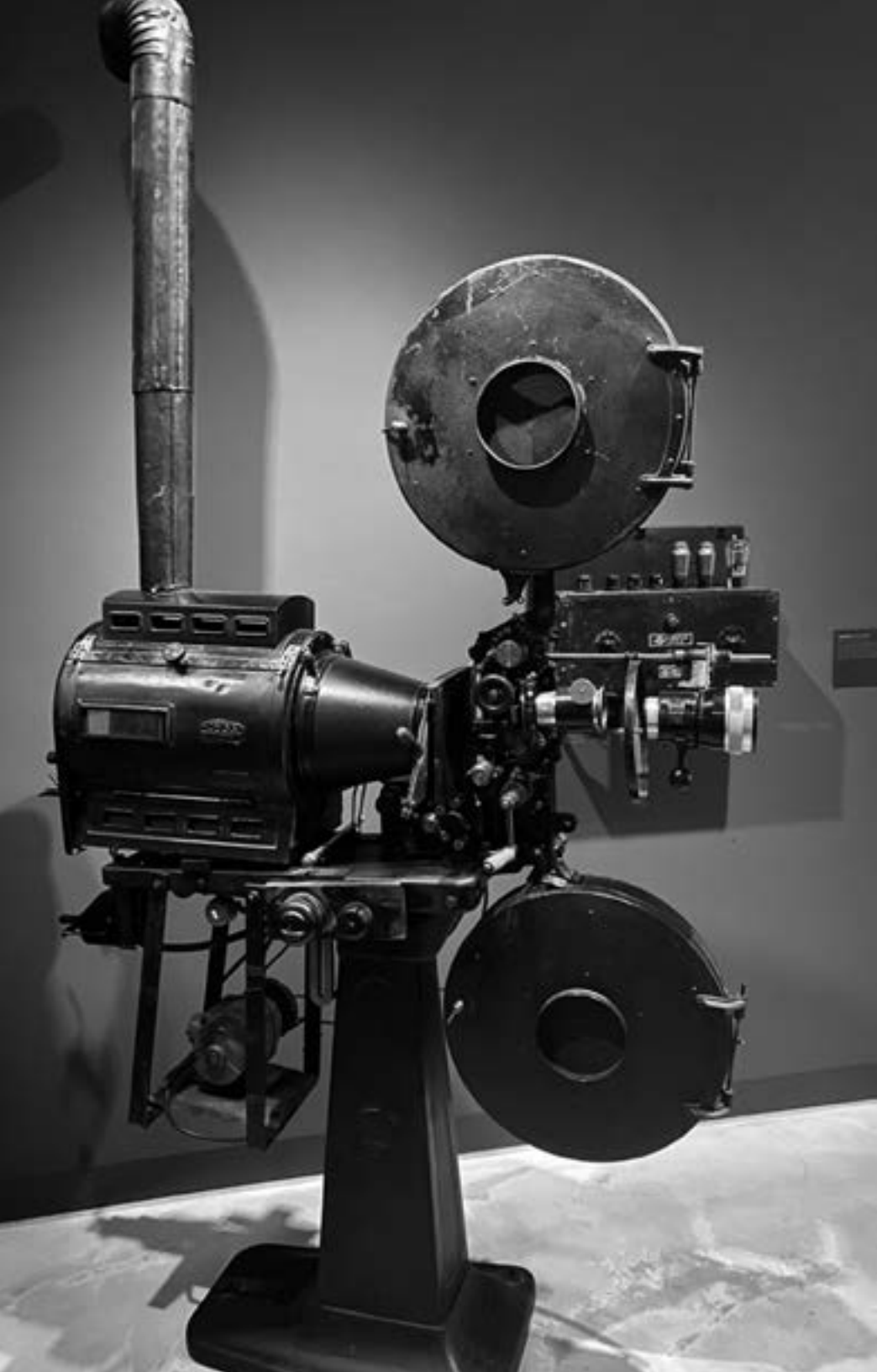
theoretically and practically, beginning with his experience of revolutionary Barcelona. Here, it was not just a hypothetical question to ask what inherited forms of the past should be unmade and how we might craft new ones. He defined an 'establishment' as what presents itself as eternal, outside and separate from the judgement of man, in contrast to an 'institution' defined by its capacity to be revoked.[25] Together with Félix Guattari and Jean Oury, they would develop an *in situ* 'psychoanalysis' of the psychiatric hospital itself, collectively analysing the 'material', 'symptoms' and 'latent content' of this 'institutional object', 'informing a 'seizure' within a given institution in its history.[26] As Norman Ajari discusses in this volume, the institutional work of Frantz Fanon, an early student of and collaborator with Tosquelles, should be understood in this lineage. So too we should understand the gesture of the Italian collective A/traverso as, taking stock of a changed situation, it publicly calls for an inquiry into a 'transversal function': not simply to present 'alternative information' on the margins but to struggle to articulate the 'problem that the real process has posed'.[27]

Informed by Guattari's reflections, supplementing those of the first-generation Frankfurt School, the CRMEP has sought to develop an understanding of transdisciplinarity as the practice of a philosophy that, no longer self-sufficient, might nonetheless maintain a specifically philosophical practice of reflection on historical and other materials.[28] Here philosophy would not act

25. Joana Masó and François Tosquelles, *François Tosquelles. Soigner les institutions*, Arachneen, Paris, 2021, p. 85.
26. J. Medam, R. Dubillard and F. Guattari, *Recherches 1*, Federation des Groupes d'Etudes et de Recherches Institutionnelles, 1966, pp. 5–8.
27. 'La funzione trasversale', *A/traverso: rivista per l'autonomia,* January 1978; Gigi Roggero, *Italian Operaismo: Genealogy, History, Method*, trans. Clara Pope, MIT Press, Cambridge MA and London, 2023.
28. Peter Osborne, 'Philosophy After Theory: Transdisciplinarity and the New', in Jane Elliott and Derek Attridge, eds, *Theory After 'Theory'*, Routledge, London and New York, 2011, pp. 19–33; Peter Osborne, 'Problematizing Disciplinarity, Transdisciplinary Problematics', *Theory, Culture & Society*, vol. 32, no. 5–6, 2015, pp. 3–35, doi.org/10.1177/0263276415592245; Éric Alliez, 'Structuralism's Afters: Tracing Transcdisciplinarity through Guattari and Latour', *Theory, Culture & Society*, vol. 32, no.

as a metadiscourse, explaining the truth of others' research; rather, the resources proffered by the philosophical tradition make it well suited to reflect upon the most general categories that impose themselves across disciplines, in a given moment, and to attend to their transdisciplinary 'totalization'. The notion of transdisciplinarity at stake posits that there is a necessary moment of, on the one hand, 'transversality' of genuine research (in the sense that the concept or work exceeds and crosses established borders) and, on the other, a partial 'autonomy' of disciplines in their specificity. Genuine transversality is not a certain dilettantism, but rather arises through autonomous work taken to its limits. Such work would not be concerned with new and economically 'productive' ways to reshuffle the modern university in a multidisciplinary manner, but with the theoretical reformulation of new social and cultural problems that might only be properly posed or resolved 'politically', as something concerned at the limit with the reconfiguration of our social world. That is, it is a question of how studies of specific objects pursued to their limit open onto transdisciplinary concepts that might help give expression to political problems posed by our time, a matter as much of exigence (it is a necessity that imposes itself from outside the investigator) as of freedom (it is an essentially open problematization). So we conclude with an injunction towards a readiness and reflected understanding – one might call it 'maturity', following Adorno – that a common world is in its essence knowable, research communicable, and a negative judgement always possible on our institutions, which will never constitute an organic and immutable aspect of, let alone an identity with, our life.

5–6, 2015, pp. 139–58, doi.org/10.1177/0263276415594237; Stella Sandford, 'Contradiction of Terms: Feminist Theory, Philosophy and Transdisciplinarity', *Theory, Culture & Society*, vol. 32, no. 5–6, 2015, pp. 159–82, doi.org/10.1177/0263276415594238.



PROCEEDINGS

1

Peculiar institutions: anti-Blackness, instituent praxis and Black extitutions

NORMAN AJARI

Where are we with the theorization of the Black condition and experience? Contemporary Black thought is structured by the urging question of Black disposability. While the history of African subjugation and anti-Blackness is intertwined with the very trajectory of modern Europe and its colonies, recent events have conditioned a necessary reframing of these centuries-old questions in terms of life, death and survival. Mass incarceration, police brutality and homicidal vigilantism, combined with rampant economic and social inequalities, have induced a militant and theoretical diagnosis of Black overexposure to the risk of death and dying. This conjuncture has led to converging theorizations from authors with otherwise different theoretical backgrounds. Famously, in her 2007 book *Golden Gulag*, Ruth Wilson Gilmore defined racism as 'the state-sanctioned or extralegal production and exploitation of group-differentiated vulnerability to premature death'.[1] The recent research of Leonard Harris tends to corroborate Gilmore's orientation: 'Racism is always a function of the undue loss of life and health. ... The probability of death defines racism: who dies, who

1. Ruth Wilson Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California*, University of California Press, Berkeley, 2007, p. 28.

benefits from their deaths, who suffer undue short lives, and who are the targets of life-shorting acts.'[2] Conversations around the Afropessimist retrieval of Claude Meillassoux and Orlando Patterson's concept of social death have also contributed to this zeitgeist. The consolidation of a death-centred definition of racism alludes to conceptualizations of the Black experience as marked and affected by the proximity of death.

Pronounced Black death rates during the recent Covid-19 pandemic only strengthened the legitimacy of these theoretical endeavours. As Judith Butler recently remarked, in 'the United States, Black and Brown people have been three times as likely to become infected with the virus as white people, and twice as likely to die', before adding that, 'within the so-called common world the loss of Black life is simply not considered as worrisome or grievable as the loss of white life'.[3] According to the philosopher Tommy J. Curry, police killings and mortality due to the pandemic must both be analysed as part of a white supremacist and anti-Black social organizing. 'Racism utilizes social maladies as instruments of death. It is an organizing principle in Western societies that guides mortality and seeks to manage the growth of racial populations that compete with the dominant white populations through death.'[4] The most provocative aspect of the thought of authors such as Harris and Curry is that they combine analysis of racist life-shortening acts with a recognition of the white beneficiaries of this system, and thus acknowledge its deliberate and possibly architectonic character.[5] Although partial and of variable intensity, these convergences

2. Leonard Harris, *A Philosophy of Struggle: The Leonard Harris Reader*, Bloomsbury, London, 2020, pp. 84–5.
3. Judith Butler, *What World Is This? A Pandemic Phenomenology*, Columbia University Press, New York, 2022, p. 4.
4. Tommy J. Curry, 'Conditioned for Death: Analysing Black Mortalities from COVID-19 and Police Killings in the United States as a Syndemic Interaction', *Comparative American Studies*, vol. 17, nos 3–4, 2020, p. 261.
5. Norman Ajari, 'Née de la Lutte: La philosophie africaine-américaine face à la mort prématurée des Noirs', *Permanences Critiques* 4, 2022, pp. 63–71.

draw an image of thought about contemporary Black experience that relates to the intrinsic precariousness and vulnerability of Black existence in the twenty-first century. They form what I have called 'a necropolitical moment within Black studies and Africana thought'.[6] It is now impossible to pretend to ignore Black overexposure to violence and death.

This context has also permitted a renewed interest in one of the oldest core concepts of the Black radical tradition: abolition. In the late eighteenth century, the books of emancipated slaves Ottobah Cugoano and Olaudah Equiano laid the ground for future intellectual interventions calling into question the white supremacist status quo. Once used to target racial slavery as immoral and inhumane, the notion of abolition has become a rallying cry for those who seek to dismantle the carceral state and racist police. Nevertheless, as is often the case when a theoretical notion crosses the centuries, the exact modalities of this newer version of abolitionism often remain hard to grasp. Drawing inspiration from Ruth Gilmore, Black Canadian scholar Rinaldo Walcott connects abolition to the idea of communism: 'Abolition has come to occupy the place that the promise of communism once held for many of us … We do not just want to abolish the police and the courts; we want to abolish everything.'[7]

Given the enduring deprivation of any meaningful political power or capacity for self-determination for Black peoples in the USA and beyond, as well as the manifestations of expropriation, alienation and massacre targeting them, the desire to abolish everything or to wish for the *end of the world*, is anything but inexplicable. 'Black activists and theorists today often talk about "the end of the world". The only possibility of flourishing will be

6. Norman Ajari, 'Forms of Death: Necropolitics, Mourning, and Black Dignity', *Symposium: Canadian Journal of Continental Philosophy*, vol. 26, no. 1/2, 2022, p. 169.
7. Rinaldo Walcott, *On Property*, Biblioasis, Windsor ON, 2021, p. 14.

after the end of the world. Racism and other forms of domination so contaminate the world that only after it ends will we be free.'[8] More often than not, however, this effort of determinate negation is alluded to rather than explained and strategized. In fact, the very notion of abolition as it is used today feels torn between the manifest negative meaning its semantics express and many scholars' desire to tame this destructive revolutionary temptation. An example of the latter is the following quotation, whose source remains unclear, but is claimed to be Ruth Gilmore's: 'Abolition is about presence, not absence. It's about building life-affirming institutions.' Abolitionist activist adrienne maree brown comments as follows: 'Abolitionists know that the implications of our visions touch everything – everything must change, including us. In order to generate a future in which we all know we can belong, be human, and be held, we must build life-affirming institutions, including our movements.'[9] In a recent book, the Jamaican philosopher Lewis R. Gordon corroborates this orientation: 'Bringing forth Black consciousness requires offering the social world, the community across time, the power of possibility through commitment. The only way to combat the enemies of this movement is to build productive life-affirming institutions of empowerment.'[10] In the present order of Black knowledge, negative notions such as abolition and enmity tend to be deprived of their literal meaning and are replaced with metaphorical references to hope and collective self-improvement.

One of the most significant theoretical consequences of the pervasiveness of Black death and the deployment of the necropolitical turn within Black theoretical discourse has been the emergence of a new, reactional Black vitalism. 'Zones of Black

8. Vincent Lloyd, *Black Dignity: The Struggle Against Domination*, Yale University Press, New Haven CT, 2022, p. 94.
9. adrienne maree brown, *We Will Not Cancel Us, and Other Dreams of Transformative Justice*, AK Press, Edinburgh, 2020, p. 1.
10. Lewis R. Gordon, *Fear of Black Consciousness*, Allen Lane, London, 2022, p. 229.

Death have produced new states of being for Black life-forms',[11] Rinaldo Walcott writes. Black tortured flesh is no longer so much a testimony of white civil society's hostility as it is praised for its infinite plasticity and spectacular resilience.[12] Everything works as if the only way Black activists could criticize, attack and demolish oppressive realities is to look inward, resorting to self-reform and collective self-betterment. Direct confrontation with and condemnation of the white supremacist grip on our existence are thereby euphemized. The focus shifts from the unbearable structures of white supremacy to the moving survival efforts attempted by oppressed groups. The question of whether it is possible to build life-affirming institutions in a world that constantly affirms, consumes and enjoys Black death and dying remains unanswered; for it is not even properly raised.

It is, nevertheless, not so difficult to imagine what the recurring references to 'life-affirming institutions' might allude to in a context of subjugation. History is replete with examples of Black people regrouping, forming communities to ensure their survival and the preservation of their dignity – from maroon encampments and quilombos to Black churches and battalions. Oppressed colonized Blacks never ceased to affirm their lives in various creative ways, leading to what Cedric Robinson called 'the battle to preserve the collective identity of African peoples'.[13]

But what this battle rarely managed to achieve in the modern era was less the affirmation of their lives in a communal manner than the conquest of sovereignty or political autonomy. Were the precarious aggregates of vulnerable enslaved or colonized peoples, aimed at securing their survival, actual institutions? And, given the amount of violence they experience, are Black

11. Rinaldo Walcott, *The Long Emancipation: Moving Toward Black Freedom*, Duke University Press, Durham NC, 2021, p. 34.
12. Norman Ajari, 'Chair en Miettes: Pessimisme, optimisme et tradition radicale noire', *Multitudes* 89, 2022, p. 155.
13. Cedric J. Robinson, *Black Marxism: The Making of the Black Radical Tradition*, University of North Carolina Press, Chapel Hill, 2000, p. 132.

people today better able to transcend the immediate and emotional stage of community to build things like institutions? In order to answer these questions, I first turn to Roberto Esposito's 'instituent paradigm' and the inspiration he drew from Cornelius Castoriadis's philosophy. I then examine a possible limit of this theory under the form of the notion of 'the peculiar institution', which refers to racial slavery in the antebellum American South. Analysing this concept in light of Haiti's Baron de Vastey's writings on the colonial system, I insist on continuities between the 'peculiar institution' and the Black Power concept of 'institutional racism'. Finally, I turn to a too-often-overlooked tradition that was nevertheless very attentive to the dehumanizing potential of institutions: institutional analysis and psychotherapy. I will focus on one of its major proponents, Frantz Fanon, who embraced its theory and clinical praxis, while also witnessing its limitations in the face of the conjuncture of racist colonialism.

Roberto Esposito's instituent paradigm

Today's philosophical conversations regarding the notion of institution are heavily influenced by the Italian philosopher Roberto Esposito's reinvestment of the concept. Drawing from notable precursors such as Socialisme ou Barbarie's two most notable political philosophers, Claude Lefort and Cornelius Castoriadis, he insists on institutions as vehicles of human praxis in a context where there is considerable mistrust towards them. This movement relates to Black endeavours to theorize life-affirming institutions to the extent that Esposito's meditation draws inspiration from the ancient Roman notion of *vitam instituere*: to institute life. The Italian philosopher and the above-mentioned Black intellectuals share the idea of an intrinsic relationship between life and institutions under the guise of a reciprocal interaction. Commenting on the conjuncture of the pandemic, Esposito

writes: 'At a time when human life appears to be threatened and overpowered by death, our common effort can only be that of "establishing" it again and again. What else, after all, is life if not this continuous "establishment", the capacity to create ever new meanings.'[14] This speaks to two important points in Esposito's interpretation, the consequences of which I will unfold. First, he sees the institution as a kind of establishment of life. Second, he theorizes the institution as what allows this life to establish itself in a meaningful way and makes it significant.

Esposito's instituent paradigm is a plea against the opposition of life to institutions. In his book *Terms of the Political*, he invites us to renew our interpretations of the relation between powers and life and to move 'toward an affirmative biopolitics'.[15] We might see the development of his instituent thought as the fulfilment of this project. Esposito attributes to the Left the harmful habit of entertaining 'a rigid opposition between institutions and movements',[16] in which the latter is taken to be lifelike and reflexive, whereas the former is viewed as stiff and repressive. In philosophical terms, he invites us to overcome the divide between the interpretation of biopolitics as power over life – which in the post-Foucauldian context probably alludes to Giorgio Agamben – and another that theorizes a life intrinsically freed from powers, evoked by Antonio Negri. By contrast, instituent thought conceives life as formed by institutions but also instituting them in return. In that regard, the instituent paradigm is a political ontology of reformism built upon the refusal of both the complete rejection of the present order of things and the enthusiastic vitalism that propels us to revolutionize society.

14. Roberto Esposito, 'Vitam instituere', in Fernando Castrillón and Thomas Marchevsky, eds, *Coronavirus, Psychoanalysis, and Philosophy: Conversations on Pandemics, Politics, and Society*, Routledge, London, 2021, p. 87.
15. Roberto Esposito, *Terms of the Political: Community, Immunity, Biopolitics*, trans. Rhiannon Noel Welch, Fordham University Press, New York, 2013, p. 78.
16. Roberto Esposito, *Institution*, trans. Zakiya Hanafi, Polity, Cambridge, 2022, p. 10.

According to Esposito, both these more radical options are pathways towards autoimmune-like political self-destruction due to their neglect of the pivotal role institutions play in our social existence. Their respective focus on the absolute legitimacy of state power and the spontaneous creativity of life are both oblivious to institutions' lability and collective importance. 'The institution of life – its placement in a particular horizon of meaning – is not a subjective option available to us but a given, which qualifies human life with respect to other living species'.[17] In other words, the institution of life is an ontological human reality, not a contingent feature one could simply get rid of. Institution is an answer to the temptation of conceiving radical politics as the effort to absolutize one's programme or project. Its plasticity resists the desire to turn a project into a totality, annihilating inner tensions, conflicts and rival perspectives. A commentator summarizes the challenge of Esposito's instituent paradigm as an effort 'to try to think of a conflict that produces order and social unification starting from an ineliminable division. But it is precisely this – a challenge – the outcomes of which are not predictable, since they are always at risk of descending into absolute antagonism and into usurpation of the place of power by forces external to politics, such as the economy.'[18] What Esposito names 'instituent praxis' is thus not only a privileged form of the establishment of life but is the very essence of political life.

The second important dimension of Esposito's concept relates to questions of meaning and signification. According to instituent thought we are all born twice: first biologically, second symbolically with our appropriation of language. This concept of life is based on 'the symbolic character of a human existence

17. Ibid., p. 90.
18. Rita Fulco, 'A Political Ontology for Europe: Roberto Esposito's Instituent Paradigm', *Continental Philosophy Review* 54, 2021, p. 382.

inscribed in the fabric of its own historicity'.[19] This aspect of his thought is directly inspired by Castoriadis. According to Castoriadis, imagination is always-already instituent and institutions are always-already imaginative: 'The social being of society is the institutions and the imaginary social meanings that these institutions embody and make exist in social effectivity.'[20] Religion, family, business, but also (more deeply) the norm, articulated language or broader semiological systems, are all institutions that carry certain meanings. That is, they are based on a certain fundamental agreement as to what they mean. Moreover, every society is intrinsically historical, inscribed in history. On the one hand, meanings have been instituted in historical time and, on the other hand, they are destined to be reproduced in the present social space, with a view to a distant destination, 'a linear time and an infinite temporal horizon'.[21]

Theorists of instituent praxis see it as a collective, meaningful social construct. In Castoriadis's words:

> Institutions cannot be reduced to the symbolic but they can exist only in the symbolic; they are impossible outside of a second-order symbolism; for each institution constitutes a particular symbolic network. A given economic organization, a system of law, an instituted power structure, a religion – all exist socially as sanctioned symbolic systems.[22]

This notion of institutions as reciprocal social systems seems oblivious of some realities that can only be described as a collapse of meaning. As the Cameroonian philosopher Fabien Eboussi Boulaga remarked: 'What comes first for the *Muntu* [the relational human according to Bantu languages] is neither astonishment nor wonder, but only the stupor caused by total defeat.'[23]

19. Esposito, *Institution*, p. 94.
20. Cornelius Castoriadis, *La Montée de l'insignifiance*, Seuil, Paris, 1996, p. 223.
21. Cornelius Castoriadis, *Domaines de l'homme*, Seuil, Paris, 1986, p. 185.
22. Cornelius Castoriadis, *The Imaginary Institution of Society*, Polity, Cambridge, 1998, p. 117.
23. Fabien Eboussi Boulaga, *La Crise du Muntu: Authenticité africaine et philosophie*,

The profound shock and stupor experienced by racialized and colonized people confronted by white supremacist institutions have often been described but remain absent from the instituent paradigm. It is particularly interesting to confront this line of thought with slavery as an institution, since it was not a centralized state phenomenon, but rather a pervasive semiological system that tells a completely different story whether we consider it from above or from below.

From racial slavery to the proliferation of peculiar institutions

Esposito writes: 'At the heart of the instituent paradigm there remains the enigma of an antagonism internal to order, acting as its driving force rather than opposing it.'[24] Such an analysis shares a theoretical option characteristic of radical democracy,[25] but also one of its main blind spots. They both fictionalize a world of equal subjects, marked by both associations and dissociations but devoid of any form of ontological inequality. By contrast, we should consider the possibility of a second enigma lying at the heart of the instituent paradigm, that of the existence of dehumanized beings whose function and persistence are integral to the life of many institutions throughout the modern era. In other words, beneath the pleasant surface reality of meaningful institutions, there could very well exist an infra-symbolic order, a reign of pure violence and consumption that the institution needs to sustain itself. Racial slavery provides us with a striking example of such a phenomenon.

Présence Africaine, Paris, 1977, pp. 15–16.

24. Esposito, *Institution*, p. 38.

25. See for instance Chantal Mouffe: 'Instead of trying to bring about a consensus that would eliminate the very possibility of antagonism, the crucial task both in the domestic and international domain is to find ways to deal with conflicts so as to minimize the possibility that they will take an antagonistic form.' Chantal Mouffe, *Agonistics: Thinking The World Politically*, Verso, London and New York, 2013, p. 23.

In 1956 white American historian Kenneth M. Stampp penned *The Peculiar Institution: Slavery in the Ante-Bellum South*. According to the author, Deep South whites routinely used the phrase 'peculiar institution' to refer to slavery. A core tenet of Stampp's definition is that, as an institution, slavery is not peculiar in the sense that it stands outside of the everyday course of ordinary people's lives. On the contrary, it draws from the habits and traditions of white Southerners. Contrary to a cliché, the phrase does not express the surprise of Northerners or foreign travellers confronted by the oddness of the planters' way of life, but Southerners' own understanding of the impact of racial slavery on their communities and society. Stampp describes how white Southerners turned slavery into a way of establishing their own lives, into a life-affirming institution. He writes:

> Slavery, now an integral part of the southern way of life, was to be preserved, not as a transitory evil, an unfortunate legacy from the past, but as a permanent institution – a *positive good*. To think of abolition was an idle dream. Now even native Southerners criticized the peculiar institution at their peril. Finally by the 1830s slavery had assumed the rigidity of an entrenched institution.[26]

The peculiarity of this institution does not reside in its outstanding character but in its functioning according to its own specific set of rules and due to its foundational character for the social order in its totality. In other words, it is not peculiar because it is curious, rare and unseen but because the exception allows the rule to exist.

If the phrase 'peculiar institution' belongs to the antebellum American South, the reality it describes – the institutional, foundational and ontological character of racial slavery – goes way beyond this specific location. More than a century before Stampp's book, a Haitian intellectual published the first-ever

26. Kenneth M. Stampp, *The Peculiar Institution: Slavery in the Ante-Bellum South*, Vintage Books, New York, 1956, p. 28.

theoretical analysis of slavery from the perspective of its Black victims. Jean-Louis Vastey, better known by his pen name Baron de Vastey, published *Le système colonial dévoilé* in 1814 in an attempt to dispel the calumnies spread about the newly independent Blacks by the former colonists of Saint-Domingue. Above all, the book is an illustration, exploration and theorization of the institutional, violent racial dynamics at stake in the colony. This relentless indictment is the result of an investigation including interviews with former slaves. He even puts his own grandfather, the coffee planter Pierre Dumas, in the dock. In Vastey's eyes, the *Code noir* is a mere legal document that does not adequately capture the empirical everyday realities of enslavement with its quasi-infinite instituent imagination when it comes to venereal vices and torture devices.

> Degraded to a condition below that of domestic animals, our precarious life subject to the whims of a barbaric master, half-covered with miserable rags and tatters, gnawed by hunger, bent under the whip of a ruthless slave driver, we worked the land, watering it with our sweat and our blood, all to gratify the colonist's arrogant sensuality and his avarice.[27]

These two notions of avarice and sensuality relate to the two primordial economies upon which the very institution of slavery is predicated. The first is, of course, the commercial economy which led numerous European aspiring businessmen to move to the colonies in the hope of making a fortune. However, the second may be even more consequential to Vastey's analysis. Sensuality relates to the profound libidinal economy that overdetermines most colonial interactions and institutions. Rape and gruesome torture targeted at both slaves and free people of colour are not isolated cases but a form of cultural expression and an intrinsic part of the colony's quotidian.

27. Baron de Vastey, *The Colonial System Unveiled*, trans. Chris Bongie, Liverpool University Press, Liverpool, 2014, p. 107.

The Baron de Vastey initiates a new form of institutional critique born of struggle, derived from the experience of the colonized, and is foundational to the Black radical tradition. Its ethics stems from the experience of racial subjugation and violence. According to the views expressed in my book *Dignity or Death*, such an ethics relates primordially to the opposition between people who are labelled as humans, on the one hand, and people theorized as sub- or inhuman, on the other. Ethical conflicts arise when a doctrine or social conjuncture is threatened by groups that were originally considered as elements of décor aimed at valorizing the others' humanity. As a consequence, the critique Vastey and others address to peculiar institutions does not raise the question of exclusion and inclusion. Such a framing would presuppose that an institutional structure innately designed to produce a morbid relationality between the human and the inhuman could simply incorporate the formerly dehumanized resort to a bunch of internal adjustments and reforms. But that is not what happened. White Southerners and French colonists experienced the peculiar institution as the very heart, the inner substance, of the polity to which they belonged. This primordial attachment raises questions concerning what happens when it comes to be abolished. According to scholars such as Aurelia Michel, it is at that point that race and racism tend to occupy a central institutional and interpersonal role in an attempt to fill the void left by the peculiar institution's demise.[28] In other words, it is a shift from the peculiar institution to what, in a famous book, Kwame Ture and Charles Hamilton label 'institutional racism':

> Institutional racism relies on the active and pervasive operation of anti-black attitudes and practices. A sense of superior group position prevails: whites are 'better' than blacks; therefore blacks should be

28. Aurélia Michel, *Un Monde en Nègre et Blanc: Enquête historique sur l'ordre racial*, Seuil, Paris, 2020.

> subordinated to whites. This is a racist attitude and it permeates the society, on both the individual and institutional level, covertly and overtly... Black people are legal citizens of the United States with, for the most part, the same *legal* rights as other citizens. Yet they stand as colonial subjects in relation to the white society. Thus institutional racism has another name: colonialism.[29]

Said otherwise, peculiar institutions are not dead. A peculiar institution is an institution whose symbolic dimension is experienced as violence and injury by a degraded genre of humans that this institution contributed to produce.

As a proponent of the instituent paradigm, Esposito overlooks the way racism may have structured institutions at their core. In *Institution* he formulates a thin definition of racism, theorizing it as both an external and an excessive phenomenon rather than an intrinsic component of Western polities at large. 'What is racism, for that matter, if not an idea of life flattened entirely onto the bodily plane or made equivalent to the color of the skin?'[30] However, race is not a mere pathology of vitalism. Race and Blackness have been, and remain, important modalities of dividing the world in terms of degrees of humanity and inhumanity. Nevertheless, contemporary critical theorists and philosophers of institution and instituent praxis have remained largely unaware of how the historical phenomenon of racialized dehumanization affects our understanding of the very nature of institutions. We expend a whole lot of effort to picture racism as a contingent feature of our societies, despite the remarkable constancy of both inequalities and senseless acts of violence. As Tommy Curry writes:

> Black Americans are meant to die from health disparities and disease deliberately, and white democratic societies create these conditions to increase the likelihood that Black people remain an

29. Kwame Ture and Charles V. Hamilton, *Black Power: The Politics of Liberation*, Vintage, New York, 1992, p. 5.
30. Esposito, *Institution*, p. 92.

> impoverished and inferior racial stock – or ultimately more likely to die.[31]

This necropolitical dynamic is in the background of our institutional efforts. However, we refuse to consider the possibility that these deaths and inequities may be aimed at achieving something for the benefit of the white population. In addition, just as was the case in Vastey, it exhibits a strong libidinal dimension as well. That is why Frank Wilderson described Negrophobia as 'life-affirming' for white communities. It has become a basic constituent of existence, where 'the jouissance that constitutes the violence of anti-Blackness secures the order of life itself, sadism in service to the prolongation of life.'[32]

Frantz Fanon beyond institutional analysis

Unlike the political philosophers of instituent praxis, a certain intellectual and clinical trend of the twentieth century was particularly vigilant in appraising the dehumanizing potential of institutions. Despite the highly influential thinkers among its ranks, such as Jean Oury, Félix Guattari or Frantz Fanon, institutional analysis or institutional psychotherapy as a movement is very little acknowledged in current conversations on institutions. Catalan psychiatrist and left-wing activist François Tosquelles initiated this reflection in the French hospital of Saint-Alban in the rural southern department of Lozère. The movement is rooted in the experience of the Second World War, when many doctors, therapists and nurses experienced confinement in military prisons or concentration camps. It led them to consider the striking similarities between these carceral institutions and asylums. They understood the negative impact the complete abolition of one's freedom may have on mental health, ruining

31. Curry, 'Conditioned for Death', pp. 266–7.
32. Frank B. Wilderson III, *Afropessimism*, Liveright, New York, 2020, p. 92.

any well-intended therapeutic effort. With clear reference to historical phenomena of racial subjugation, psychiatrist Jean Oury described the project as follows:

> Where it is developed, we could define institutional psychotherapy as a range of methods meant to resist everything concentrationary. 'Concentrationary' is an old word – we now talk about 'segregation'.[33]

The phrase 'institutional psychotherapy' refers both to the capacity of the institution to provide some form of mental healthcare and to the necessity of a permanent cure of the institution itself. Guattari is adamant: 'one could not envisage a psychotherapeutic treatment for seriously ill patients without taking charge of the analysis of the institution.'[34]

An admission of the potentially pathogenetic character of the therapeutic context is not without consequence for psychoanalytic theory itself. The attention to social and political conditions renders the biographical and familial orientations of psychoanalysis insufficient. The patient must be considered in relation to the world, to society and to their own subjectivity. The consequence is a new definition of the very notion of the symptom. It is neither what it is in classic medicine – the visible manifestation of an anomaly – nor the involuntary expression of an unconscious desire as in Freudian psychoanalysis. It is a form of creation, something the patient creates and invents. It must affect the institution and be taken into account by it. One must understand the institution as a *transferential constellation*: a multiplicity of opportunities of transference offered to the patients. In psychoanalysis, transference is 'the process through which unconscious desires are actualized on certain objects… It is a repetition of infantile prototypes experienced with a marked

33. Jean Oury, *La psychothérapie institutionnelle de Saint-Alban à la Borde*, Éditions d'Une, Paris, 2016, p. 9.
34. Félix Guattari, *Psychanalyse et transversalité. Essais d'analyse institutionnelle*, La Découverte, Paris, 2003, p. 40.

actuality.'[35] Said otherwise, repressed affects, buried in the unconscious since childhood, resurface and focus on some present object. In the classic analytic cure, the object par excellence of transference is the analyst, but institutional therapy considers all members and users of the institution as potential objects of transference. Patients must participate in activities, decisions and community life. The traditional asylum desocializes, even though psychosis itself is a disease of desocialization. It should therefore not be accentuated but, on the contrary, fought. Movies, sports, arts, work enrich patients' lives. The analyst is no longer an interpreter in charge of the hermeneutics of the unconscious. Their role is to make existence bifurcate.

Frantz Fanon was Tosquelles' intern at Saint-Alban and the entirety of his psychiatric thinking is under the influence of Tosquelles' teaching and clinical practice. It was therefore only natural that he applied these methods to his first assignment as head doctor at the hospital of Blida, Algeria. There he was assigned two distinct medical pavilions: the European women's and the Arab men's. Working with the white women, his use of institutional analysis and occupational psychotherapy was extremely successful. His contact with Algerian males was more difficult, however. At first, along with his intern Jacques Azoulay, he came to the realization that the activities and animations they routinely proposed to these patients were completely disconnected from their cultures, habits and world-views. For instance, if theatre had a relevant cultural meaning to white women, it was completely foreign to Arab men and therefore could not be used as a suitable therapeutic tool. In order to correct their initial misconception, Fanon and Azoulay travelled throughout Algeria, investigating traditional healing practices and Islamic perspectives on health, constructing what is arguably

35. Jean Laplanche and Jean-Bertrand Pontalis, *Vocabulaire de la psychanalyse*, Presses Universitaires de France, Paris, 2007, p. 492.

the first prototype of what we now call 'ethnopsychiatry'. Crafts and theatre were replaced by traditional storytelling and football games with far greater success. Nevertheless, more often than not, apparent success in improving patients' mental health was short-lived. After more or less long periods of calm, the patients would relapse and end up back in hospital. According to some of Fanon's colleagues, this was due to the very physiology of Africans, which they described as inherently prone to such psychic collapses.

This interpretation was not the one Fanon privileged. Soon enough, he came to the realization 'that colonialism in its essence was already taking on the aspect of a fertile purveyor for psychiatric hospitals', as he writes in *The Wretched of the Earth*.[36] The permanent transformation of the institution is not enough when an entire society functions as a massive enterprise of destruction for racialized people's mental health. This was one of the major catalysts for Fanon's joining the Algerian anticolonial movement. In his letter of resignation, later published under the title 'Letter to the Resident Minister', Fanon addresses the practical impossibility of institutional analysis benefiting racialized subjects in a society defined by institutional racism.

> It was an absurd gamble to undertake, at whatever cost, to bring into existence a certain number of values, when the lawlessness, the inequality, the multi-daily murder of man were raised to the status of legislative principles. The social structure existing in Algeria was hostile to any attempt to put the individual back where he belonged... The function of a social structure is to set up institutions to serve man's needs. A society that drives its members to desperate solutions is a non-viable society, a society to be replaced.[37]

36. Frantz Fanon, *The Wretched of the Earth*, trans. Constance Farrington, Grove Press, New York, 1963, p. 249.
37. Frantz Fanon, *Toward the African Revolution*, trans. Haakon Chevalier, Grove Press, New York, 1967, p. 53.

In sum, radical upheaval, not gradual reform, is the only viable response to institutional racism. Not only did institutional psychotherapy set itself the impossible ambition of curing indigenous people who were ill from the effects of colonialism without attacking its causes, but it was also necessary to envisage the possibility that this place, which dreamed of being a tribute to local forms of life and thought, could constitute a stronghold of colonial hegemony. Social inquiry must therefore take place outside the walls of the institution: the role of a doctor cannot be to prepare a patient to accept the social pathologies of colonialism.

Extitutions

Institutional analysis proves the existence of life-affirming institutions and the systematic attention it requires. Tosquelles' and Oury's psychiatric hospitals are admirable examples of both the necessity and the potentiality of instituent praxis. However, the life they affirm is not Black. They do not affirm the lives of the colonized as Fanon witnessed during the Algerian War. It seems that groups deprived of any right to self-determination and autonomy, for often they are deemed less than human, cannot benefit from institutions. As a consequence, we should ask ourselves: are organizations created to 'replace society' – to use Fanon's phrase – actual institutions? Are anti-colonial liberation fronts, Black revolutionary parties and other organizations defending the collective interests of racially dehumanized groups, institutions? According to Esposito, the 'primary task of institutions is to allow a social ensemble to live together in a given territory, but also to ensure continuity throughout change, by extending the lives of parents into those of their children'.[38]

38. Esposito, *Institution*, p. 3.

A people or a group without a territory and deprived of any capacity to ensure the future of their children cannot form institutions. To collectively conquer the very capacity to create, entertain and care for such institutions was the very object of the Black Panther Party's 'Ten-Point Program', which Huey Newton labelled as a 'survival program'. In other words, the party itself was merely a remote condition of possibility for an imagined institution, but not the institution itself. To describe what such organizations are, I am tempted to resort to a neologism and to label them as *extitutions*. This notion would be a way of naming a possible manifestation of Cedric Robinson's famous definition of the Black radical tradition as 'the continuing development of a collective consciousness informed by the historical struggles for liberation and motivated by the shared sense of obligation to preserve the collective being, the ontological totality'.[39] Extitutions are concentrations of militant force whose primary goal is to fracture totality. Their aim is to establish an autonomous particularity in contexts and conjunctures where it is never allowed and sometimes not even conceivable. They may provide us with another strategy of thought to connect the contemporary resurgence of the concept of abolition and the long history of Black ideas that preceded it.

39. Robinson, *Black Marxism*, p. 171.

2

Patrimony and the legal (de)institution of subjectivity

MICHELE SPANÒ

The title of this essay was suggested to me by the editors of this volume.[1] I realize that not only is it a particularly apt and relevant title, but it is also the affirmative formulation of an alternative title which, speculatively, could have read: '*Zweck-vermögen* and the Legal Destitution of Subjectivity'. The reasons for this second title will be quickly understood.

There is a strong relation between the theme of this collection and my most recent research, collected in an Italian volume, which revolves around what I call an 'archaeology of subjective law'.[2] With subjective rights, I have tried to identify the true principle of individuation of modern private law: through it and thanks to it, the form of juridicality and the form of individuality overlap and become inseparable. It is because of this formal and ideological hegemony of subjective rights that everything that is more than one – be they subjects, rights or interests – does not enter and cannot enter the sphere of law. To do so,

1. This text closely follows my intervention at the conference. I have maintained a certain spoken tone and style: *stringato* and allusive. The conference served to incubate a larger study on the topic published in Italian as 'Zweckvermögen. Contributo alla destituzione giuridica del soggetto', *Politica & Società* 3, 2022.
2. Michele Spanò, *Fare il molteplice. Il diritto privato alla prova del comune*, Rosenberg & Sellier, Turin, 2022.

such a multiplicity must first be constrained and reduced to the logical form of unity and the individual.

Instead of presenting some of the results of this somewhat pretentiously titled 'archaeology of subjective rights', here I will rather draw from an ongoing investigation into a possible technique of sabotage of subjective rights, or, to put it in other terms, of a legal *destitution* of the subject. I will deal with an institution known as *Zweckvermögen,* or 'property with a specific purpose'. I focus on the nineteenth century and mainly on the work of private law jurists, largely Germans, who were part of that movement known as the Historical School of Law. More specifically, I deal with a particular Franco–German dialogue. The issue is: what relationship exists between the juridical construction of property and the institution of the modern social relationship of capital? More generally, this involves an inquiry into the quality and consistency of juridical abstraction, its history and ways of making history. What part does juridical abstraction have in conditioning the idea we still have today of politics and political subjectivity?

Let us begin with property. Property is the legal institution that allows for the encounter between subject and object, between person and thing, through the medium of will. Property, through instituting an identity of juridical personality and patrimonial capacity, is what allows us to affirm that in the history of modern law *there is never law without a subject.* Before trying to understand how, and by what technical manoeuvres, *Zweckvermögen* works to break or undermine this device, it is appropriate first to take what might appear to be a long step back. However, in the world of law, it is a rather short and almost obvious step: the step back to Rome.

Why? Because the juridical construction of modern patrimony, as in the case of all institutions that still form the basis of civil-law legal systems, has depended on a fundamental reinterpretation and creative reuse of classical Roman law. I do not

have space here to dwell on this crucial point, but it is important, especially in a volume dedicated to the relationship between philosophy and law, to emphasize the *special historicity of legal science* and thus the way it has understood its dual character as both a historically determinate knowledge and a technique with a virtually universal vocation. That is, it is important to emphasize the special historicity of its technical and operational products: those that legal science first called 'institutes' and then 'dogmas'. Following this thread, we can question, on the one hand, the concept of tradition – and the role it plays in the self-understanding that jurists have of the historicity of their knowledge – and, on the other hand, how it is possible that the ideals that regulate and order contemporary economic and social relationships depend so essentially on the re-functionalization by German jurists in the nineteenth century of concepts and institutions that first emerged in Rome some two thousand years ago. This is a broad programme that can only be evoked here as the general background of a more circumscribed investigation. However, to approach our object, we may limit ourselves to the formula, suggested many years ago by Aldo Schiavone, of a 'Roman-bourgeois private law'.[3] This provides a rough idea of the way Continental jurists operated in the nineteenth century and of those particular operations to which they subjected the institutes of the *Corpus Iuris Civilis*, making them the legal grammar or *infrastructure* of the modern capital relationship.

And what of patrimony? In an exemplary essay, Yan Thomas sheds light on the posthumous construction of patrimony.[4] It is something that, upon closer examination, is absent from Roman sources as such. Patrimony, in other words, is in fact a typically modern and typically bourgeois institution that orders

3. Aldo Schiavone, *Alle origini del diritto borghese: Hegel contro Savigny*, Laterza, Rome and Bari, 1984.

4. Yan Thomas, '*Res*, chose et patrimoine (Note sur le rapport sujet-objet en droit romain)', *Archives de philosophie du droit* 25, 1980, pp. 413–26.

and restructures the relationships between rights and subjects, between person and thing, in the naturalized form that appears familiar to us. The salient points of Yan Thomas's argument are as follows. First, he emphasizes the absolute modernity of the metaphysics that divides subject from object and hence the logical necessity to recognize in patrimony that middle term thanks to which the subjective activity of the owning person can be projected onto the objective passivity of the things possessed, articulating the legal relationship – the right – that links a subject to their property. Second, patrimony expresses the typically modern relationship between a thing – in its three variants of *Sache*, *Gegenstand* and *Vermögen* – and subjective right. It is from this observation that Yan Thomas can ask if it is ultimately possible to separate the *res* (the thing) from subjective right. That is, he asks whether there exists an alternative legal system in which a thing or an object can do without the subject of law, which, starting from modernity, constitutes its indispensable logical condition. According to Yan Thomas, it is precisely Roman law – the law on which the idea of modern patrimony is supposed to be based – that embodies this alternative system. In it, the thing (*res*) is always an object of litigation and never directly the good or set of goods of a subject. The example given by Yan Thomas in support of his thesis is particularly eloquent: the Roman *res familiaris* does not in fact designate a patrimony, but rather a legal proceeding that concerns the goods of a *pater familias*. It is an example that demonstrates the strong relation of dependence that existed in Roman civil law between goods and personal statuses. The conclusion of Yan Thomas's investigation is that it is therefore impossible to think of Roman legal devices in terms of the modern opposition between subject and object. However – and here is the paradox of tradition that remains to be resolved – this has been precisely the operation undertaken by modern jurists: to project onto classical Roman law a typically modern exigency and

to use Roman tools and categories to create something genuinely new, such as the modern institution of patrimony.

To observe this in a case as symptomatic as it is exemplary, it will suffice to open a page from one of the masterpieces of German nineteenth-century legal science: Bernhard Windscheid's *Lehrbuch des Pandektenrechts.* On a page in the posthumous edition, edited by Theodor Ripp in 1906, we can read this lapidary statement: 'Die Rechte haben seine Subjekt' (Rights have a subject).[5] It is a proposition that confirms and condenses the indissoluble link between subject and object mediated by subjective rights and patrimony, so typical and decisive for legal modernity. However, this apparently irrefutable statement is contrasted by a footnote written by the editor Ripp, which reads: 'Die Frage nach der juristischen Möglichkeit des Bestehens von Rechten ohne Subjekt ist noch immer umausgetragen' (The question of the legal possibility of the existence of rights without a subject is still unresolved).[6] It is clear, therefore, that even in the pages of the book that, perhaps more than any other, has contributed to fixing the authentic interpretation of modern private law, we are faced with one of those typical 'vacillations' that punctuate the entire history of the modern legal tradition.

What I would like to submit to you is an exercise: to address the question that opens Yan Thomas's essay – 'Can we conceive of another system where our artefact of the legal subject is not presupposed?' – to the same modern tradition of private law that, as we learned from Yan Thomas himself, instituted it for the first time, making it decisive for our experience of politics and our conception of subjectivity.[7] It is now appropriate to investigate more closely the formation of this tradition as the emergence and consolidation of a modern theory of patrimony through

5. Bernhard Windscheid, *Lehrbuch des Pandektenrechts* (1906), Scientia Verlag, Aalen, 1984, p. 220.
6. Ibid.
7. Yan Thomas, '*Res*, chose et patrimoine', p. 414.

a singular Franco–German dialogue. Its origin can in fact be traced back to the work of two French jurists, Charles Aubry and Charles Rau, professors of civil law in Strasbourg. They are responsible for the translation of a volume by the German jurist Karl Zachariae, the *Handbuch des französischen Civilisrecht* (1st edn, 1827). Aubry and Rau translated the 5th edition of his volume in 1838 under the title *Cours de droit civil français* with an explicit reference to Zachariae's book, one which would later be lost as their volume took its own course and became a classic in its own right. If I have dwelt so long on this editorial story it is to emphasize a curious fact. It is very interesting that, even though legal historiography often inclines towards nationalism, the modern theory of patrimony finds its place precisely in the French translation of a book by a German jurist dedicated to commenting on the French *Code civil*; an interesting shortcut that deserves, I believe, more in-depth investigation. In any case, it is in this text that a fully subjectivist theory of patrimony is illustrated in its clearest and unequivocal form. It establishes the inseparable connection between juridical personality and patrimonial capacity, between the unity and uniformity of patrimony. The fundamental elements of the theory can be summarized as follows: every person has a patrimony; every person has only one patrimony; every patrimony belongs to one person. The unity of patrimony is justified by the possibility of reducing property and obligations to their economic quantifiability, to their nature as capital. Patrimony is therefore purely abstract: it is nothing more than the projection of personality in relation to goods. This is in effect the crucial element, reiterated countless times by Aubry and Rau as the circular connection that passes – and cannot but pass – between a subject and their right, between a person and their patrimony. Intermediate or other situations are not allowed. Two equally decisive theses are based on this major premiss: one, patrimony is indivisible; two, patrimony is

not acquired. It is, on the contrary, necessarily implicated with juridical personality. This is how Aubry and Rau can conclude that even the destitute – those who, strictly speaking, own nothing – still possess a patrimony.

It is needless to emphasize the formidable implications of this theory for the institution of the social relation of capital. It is enough to consider how the construction of the destitute's patrimony will play a part in the qualification of the labour relationship as a species of exchange contract. I cannot dwell on this, but it is crucial to grasp that two decisive elements for the history of modern capitalism are fixed in this passage: the possibility of separating the critique of exploitation from the juridical form that interprets the labour contract according to the ideology and technique of contractual freedom;[8] and the crucial role played by the form of juridical subjectivity in sustaining the capital relationship.[9]

The last and undoubtedly decisive step in the constitution of the modern theory of patrimony is due to the father of the Historical School, Friedrich Karl von Savigny. In his masterpiece, the *System of Modern Roman Law* (1840–49), the modern face of patrimony is fixed and almost sculpted. Not only that: it is in this same work that those vacillations take root, a fundamental echo of which we recognized in the page of Windscheid that we used as a threshold to access the modern patrimonial tradition and the ambiguities that run through it. Paragraph 53 of Book I of the *System*, 'On the Different Types of Juridical Relationships', expounds the reasons why patrimonial law must be unified. Patrimony is considered as the fruit of the extension of individual willpower, which is to say as the set of rights over things (property) and the actions of other subjects (obligations).

8. Mikhail Xifaras, 'Illégalismes et droit de la société marchande, de Foucault à Marx', *Multitudes*, vol. 2, no. 59, 2015, pp. 142–51.
9. Christoph Menke, *Kritik der Rechte*, Suhrkamp, Frankfurt am Main, 2018.

What, however, makes property and obligations unifiable? Their reducibility to a quantity of money. Both personal and real rights can be reduced to purely economic quantification. Patrimony is therefore one – and only one – because everything that composes it can be reduced to exchange value. Savigny includes every relation mediated by money in the purely formal conceptual pair that articulates freedom and dominion. Objective law has the function of guaranteeing freedom and the protection of possession of things by regulating only their forms of declaration. On the subjective side, therefore, the will is not free to objectify itself except in the forms already prepared by objective law. The machine of subjective rights is here fully in motion: autonomy of the will and the legal system reproduce exchange as the typical form of every social relationship thanks to the unity of patrimony.

With Savigny, an absolute and formal equivalence between person, patrimony and capital is established, which Aubry and Rau only announced with their pages dedicated to patrimony. The apparently insoluble connection between law and subject seems to be fixed once and for all. We are, so to speak, precisely in the situation described by Yan Thomas: a legal system in which a thing cannot exist without the protection of a subject. It is therefore worth raising a question that was also his: are there alternatives? If I have insisted so much on the vacillations that punctuate the emergence of a modern theory of patrimony – and more generally the development of the modern legal tradition – it is because these will immediately become the object of heated debate. Let us remember the gloss that Ripp appended to the text of Windscheid: can there be rights without a subject? Can there be patrimonies without will? These apparently rhetorical questions will occupy many nineteenth-century jurists after Savigny. Despite the theory appearing to be defined, they will immediately begin to question it and occasionally put it in crisis. The textbook

case that will continue to interest them is that of the *eredità giacente* (unclaimed inheritance). Through the many investigations into this exemplary case study, Roman civil law itself – and subsequently mediaeval common law – will reveal within its midst infinite patrimonial situations as well as infinite schemes for the attribution of property rights that do not at all correspond to the apparently crystalline schema that requires that for every right there is, and cannot not be, a subject.

In 1960 the great Italian legal historian Riccardo Orestano dedicated an extremely important essay to this history, 'Diritti soggettivi e diritti senza soggetto. Linee di una vicenda concettuale' (Subjective rights and rights without subject: lines of a conceptual story), which still awaits the continuation it deserves. It is enough, however, to turn to Yan Thomas's studies on the vanished community[10] or Feenstra's on the history of foundations,[11] to Torre's on the confraternities of the *ancien régime*,[12] or even to Orestano's research on objective imputations and foundations in classical Roman law,[13] to gain access to a substantial counter-history of the modern relationship between subject and object that patrimony would have fixed once and for all. Here we limit ourselves to considering only contemporary responses to the emergence of the hegemonic theory of patrimony. Windscheid himself can be considered the initiator of a reflection on the hypothesis – and admissibility – of rights without a subject. Zitelmann will speak of will without a body.

10. Yan Thomas, 'L'extrême et l'ordinaire. Remarques sur le cas médiéval de la communauté disparue', in Jean-Claude Passeron and Jacques Revel, eds, *Penser par cas. Raisonner à partir de singularités*, Éditions de l'EHESS, Paris 2005, pp. 45–73.

11. Robert Feenstra, 'L'histoire des fondations. À propos de quelques études récentes', *Tijdschrift voor Rechtgeschiedenis* 24, 1956, pp. 408–33.

12. Angelo Torre, '"Faire communauté". Confréries et localité dans une vallée du Piémont (XVIIe–XVIIIe siècle)', *Annales: Histoire, Sciences Sociales*, vol. 1, no. 62, 2007, pp. 101–35.

13. Riccardo Orestano, 'Beni dei monaci e monasteri nella legislazione giustinianea', in *Studi in onore di Pietro De Francisci*, vol. III, Giuffrè, Milan, 1956, pp. 563–93; *Il problema delle fondazioni in diritto romano*, Giappichelli, Turin, 1959; 'L'assimilazione canonistica degli enti ecclesiastici ai pupilli e la sua derivazione romanistica', in *Études d'histoire du droit canonique dédiées à Gabriel Le Bras*, vol. II, Sirey, Paris 1965, pp. 1353–7.

Jhering in an essay, 'Passive Wirkungen der Rechte' (Passive effects of rights, 1873), which deserves much more attention, will formulate the hypothesis of interests without will. Yet in all these cases, as noted by Orestano himself, the formulations or systems proposed fail to resolve the antinomy represented by the problem of rights without subject.[14] They are solutions that mostly limit themselves to personalizing patrimony while waiting for the entitled subject to appear.

The only proposal capable of opening a genuinely new speculative and technical space, and thus capable of accommodating a radically unprecedented problem, is the theory of *Zweckvermögen*. It is a theory whose most consistent exposition is due to Alois Brinz (1820–1887) as presented in his *Lehrbuch der Pandekten* (1857–71). The theory is also present in the writings of Ernst Immanuel Bekker (1827–1916) in his *System des Heutigen Pandektenrechts* (1886) and in *Zur Lehre vom Rechtssubjekt* (1871). But Brinz is certainly its most gifted and innovative interpreter. The development of his thesis begins with a critique of fiction. Brinz proposes to distinguish between fiction and personalization in order to think about patrimony outside the binary relationship with the person. To do this, he rejects the idea of identifying patrimony with a thing in the sense of the German *Sache*, which, in the modern legal system, would be destined for personalization, as a moment of the dialectic of subjective right. Rather, he considers it an object/thing in the sense of *Ding*. Brinz thus opposes a purely subjective theory of patrimony with a thoroughly objective one, halting the mechanism that forces us to link an object to a subject and a certain number of goods to a person.

According to Brinz, this necessity can be contested and revoked. For him, the entire plane of consistency of the

14. Riccardo Orestano, 'Diritti soggettivi e diritti senza soggetto. Linee di una vicenda concettuale', *Jus. Rivista di scienze giuridiche*, vol. 11, no. 1, 1960, pp. 149–96.

discussion must be shifted from the issue of ownership to that of function. Brinz no longer asks 'to whom' something belongs or 'whose' patrimony it is, but 'for what' (*wofür*) it is. He replaces the person with the purpose. With Brinz, we are outside the discussion of ownership classically expressed in terms of personalistic specification – 'something belongs to someone' – and instead find ourselves on a new and purely impersonal plane: 'something is for something'. Linguistically speaking, we can consider it as a predicate that, in order to signify, does not need a subject. The link between property and ownership is no longer in play. Brinz opposes the question of the thing (*Sache*) with that of the cause: now something not only does not belong to anyone but strictly speaking does not *belong* at all. It is there *for something.* The discussion finally moves to a plane of pure immanence that is at the opposite pole of the transcendent subjective will projected onto an inert and appropriable matter. It seems, in short, that we have located an institutional possibility that approximates the situation to which Yan Thomas alluded and that modernity would have sought to exorcize by all means: a legal system in which our artefact of the legal subject is no longer presupposed.

It is worth remembering that it is precisely the primacy of function over ownership that provides the specific difference of what contemporary private law theory calls 'common goods' (*beni comuni*). Perhaps it may not appear entirely coincidental that in one of his early studies dedicated to water rights in Roman law, *Zur Lehre von den Wasserechten* (1850), discussing the ownership of the waters of a river that flows between different properties, Brinz rejects the alternative between public ownership and private ownership by introducing the hypothesis of *Gemeinschaftliches Wasser* (common waters).

We should ask ourselves how much of this alternative theory, which subsequent law has mostly ignored, could be useful or vital for thinking today about certain legal impasses that weigh

on subjectivity and its relationship with property and with the most recent metamorphoses of the social relation of capital. As counterintuitive as it may seem, it is interesting to observe that the *Nachleben*, or afterlife, of the *Zweckvermögen* has found its preferred place in commercial law and in the discussion on the legal nature of the corporation and the joint-stock company. We can say more: it is precisely from a certain *inoperativity* of the device of subjective rights that it is perhaps possible to trace a separation between civil law and commercial law. As the great and nonconformist Italian commercial law scholar Paolo Ferro-Luzzi wrote, the 'subject-based system' and the idea of property that constitutes its fundamental pillar make no sense when applied to the legal problems of the corporation.[15] In fact, in the law that concerns it, it is the notion of activity – and not that of act – that organizes all legal grammar. The corporation is a very singular legal animal: neither truly a subject nor properly an object; but rather 'an independent term of legal relationships' (F. Santoro-Passarelli).

In conclusion, I would like to propose a Brinzian reading of the corporation as a premiss for a rereading of certain Marxian passages that are still only rarely visited. I am referring to Volume 3 of *Capital* and in particular to chapter 27, dedicated to 'The Role of Credit in Capitalist Production'. On this chapter, which consists of terse and allusive notes, two very different authors have written decisive pages: Francesco Galgano and Étienne Balibar.[16] A jurist and a philosopher have independently followed the hypothesis that in the *Aneignung* (appropriation) of one of the most typical logics of the capital relation we may locate the key to its overcoming. According to their readings,

15. Paolo Ferro-Luzzi, *I contratti associativi*, Giuffrè, Milan, 1976.
16. Francesco Galgano, 'Proprietà e controllo della ricchezza: storia di un problema', *Quaderni fiorentini per la storia del pensiero giuridico moderno*, V–VI, 1976–1977, pp. 681–701; Étienne Balibar, 'Sur l'expropriation des expropriateurs', *Revue de métaphysique et de morale*, vol. 100, no. 4, 2018, pp. 479–90.

Marx formulates in these pages the hypothesis as to the plausible appropriation of the same device of dispossession that is at the heart of the development – and later the virtual disappearance – of the exchange form. Both insist, in fact, on Marx's intuition of the separation between control and ownership that becomes conceivable within the corporate form, especially in the joint-stock company. According to Galgano, it is precisely because of this divergence that the separation between the functions of capital and the ownership of capital makes it possible to hypothesize the transformation of the former into social functions. The legal form of the corporation is therefore also outside the hegemony of ownership (and thus of property and exchange) and is instead governed by the themes of organization and circulation.

Following the readings of Galgano and Balibar, it would therefore be a matter of 'appropriating' that form of formal exit from private property, of the means of production typical of a stock company – the same one that finds its highest expression in a cooperative. Both transitory forms – or, to be more explicit, legal forms of transition – and typologically similar from a legal point of view, the stock company and the cooperative legally 'remove' the contradiction between capital and labour. Not to reconstitute them in harmony, but because the functions of capital, once they are no longer governed by ownership and property, flow back reappropriated, into social functions. As hyperbolic and paradoxical as it may appear, Brinz's criticism of the modern theory of property and its apparently insurmountable connection with the purely individual and personalistic constitution of the subject provides materials for legally thinking about the current metamorphoses of the social relation of capital and perhaps even some legal suggestions as to how to transform dispossession into reappropriation.

3

What *ius*? Common good constitutionalism at the end of modern politics

GERARDO MUÑOZ

Although it is always difficult to provide a fixed description of contemporary legal transformations, this chapter attempts to draw attention to a fundamental development in the context of Anglo-American jurisprudence. We are currently living under a new orientation of political order. This new orientation amounts to the rise of an all-encompassing civil order that follows in the wake of the collapse of the established modern political mediations between state and society, constituent power and institutional representation. This new civil regime both mitigates the social *efficacy* of civil conflict and directs an otherwise stagnating process of economic accumulation.[1] Recent legal transformations do not constitute an exception to the overarching transformations of this transitional epoch, which is why the new institutional constructions for their juridical containment can no longer be thought through the sociological categories of the modern welfare state with its rigidly designed rules of operation and its political economy. Rather, they are what Grégoire Chamayou has called a 'power nexus' constitutive

1. This transformation is thus the object of post-2008 analyses of crisis from the Marxist tradition as well as those of changes to governmentality through an increscent cybernetic rationality, for which see for example Tiqqun, *The Cybernetic Hypothesis*, Semiotext(e), Cambridge MA, 2020.

of a particular governmental rationality. In his important reconstruction of authoritarian liberalism's 'managerial revolution', the central challenge after the crisis of legitimacy of the 1970s was not an economic challenge but an institutional and political one: how to invent a new political technology.[2] This meant adopting institutional elaborations first pioneered within the modern firm: in dissolving strict organizational divisions and competencies, the firm ceased to be the firm of old and became a legal fiction that encapsulated ever-shifting, contractually constrained relations between agents within and outside itself so as to better respond to changing market conditions. Translated politically, this meant a dynamic legal governmentality that could respond to the ever-new problems of social conflict in ever-new ways, abandoning the strict framework of a constitutive division between civil society and the state.

Authoritarian post-liberalism

Chamayou's conceptual and institutional cartography in *The Ungovernable Society* helps us to understand concretely how the political collapse of law into technique has been a process internal to liberal principles. This framework can also help illuminate discussions around contemporary 'post-liberalism' as a cynical conflation of politics and administration, two spheres that now become equivalent within the structural nihilism of our times.[3] Chamayou provides important insight into how liberalism's deployment of this power nexus – which constitutes a political translation of the managerial revolution that had already taken place in the newly decentralized firm, subject only to the constraints of a self-managed 'cost–benefit analysis' – is

2. Gregoire Chamayou, *The Ungovernable Society: A Genealogy of Authoritarian Liberalism*, Polity, Cambridge, 2021, p. 10.
3. Jean-Luc Nancy has argued that the principle of general equivalence is the last name of nihilism, in *The Truth of Democracy*, Fordham University Press, New York, 2010.

best understood as a replacement for the modern mediations between civil society and the state that for centuries guaranteed the legitimation of modern political statecraft. As a previously presupposed economic expansion began to slow, it became apparent that the state had become overdependent on the 'autonomy of the subject' to pursue its own interests towards the economic *common good* of civil society, and that the inefficiencies of modern liberal institutions would be impossible to maintain.

This is why the power nexus is best understood in light of Carl Schmitt's hypothesis of an 'authoritarian liberalism' that he articulated in a conference delivered to a German industrial association in 1932, entitled 'Strong State and Sound Economy'. In this text the German jurist sketched how the state, if it is to survive, must align itself with industrial and market interests, remaining feeble in its capacity to set its own sovereign ends but resistant to any accidental absorption of social demands or democratization.[4] In other words, the state is encouraged to no longer serve as the mere guarantor of a framework for market activity at a distance, but to become a direct assistant to capital interests and accumulation by delegating its institutional capacities to corporate protections, resulting in a trade-off between an expansion of governmental authority and the legal regulation of administrative order. This was Schmitt's own paradoxical contribution to what later he came to lament as the unrestrained world legal revolution.[5] Ultimately, Chamayou's mapping of the development of authoritarian liberalism shows the way in which an optimizing rationality, based on predetermined values and calculative reasoning, became a new design for institutions of governance. This was truly a silent revolution, as some contemporary jurists have called it.[6]

4. Carl Schmitt, 'Strong State and Sound Economy', in Renato Cristi, *Carl Schmitt and Authoritarian Liberalism*, University of Wales Press, Cardiff, 1998, pp. 312–32.
5. Carl Schmitt, 'The Legal World Revolution, *Telos* 72, 1987, pp. 72–89.
6. Cass R. Sunstein. *The Cost–Benefit Revolution*, MIT Press, Cambridge MA, 2019, p. 5.

But here I must depart from Chamayou. The fact that he does not account for the question of the corresponding juridical transformations to legality amounts to a significant gap, which this contribution attempts to fill. We are currently experiencing a new mutation of the state as 'power nexus' that I will call *authoritarian post-liberalism*. I call it post-liberal because its mechanisms of governmental order are oriented towards a positive assistance of the social that seeks to guarantee an active role of government at the expense of classical liberal commitments (such as individual freedom, the separation of powers, and even the guarantees of modern criminal law).[7] The waning of the premisses that sustained the liberal state have become indexed to a demand to stage a social order based on an illiberal common good that requires a transformation of legal justifications.[8] At first sight this framework, integralist in its aspiration, brings to mind Alexandre Kojève's post-war proposal of 'gift-giving capitalism', which aimed at the realization of a concrete geopolitical strategy of the Fordist regime in the wake of questions of global underdevelopment and the rise of new modern imperial spaces.[9] Inspired by Marcel Mauss's anthropology of the gift, Kojève claimed that only a system rooted in a 'gift-giving capitalism' could harmoniously integrate 'producers and consumers' and ward off the latent threat of planetary civil war. This was the introduction into European politics of the principle of subsidiarity, originally developed within the Catholic Church, as the delegation of initiative from the centre to that group or entity best suited to the pursuit of

7. These thoughts on administrative law are to be complemented by work on the rise of punitive law by the Argentine legal philosopher Andrés Rosler in *Si quiere una garantía compre una tostadora: ensayos sobre punitivismo y Estado de derecho,* Editores del Sur, Buenos Aires, 2022.

8. This is the important theorem of secularization proposed by Ernst Böckenförde: 'The liberal, secularised state is sustained by conditions it cannot itself guarantee. That is the great gamble it has made for the sake of liberty.' 'The Rise of the State as a Process of Secularization' (1967), in E. Böckenförde, *Religion, Law, and Democracy: Selected Writings,* Oxford University Press, New York, 2022, p. 167.

9. Alexandre Kojève, 'Colonialism from a European Perspective', *Interpretation* 29, 2001, p. 128.

a shared goal; here a limited conception of justice as *subsidium* or economic 'assistance'. This is why for Kojève the image of the future was condensed in the image of Molotov wearing a cowboy hat on his visit to Channeye in 1955: global commerce and subsidiarity were to be taken seriously as the basic structures for the post-historical unity of the planet.[10] The analogy breaks off, however, when we realize that the positive socialization of the post-liberal enterprise is instead based on the changing conditions of globality under a new reality of social fragmentation and disorder, which Kojève feared.[11] Furthermore, Kojève remained silent about the nature of institutions, since for him planetary unity based on 'gift-giving capitalism' already presupposed the triumph of an eternal and post-historical bureaucratic dominion where nothing new could emerge.[12] Today we can plainly see, on the contrary, a novel institutional and legal nexus able to balance the end of modern liberties with the continued functioning of economic accumulation and governmental rationality. All things considered, the outlook of mutations in contemporary legal institutions and juridical thought, at least in the English-speaking context, offers a useful entry point to consider the new forces, apparatuses and rational mechanisms that mobilize the artificiality of the arts of government.

The administrative nexus

To write of the Anglo-Saxon legal context as a whole could run the risk of abstraction, and it is not my intention here to provide any fundamental typology of the field of problematization.

10. Ibid., p. 103.
11. Gerardo Muñoz, 'Alexandre Kojève, philosophe de la politique mondiale, une conversation avec Marco Filoni', *Le Grand Continent,* 2022, legrandcontinent.eu/fr/2022/01/25/alexandre-kojeve-philosophe-de-la-politique-mondiale-une-conversation-avec-marco-filoni.
12. Boris Groys, 'Romantic Bureaucracy: Alexander Kojève's post-historical wisdom', *Radical Philosophy* 196, March/April 2016, pp. 29–38.

Instead I will focus on a case that exemplifies the generic orientation of the self-understanding of post-liberal authoritarianism: Adrian Vermeule's juridical theory of administration. Vermeule's reformulation of jurisprudence and constitutionalism in the American context is also applicable to most systems in the Anglo-Saxon common-law tradition. The Harvard Law School jurist's groundbreaking work on administrative law, the constitutional theory of risk regulation, and arguments about executive power are too extensive to reconstruct entirely here, and I have offered analytical treatment of it elsewhere.[13] Here I will focus on his most recent book, *Common Good Constitutionalism*, where his expertise in the administrative state is deployed for a stealth transformation of the very nature of constitutional governmental authority. There is no doubt that *Common Good Constitutionalism* is the work of a learned and professional jurist, as it moves between theories of juridical reasoning, models of interpretation and analyses of Supreme Court cases in the United States context. The book also has the tone of a legal manifesto against the current state of things.[14] The generic framework of his proposition can be considered on at least three levels: first, a substantive commitment to the 'common good' as a way to affirm law's internal *positive* morality that is not reducible to social facts; second, the role of the administrative state as a 'motorized' and specific juridical technology; and third, Vermeule's focus on the doctrine of positive subsidiarity.

It must be first said that the turn to the 'common good' within North American constitutionalism signals a restitution of the long natural law tradition, drawing from the technical repositories of Roman and Canon law. In contemporary legal

13. Gerardo Muñoz, 'Quietly Lying Beneath the Throne: On Adrian Vermeule's *Law's Abnegation: From Law's Empire to the Administrative State*', *Hiedra Magazine*, 2018, pp. 105–16; and 'Posthegemony and the Crisis of Constitutionalism', in Giacomo Marramao, ed., *Interregnum: Between Biopolitics and Posthegemony*, Mimesis, Milan, 2020.

14. See William Baude and Stephen E. Sachs, 'The Common Good Manifesto', *Harvard Law Review* 136, 2023, pp. 861–906.

discussions, the revival of natural law has been associated with the groundbreaking work of John Finnis's *Natural Law and Natural Rights*.[15] Finnis's reconstruction of natural principles, however, is adjusted to the authoritative framework of modern positive law. Something quite different thus emerges in post-liberalism's restitution of natural law. Indeed, in contrast to Finnis's rejuvenation of natural law in light of the modern debate around law and morality, Vermeule's conception of the common good does not depend on a typology of goods for positive derivatives of action. Rather, it is anointed for a substantive and 'direct' type of morality in at least two ways: it is committed to a positive background of 'peace, justice and abundance' (and its modern secularizations as health, safety and economic security), but also pragmatically in the application of juridical principles of interpretivism, associated with the anti-positive legal philosophy of Ronald Dworkin, whose theories of constitutionalism as law's internal morality subsume positive norms to flexible forms of justification and the fitting of principles.[16] In this way, common-good constitutionalism juxtaposes a broad framework of principles (*ius*) with the pragmatics of moral determinations (*lex*). These spheres of strict scrutiny for application (*determinatio*) are situated within the scope of administrative agencies that, in the US legal system, flow directly from executive power.

At the pragmatic level of authoritative application, the ambition of common-good constitutionalism is to mobilize the hegemony of presidential authority (*Lex regia*) as the centre of political energy. It should be noted that the crisis of positive law in juridical practice – present in legal philosophies of interpretation such as originalism and a living constitutionalism that

15. The standard work of the modern recasting of natural law and natural rights is Robert P. George, *Natural Law, Liberalism, and Morality: Contemporary Essays*, Clarendon Press, Oxford, 1996.

16. Ronald Dworkin, *Law's Empire*, Harvard University Press, Cambridge MA, 1986. For Dworkin's legal philosophy, I am relying on the analysis by Scott Shapiro in *Legality*, Harvard University Press, Cambridge MA, 2011, pp. 282–330.

cuts across ideological commitments – is not meant in the way that 'classic' natural law aspires to the common good. Rather, it defines an institutional field in which substantive morality can be reoriented ever anew to what is just and good. This explains why Vermeule's common-good constitutionalism depends fundamentally on a Dworkinian interpretive legal philosophy of values. In other words, if the classical substantive principle ceases to be limited by norms and social facts, this entails that principles are mainly organized by those values held at the point of practical judgement in the decision-making process. As Vermeule argues, 'on the classical view, departing from the text is not the same as departing from the law; the law is the lawmakers' ordination of reason for the common good, which may be imperfectly expressed by the enacted text.'[17] Likewise, Vermeule can claim that both originalism and progressive constitutionalism are ultimately Dworkinian positions, and that there is nothing outside open-ended interpretation of legal texts: 'common good framework is Dworkinism plus deference, just with a better account of justification than the one that Dworkin offers.'[18] The unit of deference (to which we will return) implies the delegation of interpretative and legislative functions to an administrative agency over courts and the classical branches of government. Common-good constitutionalism, then, departs from liberalism's central aspiration that claims the pre-eminence of rights against governmental domination and overreach. This is no longer a concern for infused moral constitutionalism, since the application of seemingly arbitrary interpretations flows from a legible and stable history of the natural-law tradition that no longer depends on social facts for mediation. This is why Vermeule also claims that, in Hart and Fuller's debates around morality and law, the only possible winner is none other than Saint Thomas

17. Adrian Vermeule, *Common Good Constitutionalism*, Polity, Cambridge, 2022, p. 75.
18. Ibid., p. 69.

Aquinas, who provides an integral conjunction of morality and law without residue.[19] In Vermeule's juridical realism, however, these principles do not entail a disruptive imposition upon the current juridical order. *It is already what the force of law demands.*

If this is so, what then would the 'common good' provide, given that it is already what the law does? It is here that the administrative state enters the stage. For Vermeule, it stands not as a supplement to the rule of a public law system, but as the main terrain that multiplies and dissolves the classical separation of powers (judicial, legislative and executive) into a domain of legal application as command. Indeed, the motto *imperare aude* stands in the book as the basic unit of executive application.[20] Vermeule does not shy away from stating that the administrative state is today the main locus and vehicle for the provision of good, peace and justice or from arguing that our administrative law amounts to law as *ius*, not merely as written positive *lex*. After all, broad deference to administration is itself a juridical principle, rooted in political morality, which can serve the common good.[21] In this way, the administrative state authority is a 'motorized law', which can be achieved through the posited principle of deference to agencies and bureaucratic compartmentalization. The deferral to specific agencies for statutory interpretation and executive control supersedes 'Law's empire' once the latter is dominated by judges and congressional legislation.[22] In other words, the marginalization of positive law in favour of an administrative hegemony is justified since it provides broad scope for the optimal

19. Adrian Vermeule states this in a seminar on Lon Fuller's *The Morality of Law*: 'At the end, the Hart–Fuller debate means that they are both in agreement: for Hart law is management, while for Fuller law is integrity. This is why Saint Thomas Aquinas is the true winner of the debate.' Recording at the Thomistic Institute Podcast Series, August 2018: soundcloud.com/thomisticinstitute/the-relationship-of-positive-law-and-natural-law-pt-3-prof-adrian-vermeule.
20. Vermeule, *Common Good Constitutionalism*, p. 71.
21. Ibid., p. 138.
22. Adrian Vermuele, 'Imagine There's No Congress', *Washington Post*, 11 January 2016, www.washingtonpost.com/news/in-theory/wp/2016/01/11/imagine-theres-no-congress.

and discretionary power required to manage the reproduction of societal risks and the constitution's allocated functions.[23]

What is striking in this picture only properly comes to light if we attend to Vermeule's 2016 book on the authority of the administrative state, *Law's Abnegation: From Law's Empire to the Administrative State*. There Vermeule argues that the legitimization of the administrative process is based on an internal abnegation of rationality (and not of affirming wholly heteronomous and unconstrained indirect powers able to sovereignly determine their own goals) required to adjust to social complexity.[24] For Vermeule, the institutional capacities of administrative agencies, capable of variously mobilizing the three branches of government, are defined as the procedural extension of a code (such as the Administrative Procedure Act which governs the process of intra-agency regulations and rule-making) that is to provide the intrinsic principles able to 'orient the good'.[25] Further extension of the code facilitates an operation of exchange and distribution of sources that never sidesteps its legal conditions.[26] But what positive and effective deployment does common-good constitutionalism generate in the administrative state? Here the power nexus takes the form of a *positive* principle of subsidiarity. Yet it is not enough to understand this principle as a transplant of Catholic social thought into bureaucratic administration, as it was executed in the diverse traditions of European Christian democracy.[27] This positive principle of subsidiarity differs fundamentally from classical post-war liberalism's negative development of subsidiarity, exemplified by the architect of the Chilean

23. Vermeule, *Common Good Constitutionalism*, p. 139.
24. Adrian Vermeule, *Law's Abnegation: From Law's Empire to the Administrative State*, Harvard University Press, Cambridge MA, 2016.
25. Vermeule, *Common Good Constitutionalism*, p. 146.
26. Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality*, Princeton University Press, Princeton NJ, 2020.
27. For two classic treatments of the principle of subsidiarity in legal thought, see John Finnis, 'Subsidiarity's Roots and History: Some Observations', *American Journal of Jurisprudence* 61, 2016, pp. 133–41; and N.W. Barber, *Principles of Constitutionalism,* Oxford University Press, Oxford, 2018, pp. 187–217.

constitution, Jaime Guzmán, who decentralized control across state institutions so as to transform them into vessels for the expansion of debt, passively in support of those economic agents capable of real initiative in the name of accumulation within civil society.[28] On the contrary, positive subsidiarity enforces an efficacious power that is organized by administrative duties to intervene within the context of an 'exceptional situation'. As Vermuele writes:

> Subsidiarity implies a positive power and a correlative positive duty for the highest public authority in this jurisdiction, triggered by an exceptional situation: the authority is both enabled and duty-bound to intervene when other competences cannot carry out their functions in an overall scheme oriented to the common good ... the core meaning of *subsidium* is the military reserve that stands ready to enter battle if the front line faces crisis. The state, and whoever commands, is thus subject to both a power and a duty. The whole point of the reserve is that it is committed only at the crisis of the battle, if ever.[29]

Thus positive subsidiarity is neither wholly negative nor institutionally planned as in the modern corporatist state, but rather grants a freedom of initiative within an exceptional situation whose overall purpose, all things considered, is to promote security and the continuation of the social bond.[30] Why does this positive subsidiarity coincide with such a state of exception without remainder? Clearly it is not because it 'annihilates life' as in a concentration camp, but rather because it guarantees the possibility of those adaptative and contingent responses necessary to mitigate the security of an order directed towards ends already laid out axiomatically.[31] This is the

28. Renato Cristi, *El pensamiento político de Jaime Guzmán*, LOM Ediciones, Santiago de Chile, 2011.
29. Vermeule, *Common Good Constitutionalism*, p. 157.
30. Ibid., p. 155.
31. Giorgio Agamben, in the wake of the pandemic, has been attentive to the concrete reality of the administrative state, as developed by Cass R. Sunstein and Adrian Vermeule. See Giorgio Agamben, 'Intervento al convegno degli studenti veneziani

crux of post-liberal authority. In other words, this conception of subsidiarity seeks to create a concrete institutional fabric in which the constitutional framework turns into 'a loose-fitting garment that leaves room for flexibility and adjustment over time as circumstances change. … Not some fantasy of perfect legality, but rather an overly brittle framework that cracks because it cannot bend.'[32]

This image of constitutionalism deserves further attention and it is important to consider seriously the metaphoric operation of the 'loose-fitting garment'. In 'A Theology of Clothes', German theologian Erik Peterson argues that the garment has the function of assessing the coming to presence of man and regulating its originary deficiency (original sin).[33] Here, in a similar way, the theological premiss of original sin is presupposed to advance ideals of 'redistribution' and 'social justice', providing an exemplary demonstration of the correspondence between positive subsidiarity – originally an organizational principle developed within the Catholic Church – and operative biopolitics as a regime of management. The loose-fitting garment of the administrative state is the site of the reproduction of social life that treats the originary *felix culpa* as a modern legitimation of constituent power ('democratically representative majority').[34] To push the metaphor even further, it is not difficult to understand that the function of the administrative state as the 'dress' of civil society emerges at the moment in which the separation between the social and the state collapses. This is why it is no surprise that the garment of common-good constitutionalism shares a striking figurative

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contro il greenpass l'11 novembre 2021 a Ca' Sagredo', *Quodlibet*, 2021: www.quodlibet.it/giorgio-agamben-intervento-al-convegno-degli-studenti-veneziano.

32. Vermeule, *Common Good Constitutionalism*, p. 160.

33. Erik Peterson, 'A Theology of Clothes', *Selection II: A Yearbook of Contemporary Thought,* Purnell & Sons, London, 1954, pp. 54–62.

34. Adrian Vermeule, 'Liberalism as a felix culpa', *New Polity*, 2021, newpolity.com/blog//liberalism-as-a-felix-culpa.

resemblance to John Rawls's 'veil of ignorance', also deployed to render the proper ends of the good and to break with centuries of Paleagian liberalism.[35] It is in this context that Vermeule can write that 'the administrative state determination and deference is arbitrary. ... The closest analogue in modern law is probably the arbitrary review under the APA, which focuses on ensuring *government action* in light of the interest at stake. In a very loose sense, under the classical structure, all constitutional law is like modern administrative law.'[36]

To 'steer' towards the common good entails, ultimately, to understand that it 'is not merely an artifice for the province of judges; it is the proper *governing approach for all*'.[37] Here we see most clearly that the 'orientation' of common-good constitutionalism is neither limited simply to legal interpretation nor a specific institutional design, but is more like a governmental ensemble composed of scraps of moral principles, executive command and positive subsidiarity in order to maintain the illusion of civil unity. In this scenario a previously immutable constitutionalism now adopts the theological garments of continuous doctrinal change that allow for an ever-expanding legal planning to administer the protection of its principles.[38] The principle of subsidiarity authorizes this moral administrative machine to steer the social space through the nexus of a positive state of exception which serves to authorize a 'commanding' over an increasingly arbitrary and fictional social order.

35. I am relying here on Eric Nelson, *The Theology of Liberalism: Political Philosophy and the Justice of God,* Harvard University Press, Cambridge MA, 2019.
36. Vermeule, *Common Good Constitutionalism*, p. 168.
37. Ibid., p. 129.
38. It is not a jurist but a theologian, John Henry Newman, who emerges *ex deus machina* with his *An Essay on the Development of Christian Doctrine* (1845) as the source of constitutional doctrine development for Vermeule.

Towards a civil stasiology

In sum, let me offer five theses about this model before concluding with a few words regarding principles and governmental design.

First, common-good constitutionalism is not a mere return to an unrealizable natural law. Rather, it is the deployment of a moral framework developed within the natural-law tradition, thus unconstrained by social or democratic processes, as the orienting and justifying principles of an institutional 'power nexus' that operates according to Dworkinian moral interpretivism. It comes as no surprise that this manoeuvre takes an anti-positivist stance against originalism or judicial activism that seeks to establish determinations of social constraints and justifications for social and institutional action. In other words, common-good constitutionalism could be defined as *morality plus administrative institutionalism*.

Second, it becomes clear that the crisis of positivism, of the rule of judges and courts that had been the heart of modern political authority, has paved the way for an administrative infrastructure that compartmentalizes the decision-making processes that *both rule and govern*, sidestepping democratic legitimation. If positive law ensured an institutional mechanism able to publicly and legitimately mitigate between plural interests, then the socially visible decline of its authority amounts to a plastic operation within the perpetual management of civil war.[39] In other words, the administrative state's new authority amounts to the reproduction of a *civil stasiology*, which reveals the ongoing fragmentation taking place beneath it.

Third, this new institutionalism does not derive from the compartmentalization provided by the separation of powers and

39. Andrés Rosler, *La ley es la ley: autoridad e interpretación en la filosofía del derecho*, Katz, Buenos Aires, 2021, p. 120.

republican institutional designs, but rather from the de facto legality of a rationalized administrative process. As Vermeule argues, the administrative state developed over time and its agencies have become the 'living voice of our positive law'.[40] This requires, as elaborated by Ulpian during the Roman epoch, that the judge act as a priest.[41] Any 'political realism' will first have to confront the logistics of this institutional-administrative force. It goes without saying that any attempt to theorize a new institutional thought today that is still grounded in the tried premisses of positivist law and philosophical anthropology will only reproduce the same conditions that led to the administrative law that we are currently experiencing.[42] It is ultimately self-defeating to try to find a negation of this administrative legality of the exception within a renewed positivist or secularized natural law design which does not move us forward from the current impasse.

Fourth, the orientation of the administrative state towards the common good is realized through a new conception of a positive subsidiary as an internal state of exception. This conception of the subsidiary establishes itself as a governmental hegemony over the reproduction of social life. Unlike the negative forms of subsidiary, this conception establishes civic submission without appealing to democratic legitimation.

Fifth and finally, we are confronted by the fact that the state increasingly reorganizes itself in the image of the modern firm as a 'power nexus' defined by a mediation between morality, administrative law and the commanding intervention of subsidiaries, driven to make proactive interventions oriented

40. Vermeule, *Common Good Constitutionalism*, p. 151.
41. Ibid., p. 138. On Ulpian's lawyers as priests, see Ronald Syme, 'Lawyers in Government: The Case of Ulpian', *Proceedings of the American Philosophical Society* 116, 1972, pp. 406–10.
42. I am thinking here, for instance, of Roberto Esposito's recent endorsement of an 'instituent thought' and anthropological institutions based on an ahistorical continuation of the legal philosophies of Santi Romano and Claude Lefort. Roberto Esposito, *Instituting Thought: Three Paradigms of Political Ontology*, Polity, Cambridge, 2021.

towards economic growth and the reproduction of the social. This picture is certainly one of an increasingly total government. It is also a picture in which the rhetorical deployment of the concept of hegemony amounts to an operation whose central aim is to present a coincidence between subjection and political structures. In other words, from a legal perspective we clearly see that the void produced by the crisis of legitimation of the 1970s implies that counter-hegemony cannot be an effective oppositional strategy since hegemony is one and the same with the rise and consolidation of the administrative process.[43] The new common-good administration of social life implies an art of government that stands in the way of a *common political thought* that could allow us to move past the hegemonic closure of our time.

Ius: a techno-theological garment?

In conclusion, I would like to offer a preliminary reflection on the *ius* or 'principles' which are today at the centre of diverse theoretical developments of constitutionalism.[44] An entry point to this problem was already laid bare in the figure of constitutionalism as a garment.[45] In the context of *Common Good Constitutionalism*, one should not lose sight of the echoes of Roman law's force in creating an 'institution of nature' as a

43. This was Ernesto Laclau's hypothesis about the rise of an absolute principle of politics, as he states towards the end of *Emancipations*: 'The metaphysical discourse of the West is coming to an end, and philosophy in its twilight has performed, through the great names of the century, a last service for us: the deconstruction of its own terrain and the creation of the condition for its own impossibility … the realm of philosophy comes to an end and the realm of politics begins.' *Emancipation(s)*, Verso, London and New York, 2007, p. 123.

44. Martin Laughlin has recently offered a systematic critique of constitutionalism in contemporary legal theory, although for the most part the problem of principles needs further elaboration. Martin Loughlin, *Against Constitutionalism*, Harvard University Press, Cambridge MA, 2022.

45. Gerardo Muñoz, 'Como una pieza suelta: el constitucionalismo administrativo de Adrian Vermeule', *editorial diecisiete*, April 2022, diecisiete.org/nuncios/como-una-pieza-suelta-el-constitucionalismo-administrativo-de-adrian-vermeule.

'fixed point' that dispenses with Dworkin's plain morality of law. As Vermeule writes programmatically: 'It is in our administrative law where law takes the form of *ius* and not just a form of mere positive *lex*.'[46] Notwithstanding the difficult substantive reconstructions of Roman law that are beyond the scope of this essay, I would like to emphasize the nature of the procedural rationality at work: the appeal to 'natural principles' is not what leads to the rise of the administrative state and its agencies. It is, rather, to frame the matter instead in Yan Thomas's institutional language, that the natural principle (*ius naturale*) is the mechanism by which the force of law produces a precondition for its own natural representation. This institutional operation is pliant enough effectively to adapt to the increasing heterogeneity of the social. As Thomas writes lucidly in his essay on the institutionalization of the image of nature: 'One is merely duped in thinking that the law was established out of a natural regime that law itself then made vanish.'[47] The institutional relation of *ius* to *lex* makes the principle of nature operative. This flexible operation of *ius* is not only phantasmatic in Vermeule's constitutionalism, but crucially *already* in Ronald Dworkin's definition of the integrity of law and its empire as a process of 'justification and fit' in terms of equity.[48] To put it in Vermeule's terms, 'fit' must accommodate itself to *lex* within an optimal range of discretionary possibilities.

Now, if administrative capacity presupposes the garment of constitutional law, this means that the substance of successive legal operations are always open to potentially qualitative changes that are then vested in the body of the social polity, while at all times claiming that it is its *natural body* because it

46. Vermeule, *Common Good Constitutionalism*, p. 138.
47. Yan Thomas, 'Imago Naturae: Nota sobre la institucionalidad de la naturaleza en Roma', in *Los artificios de las instituciones: estudios de derecho romano*, Eudeba, Buenos Aires, 1999, p. 26.
48. Dworkin, *Law's Empire*, pp. 230–32.

has already been ordered towards the 'common good'. Although the metaphor of the garment is derived from the Hamiltonian definition of the 'strong executive' in *Federalist* 70, for Vermeule the garment renders possible an effective operation tailored to fit the needs of the *ius* in each and every case. The framework of the constitution adequately coincides with the figure of the loose-fitting garment because, as Vermeule tells us,

> Excessive constitutional constraint can be as dangerous as insufficient constitutional constraint. The Constitution, emphatically including the vertical distribution between and among subsidiarity jurisdictions and the highest-level authority, should be a loose-fitting garment that leaves room for flexibility and adjustment over time as circumstances change. The alternative is not some fantasy of perfect legality, but rather an overly brittle framework that cracks because it cannot bend.[49]

Likewise, the garment of positive constitutionalism (based on the substantive aspiration of *Lex Regia*) folds at multiple angles and intersections due to the administrative intra-agencies' *determinatio.*[50] The 'loose garment' does not only ideologically dress the social polity – it can direct its force towards the realization of civil exchange and economic growth. In this sense, the principle of the common good is oriented towards the transformative axiomatic order. The garment is not a mediation between the world of life, social practice and action; rather, it is the mechanism that plots practices, discourses and the general coordination of effects towards immutable ends as second-order arrangements.[51]

In the administrative phase, theology has become an instrument at the service of technicity. In the wake of the collapse of the authoritative construction of the modern state – rooted

49. Vermeule, *Common Good Constitutionalism*, p. 160.
50. Conor Casey, 'What Pleases the Prince? The Relevance of Classical Legal Principles to Contemporary Public Law', *Revue international des droits de l'antiquité*, 2023.
51. Vermeule, *Common Good Constitutionalism*, p. 173.

in the Hobbesian motto *non veritas facit legem* that gave birth to liberalism and juridical positivism[52] – the emergence of the principle (*ius*), devoid of a mystical body, is the garment that administers and constrains the social body as a whole as much as each and every subject individually (*omnes et singulatim*) towards the execution of moral and economic demands. The practical scope of administrative law as principles no longer presupposes constituent power, but rather appears as a bodiless garment in which every life can only be represented as a function of delegated authority. This technified juridical operation differs from the emblematic authority of the emperor's uniform that glorified the arcana of mediaeval sovereignty.[53] Yet what are we to make of the convergence between the theological condition of the garment, as the earlier quotation from Peterson reminded us, and this new governmental 'power nexus'? The political theology of the state rooted in the principle of sovereign authority transforms itself into an economic theology through the civil principle as the last fictional domain of social recognition.[54]

To sum up, the consolidation of administrative law is a fully fledged attempt to bridge the gap between the pole of rule-making and the stagnating accumulation of value and exchange within civil society, which can no longer be left to its own autonomy. This is why Erik Peterson will insist that the existence of garments can 'redeem the lost garment [of Paradise] that is the only one that can express and unconceal our dignity'.[55] But the garment's *dignitas* in Peterson's *ex-lex theology* will imply, in turn, that any claim to a substantive common good will only be compensatory to an unending and accelerating process of

52. For arguments about Hobbes as the founder of modern legal positivism, see Norberto Bobbio, *Iusnaturalismo y Positivismo Jurídico*, Trotta, Madrid, 2015; and Andrés Rosler, 'Prólogo', *Thomas Hobbes, Elementos filosóficos, De ciudadano*, Hydra, Buenos Aires, 2013.
53. Ernst Kantorowicz, 'Gods in Uniform', in *Selected Studies*, J.J. Augustin, New York, 1965, p. 21.
54. Felipe Martínez Marzoa, *El concepto de lo civil,* La Oficina, Madrid, 2018.
55. Peterson, 'A Theology of Clothes', pp. 54–62.

adjudication.[56] Whoever gazes at life in the USA today can see this everywhere in the institutional legal fabric: as state–society separation withers, governance and guidance transform into *utilitas rei publicae* as a fictitious fabric of civil society.

Goethe famously told Eckermann that the 'enduring life of Roman law is like a diving duck: at times it hides under water, but it never disappears, always emerging to the surface and coming up alive again'.[57] In an epoch that is no longer based on the modern forms of legitimation and constituent power – confirming Ernst Böckenförde's important thesis that liberal society can no longer guarantee the premisses of its foundation – it is no surprise that Roman principles (*ius*) are mobilized as a set of engineering techniques. They serve, as ever, as a 'universal syntax, uniquely capable of accommodating and setting into form new institutional arrangements. Through recourse to Roman law, [modern lawyers] instituted the rational *a priori* of civil society, populated by the subjects of exchange.'[58] At the end of the categories of political modernity and the collapse of modern legal positivism, a new civil imperium gains traction, generating multiple investitures and accrescent compensatory enactments.

56. Carl Schmitt, 'The Plight of European Jurisprudence, *Telos* 83, 1990, pp. 35–70.
57. Johann Peter Eckermann, *Conversations with Goethe*, Penguin, London, 2022, p. 320.
58. Cooper Francis, 'The Subject and/of the Law: Yan Thomas and the Excess of History over Concept', in Peter Osborne, ed., *Afterlives: Transcendentals, Universals, Others*, CRMEP Books, Kingston upon Thames, pp. 96–7.

4

Hegel, Marx, Pashukanis and the idea of abstract right as a bourgeois form

ÉTIENNE BALIBAR

The relationship between philosophy and law as disciplines is an essential one on both sides. I do not believe there can exist genuine legal theory without philosophy. This is true even for legal practice, despite the differences between the two modern traditions. Perhaps I am overly influenced by the fact that I come from Continental Europe where common law is not dominant. The *Code civil*, which is the root of the modern normative legal constructions in continental Europe, is filled with philosophical references and foundations. The same is true on the other side and the relationship is never unmediated: there is much law in philosophy and much philosophy in legal discourse. The mediations are anthropological and political, more or less explicitly. Nonetheless, to make a point inherited from Althusser, who never tired of repeating it: there is a great dichotomy among philosophers even before Kant – Rousseau being a prime example. Some philosophers accept the primacy of the question *Quid Juris?*, which is by definition a meta-juridical question distinct from the empirical *Quid Facti?* And some philosophers reject that meta-juridical point of view, particularly as it was incorporated into the transcendental motive by Kant and his followers.

The tradition in which I was trained – which is broader than the Althusserian structuralist tradition – and it is very much also the case for the *Neue Marx Lektüre*, strongly places Marx on the anti-juridical side. The idea reigns that Marx's way of *critical* thinking and his key categories are not derived from juridical or meta-juridical discourses. This leads to the inevitable consequence that at some point you have to 'bring back' the juridical question as a secondary problem, which of course becomes insistent, especially when you pass to the political side. Despite considerable and important exceptions – Schmitt and Kelsen, for example – very few philosophers really study law. However, Marx's personal case is interesting because he was trained both as a lawyer and as a philosopher. He took classes in both disciplines, after which he apparently set both legal theory and philosophy aside and became… what? He became Marx! He created, invented, his own discourse. As Foucault wrote somewhere: Marx belongs to the category of inventors of a new discourse. This discourse has many facets and many sides, including that of a journalist and an activist, having to deal explicitly with matters where law is crucial. The most famous example being the extraordinary series of articles on the 'thefts of wood' from 1842.

The commentaries on Marx are generally poor on Marx's relationship to legal matters and to law in general. There are volumes which deal with the distinction between base and superstructure, locating the question of law on the side of the so-called superstructure, but I am going to argue against these, on the basis of a closer reading of some passages in Marx's *Capital*. Such commentaries tend to oscillate between well-known formulas: law, or legal categories and forms, as expressions of something else – what? 'economic relations', relations of production and exchange – or law as 'instrument' in the hands of the ruling class, and sometimes in the hands of the dominated class that tries to impose forms of *counter-power*, in the field of social

rights and the regulation of exploitation and the organization of labour. Apart from this I have found little. One interesting exception is an article by Gene Axelrod Cahan on Marx's concept of property; another is a chapter in Paul Hirst's collection of essays on *Law and Ideology*, but it does not completely escape the critique I am proposing.[1]

There remains a remarkable blindness in the detailed commentaries on Marx's *Capital* to the issue of juridical forms and the function of law in Marx's analysis of the process of production and exploitation. None seem to be interested by the fact that in Marx's writing a motto continuously returns that has to do with the modality and efficacy of juridical forms, or that in certain key passages in *Capital* (particularly in chapter 2 of Volume 1, which is the central chapter in the first section on the commodity titled 'The Process of Exchange') juridical form is key to the understanding of Marx's reasoning. All of this is completely ignored and left aside.

Now you will ask: what special lucidity leads me to suggest that? The answer is Pashukanis's *The General Theory of Law and Marxism*.[2]

Pashukanis: the immanence of law

Pashukanis is the great exception. Returning to his text for this event left me with the same extraordinary impression as the very first time I read it many years ago. This is a fundamental book. Pashukanis considered himself a Marxist and he knew *Capital* and other works very well. But he was also a legal theorist in the full sense of the term, taking part in the debates of his time

1. Jean Axelrad Cahan, 'The Concept of Property in Marx's Theory of History: A Defence of the Autonomy of the Socioeconomic Base', *Science & Society*, vol. 58, no. 4, Winter 1994/95, pp. 392–414; Paul Hirst, 'The Problem of Property and Marxism', in *On Law and Ideology*, Macmillan, Basingstoke, 1979, pp. 96–152.
2. www.marxists.org/archive/pashukanis/1924/law/index.htm.

and in particular reacting to the newest developments in what is known as legal positivism. That raises an interesting question, that of his relationship to the work of Kelsen.

Pashukanis's book was first published in 1924. Not just any year in the history of the Soviet Revolution, 1924 was the year of Lenin's death and it was the year of the beginning of the so-called New Economic Policy (NEP), which was the attempt by the Bolshevik leadership to rectify the disastrous consequences of war communism. It therefore raises the huge problem of the relationship of the Revolution to the peasantry, which led to the final catastrophe of the Russian Revolution. There the central issue was the relationship of communism to property as an individual attribute, to the small property-holder. In his texts from the period Lenin argued that if the small property of the peasant remains the basis of the existence of individual producers who are proprietors of their own land, you retain the germs of the later development of capitalism. That is, the return of capitalism after the revolution itself. So NEP proposed a more dialectical politics in which a combination of state ownership and planned economy (not yet the great 'Planning' of the 1930s, but already an economy governed *politically*) was combined with the preservation of small property. Pashukanis strongly believed in the idea that the transition from capitalism to communism through an intermediary socialist phase should lead to what Marx and Engels called the 'withering away of the state'. But in Pashukanis's view the withering away of the state also includes the withering away of the law in its bourgeois forms. So he is a theorist of the withering away of the law and the state. This soon led to a violent conflict with the Stalinian orientation. NEP was abolished in 1929 when Stalin became the autocratic leader of the revolution. The old Bolsheviks were eliminated one after the other and Pashukanis himself, as the text of the Preface to the French edition euphemistically puts it, 'disappears' in 1937.

He was arrested in the year of the new 'democratic' constitution and probably executed.

Pashukanis's work contains both a rectification of vulgar Marxism and a critique of the emerging new positivist legal paradigm in its Kelsenian variety. The book he quotes from Kelsen, from 1922 – two years before his own – is the very interesting *Der soziologische und der juristische Staatsbegriff: Kritische Untersuchung des Verhältnisses von Staat und Recht*.[3] In this book you find the central formula 'Rechtsordnung ist Zwangsordnung': the juridical order is an order of coercion. This places Kelsen in a long tradition including Hobbes, of course, and Kant certainly, but not Locke and probably not Rousseau and no natural-right theorists in that early sense. This precedes the successive editions of the *Reine Rechtslehre* (*The Pure Theory of Law*), from 1932 onwards, which contains the definition of the legal norm and the hierarchy of norms that is so central to Kelsen's view. But if you reread Pashukanis with attention, there is already a virtual rejection and critique of that definition. This is particularly explicit in the central chapter of Pashukanis's book, titled 'Norm and Relation', or, if you prefer, 'Social Relations'. It advocates the idea that law is not essentially a norm or a normative order. We will retrieve this. Pashukanis connects it with the idea that law is not articulated with social relations of production or economic social relations in the Marxian sense, 'from the outside'. It does not derive from a source, an authority that would exist in an autonomous manner outside the realm of social relations. Rather, it belongs to the system, or, as I will say in a moment, to the *structure* of social relations themselves. Therefore, with respect to those relations, law is not transcendent or external but completely immanent. This leads to the other

3. I comment on this text in my essay 'The Invention of the Superego: Freud and Kelsen, 1922', chapter 12 of *Citizen Subject: Foundations for Philosophical Anthropology*, trans. Steven Miller, Fordham University Press, New York, 2016, pp. 227–55.

side of his critique, which I take to be a critique of the vulgar Marxism (in which I include Marx himself at some points) that represents law as superstructure, especially the representation of law as *ideology*. This is Pashukanis's main target. Central to Pashukanis's argument is the insistence on the idea that law is not an ideology. That is, it is not an illusion, not an appearance, it is not a 'representation' of social relations. It is in some sense *as real* as the social relations of production themselves. When he invokes the category of reflection that is used so frequently in Marx's philosophy, he means to say: the increasing abstraction of the bourgeois juridical form 'reflects' the generalization of the commodity form itself. So, as the commodity form itself becomes universal, leading to something like the world market, which Marx derives from the concept of capital itself, the bourgeois notions of law – particularly the essential binary of property and contract – themselves become more and more abstract, in order to apply to every possible place and situation.

This leads to the final idea I want to retrieve from Pashukanis: namely, the idea that the core juridical or legal form is made of the articulation of the two categories: *private property* and *contract*. Now this seems to be quite innocent, but it is not. Because we are philosophers, our immediate intuition is that it derives directly from Hegel's presentation of 'abstract' law or right (*Recht*) in the first section of his *Philosophy of Right*.

Hegel: property, contract, crime

In this section of Hegel's text you will find this symmetry in a most explicit manner, suggesting that the two categories be taken in their most absolute sense. *Property* is the property of any 'thing' that can be appropriated without limitations. We will have to rectify that first 'circular' definition, since Hegel himself feels obliged to introduce, on the practical side, secondary

limitations regarding the property of land and the question of inheritance. *Contract*, on the other hand, is just as universal because it is the typical form of the relationship between 'persons'. Hegel does not use the term 'legal subject', which was invented around 1840 by representatives of the Historical School of Law, deriving from the work of Savigny and his disciples, including Hugo and Puchta. But what we have here is a partial equivalent, which is the notion of person. So anybody who is a person enters into contractual relations with others, and whoever enters into a relationship of contract is by definition a person in the moral and legal sense. This leads Hegel in particular to reject strongly something he found absolutely horrifying in Kant's theory of law, but which is of great interest to many commentators today: the idea of a *auf dingliche Art persönliches Recht*, a 'personal right in the manner of a thing'. This is a hybrid category that Kant used to describe extremely important cases such as matrimony, the relationship of education between parents and children, and especially the relationship between masters and servants. But Kant does not consider wage labour. This is important when we come to Marx, as it is also considered by Hegel in his refutation of Kant.

Now, if we stick with this, there is a sense in which Pashukanis's understanding of the immanent character of the juridical form (as opposed to a hierarchic or transcendent understanding) derives or takes him close to the Hegelian view, which he does not cite. Why? Perhaps this was politically impossible at that time. The complete structure or the complete system of abstract right in Hegel is not only made of the correlation between property and contract, but involves a *third moment* which, from a dialectical point of view, is the key, since it is the point at which you need to arrive in order to understand the inner consistency and intrinsic logic of this form. In Hegel's German this has a wonderful name which raises interesting speculative possibilities.

The third section in Hegel's 'Abstract Right' is titled *Unrecht*: the non-legal or the *illegal thing*. And that is very interesting because *Unrecht* is not just a quality you can apply to things: 'this is illegal' or 'this belongs outside of law'. It designates a moment of the negation and in fact, already, the negation of the negation. Therefore the whole presentation has to do with *crime* or *violation* of law, of any type, and hence *sanction*. Sanctions of whichever form, but centrally *punishment*.

The moment of *Unrecht* or illegality, and the correlation between crime and sanction, is an achievement of the development of juridical form. There is no law, no juridical form, without that moment. In Hegel, of course, the dialectics of crime and punishment lead to an important form of *recognition*. For Hegel, the criminal, while breaking the law, *wants* his or her punishment, because this is the procedure through which he or she will become reintegrated into the political or social community. This provides the starting point for the subsequent development of the book, where abstract law combined with its 'subjective' counterpart, morality, will initiate a process of integration of individuals into the social state. The idea that, even unconsciously, the desire of the subject could be *not to become* integrated or reintegrated into the society, but to become bandits or social outlaws, is not something that Hegel takes into consideration. It would probably belong to what the Preface to the *Philosophy of Right* describes as the 'contingencies' that you have to ignore or that will remain negligible from the point of view of the identity of the rational and the actual. That's not the case in either Marx or Foucault. I wonder about Axel Honneth…

This leads to the question: what does Pashukanis do with the penal law? He differs from Kelsen, whose concept of law consists of the *articulation of two norms*. For Kelsen, every juridical/legal norm has two sides. It is much like the Kantian formula 'concepts without intuitions are empty, intuitions without

concepts are blind'. Kelsen's definition of the juridical norm combines what he calls a 'primary norm' and a 'secondary norm'. And the hierarchy is very interesting because the primary norm is the *sanction*, therefore the *punishment*. The virtuality of every illegal action (harming property or any right of others) is to be punished. The secondary norm is the *obligation*, which has a subjective content. You could call it morality, but Kelsen argues: 'I don't care about the motives: the reasons why people obey the law is not my problem because I'm a positivist. They can obey the law because they fear something, because they adore or worship some value, the important part – as in Weber or Spinoza – is the obedience itself.' But you need the correlation of the two sides, so you could say, in a Kantian manner: 'a juridical norm without sanction is impotent or ineffective, a juridical norm without obedience is arbitrary or aleatory or deprived of legitimacy.'

In Pashukanis, on the other hand, the penal law is introduced *a posteriori* and that owes something very important to Marx: the deduction of the necessity of the state. This is the moment when the idea of the state is introduced. And it is introduced as the executioner, I would say, or as the bearer of the penal function, which derives from inevitable conflicts and breaches of the juridical order in its core system.

Marx: the juridical mediation of commodity exchange

Now, if we return to *Capital*, Volume 1, Part 1, chapter 2, 'The Process of Exchange', we find an explicit indication that there is no economic process without a juridical mediation. The juridical mediation is not something external. Pashukanis is right. It is not something external that would serve the interests of ideological legitimation. Without the juridical form, the economic process *does not work*. This is explicit in the text. I will cite just the first few sentences:

> Commodities cannot themselves go to market and perform exchanges in their own right. We must, therefore, have recourse to their guardians, who are the possessors of commodities. Commodities are things, and therefore lack the power to resist man. If they are unwilling, he can use force; in other words, he can take possession of them.

And continuing:

> The guardians must therefore recognise each other as owners of private property. This juridical relation, whose form is the contract, whether as part of a developed legal system or not, is a relation between two wills, which mirrors the economic relation. The content of this juridical relation (or relation of two wills) is itself determined by the economic relation. Here the persons exist for one another merely as representatives and hence owners of commodities. As we proceed to develop our investigation, we shall find, in general, that the characters who appear on the economic stage are merely personifications of economic relations; it is as the bearers of these economic relations that they come into contact with each other.[4]

This is even more convincing if we jump to the end of Volume 1, to Part 7 on 'The Process of Capitalist Accumulation', or, more precisely, chapter 24, 'The Transformation of Surplus-Value into Capital'. There you have an extremely important passage which reads:

> Therefore, however much the capitalist mode of appropriation may seem to fly in the face of the original laws of commodity production, it nevertheless arises, not from a violation, but, on the contrary, from the application of these laws. Let us make this clear once more by briefly reviewing the consecutive phases of motion whose culminating point is capitalist accumulation.[5]

The pages that follow contain the idea that the process of *ap*propriation is at the same time – or becomes over time, through repetition and becoming – a process of *ex*propriation. Therefore

4. Karl Marx, *Capital: A Critique of Political Economy, Volume 1*, trans. Ben Fowkes, Penguin, London, 1976, pp. 178–9.
5. Ibid., p. 730.

the content of the law of private property is something we might want to call ex-appropriation, à la Derrida. Appropriation and, at the same time, expropriation. Expropriation, the chapter explains, first of the proletarians themselves, who are, and remain, deprived of any personal property except their labour force. And then, in a second moment or level, expropriation of capitalists by other capitalists, leading to the increasing concentration of property. The important point is that Marx insists, again and again, that this is not a breaking of the law. This is against Proudhon perhaps. This is not a 'contradiction'. If there are contradictions they are not there. There is no contradiction with the so-called law of private property, which, I assume, is the same as the juridical form present in the exchange discussed in chapter 2. It is rather the inevitable consequence of its application and its rigid or strict observation. So, from the point of view of the use and effects of the juridical form, Marx's *Capital* presents a dialectical process in which the first moment is exchange, where the whole society appears as a society of property owners (or *proprietors* as Locke would say in the old terminology expressing the juridical form), and the last moment (moment three) is the moment I call 'ex-appropriation', the internal reversal of a law of appropriation into a law of expropriation, through its very implementation.

But what, you will ask, is the middle term, moment two? It is to be found in the chapter on the *wage form*, or more generally in the central part of the volume, where Marx deals with 'buying and selling' the commodity, where the capitalist buys and the worker sells the commodity called 'labour force' or 'labour power'. There are two different words in German here, which are both used by Marx in the central passage in a significant manner. This force or power is first called *Arbeitsvermögen*, which means power in the old sense of the Greek *dynamis*, a capacity to work. Interestingly, this is the same word you would use in German to designate a patrimony: 'what do you possess, what

are your estates?', one would say using the old English word. So it is a question of 'what is the worker's estate?' – his or her labour force, and nothing other. But you also find *Arbeitskraft*, of which the Italian Workerists (Tronti in particular) made something extraordinary.[6] This is where they said: 'Look, this labour force is a class, and this class is struggling, and it is a political force.' But in the context of Marx's *Capital* the reference is more to the contemporary developments in physics, Helmholz's 'conservation of force', which physicists today would call 'total energy'. Labour power is bought as a *capacity to work* by the capitalist and it is consumed as an *energy,* a *force*. Everything revolves around the idea that there exists a *commodity* that can be bought and sold according to the pure laws of exchange, presented in the first moment, and whose use or permanent implementation will lead to the dialectical reversal of that law.

So the problem lies within the 'labour force', as commodity, and the worker as owner of his own labour force. This is expressed most typically where Marx uses the interesting terminology of 'fiction'. He writes that buying labour – not labour force, but labour – is a *juridical fiction*. I have a tendency to force the interpretation of the text here, because I have other references to 'fiction' in mind. One of them derives from Kelsen, for whom legal forms are essentially *fictions*.[7] Not in the sense that they are imaginary but in the sense that they are creations, they are *institutions* called fictions in that sense. And their efficacy derives from precisely being fictions. One can add to this the whole question of entities that become possessors or owners, such as corporations. Recently, the Supreme Court of the United States decided that corporations as 'legal persons' can contribute to

6. See Mario Tronti, *Workers and Capital* (1966/1972), trans. David Broder, Verso, London and New York, 2019.

7. See Hans Kelsen, 'On the Theory of Juridic Fictions: With Special Consideration of Vaihinger's *Philosophy of the As-If*' (1919), in Maksymilian Del Mar and William Twining, eds, *Legal Fictions in Theory and Practice*, Springer Verlag, Berlin and Heidelberg, 2015.

electoral campaigns, as if they were citizens themselves, which is one step further. The other reference I have in mind is Karl Polanyi.[8] Polanyi's notion of *fictitious commodities* includes *labour*, *land* and *money*, and there is an interesting overlap with what Marx describes in his chapter on labour.

The core question that nobody had ever asked before Marx – and, later, not even Pashukanis really takes this into account – is: what does it mean to identify something called 'labour power' or a 'labouring capacity' *as* a commodity? This involves two sides. On the one side, there is an owner entering contractual relations. That means that the labourer is not a slave. The obedience that the labourer will enter into (in the factory) is a kind of *voluntary servitude*. At the starting point there is a contract and the owner of the labour force is a 'free' man or a 'free' citizen. This leads to the very strange function of the comparison with slavery in Marx's description. The central idea is that capitalism essentially relies on the existence of free labour and therefore on the historical process that liberated the individual from all forms of bondage and forced labour relations. Slavery under capitalism can only be an anomaly, then. Cedric Robinson and other Black Marxists have argued strongly against this.[9] Marx was miles away from the idea of capitalism as a 'world system' whose economy relies on a combination of free labour and slave labour. For him, there is only free labour that produces surplus value in the form of wage labour. But, on the other hand, the analogy between the 'servitude' created by the wage form – and particularly the fact that after he has sold his labour force the labourer becomes caught in a disciplinary relationship within the factory, where the capitalist creates 'his own private legislation', based not only on discipline, but on violence and punishment – and

8. Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, 2nd edn, Beacon Press, Boston MA, 2001.
9. Cedric Robinson, *Black Marxism: The Making of the Black Radical Tradition* (1983), 3rd edn, University of North Carolina Press, Chapel Hill NC, 2020.

slavery or *bondage* (*Hörigkeit* is a term that Marx uses) is central to the politics of Marx's portrayal of the capitalist labour process. Yet it has nothing to do with the fact of an individual becoming the property of a master, as in chattel slavery, but rather with the fact that the labourer's freedom – initially asserted and periodically renewed in the form of a new contract between a worker and capitalist – is practically annihilated in both the factory and society as a whole, where if you were born a proletarian you and your children would remain proletarian indefinitely.

The other side of the problem is: how can you consider something called the labour force, a *dynamis* or 'energy' (which Marx says is identical with life capacities, the living organism of the worker himself) as a *thing*, an object of appropriation? Here something extraordinary takes place, which is a renewed interpretation – and subversion – of the fundamental Lockean notion which, in a sense, is the root of modern liberalism (or modern *possessive individualism*): namely, the idea that the person or the individual as person is a proprietor of himself or herself.[10] Locke's central concept of the *propriety in one's person* becomes in Marx *materialized*, as it were, in the form of the property right to one's labour force (and that's why certain Marxist readers of Locke say 'look, he prepares capitalism!'), provided you take into account a very important nuance. When Locke writes that an individual, in fact a citizen in a liberal state, is a proprietor of 'his own person', which he explains as 'life, liberty, and estates', this means there is something that *cannot* become alienable, from which the individual *cannot be separated*. What Marx says, however, is just the opposite. He says: there *is* something that the worker possesses or owns in a *juridical manner,* and evidence of that is that he can sell it, he can *transfer it* to someone else who will *become* the owner and enjoy the right of 'using and abusing'. Therefore, the

10. See my essay 'The Reversal of Possessive Individualism', in *Equaliberty*, Duke University Press, Durham NC, 2020.

root of 'owning oneself' is not inalienability but *alienability.* We are back to the phenomenon of ex-appropriation.

That's the efficacy of this fiction. If you return to the first moment – that is, the chapter on exchanges – and you follow this thread that I have extricated from a comparison between Pashukanis and Marx, you find something which I am tempted to call *the structure*. If there is a 'structure' somewhere in Marx it is not where, sixty years ago (in the collective book *Reading Capital*, edited by Louis Althusser), I first tried to locate it. It is here. Why? Because the core of the chapter is the idea that you have a correspondence or *homology of the juridical form with the value form*, which Marx presents in the form of an equivalence between two categories: equivalence and contract. *X* quantity of commodity *A*, he will write, is equivalent in value to quantity *Y* of commodity *B* and therefore they can be exchanged against one another. The reason for that is derived from a 'symptomatic reading' of the classical economists: they represent the same amount of abstract social labour.

We know this argument. But what interests me now is the fact that, as Marx writes at the beginning of the chapter, 'the commodities do not go by themselves to the market'. There is an ambiguous footnote, sexist and ironic, referring to a satirical poem by the medieval French poet Guillot de Paris, in which he notes an exception. 'In the twelfth century, so renowned for its piety … among the commodities to be found in the fair of Lendit… [are] "*femmes folles de leur corps*"' – which is to say, prostitutes.[11] But, leaving that exception aside, which might take us in unexpected directions, Marx says in the text that you have to introduce another level where each commodity has an owner who is a juridical person. He uses the extremely ambiguous word 'humans' or 'man' – even 'person' is an equivocal or

11. Marx, *Capital, Volume 1*, p. 178 n. 1.

'amphibiological' term. You might be tempted to interpret it in light of the chapter on fetishism: you cannot only deal with objectified 'value' relationships. Behind the objectified relationship there exists a social relation among living persons that has been 'inverted' or 'mystified'. But this is not what this chapter says. The chapter says that *you need a person* in the juridical sense of the term. This person means *purely*, by a very strong abstraction that clearly owes something to Hegel, a proprietor, *a property owner*.

So you need this proprietor *A* and proprietor *B* for the two commodities to become exchanged against one another. You need this detour, that they contract with one another – one of the elements of the contract being, of course, the equal value of their goods – so that the first gives his commodity to the second and conversely. So that's the most elementary form of the structure. I call it a structure because you have precisely two levels and a formal correspondence (the homology) between them. But the more I read this chapter, the more I uncover paradoxical consequences of the structure, especially if we have in mind the application to the question of the buying and selling of labour force, which is not just *any* good. Marx will write pages and pages explaining that labour force has a *value* like *any* other commodity and thus must be produced through some process of social labour. This is one of the nests in which so many difficulties are hidden, because Marx is forced to adopt a view shared by the economists which equates the value of the worker's labour force with the value of the goods a worker must consume in order to 'produce' his labour force. And while doing that, like all his predecessors, he brushes aside what contemporary feminists – Federici and others – have brought back: namely, that you cannot just have on one side a so-called basket of consumable goods – bread, bed, house – and on the other side the value of the labour force. You need a *process of social reproduction*! A

process in which other people play an essential part. You buy the meat but someone has to cook it. And most of the time it was not you the worker, it was your wife, and so on and so forth.

So there is a nest of difficulties. But what interests me is that, in order to make sense of the idea of applying this general form to the particular case of the labour force as a commodity, you need to transform the symmetry of '*A* contracts/exchanges with *B*' into a dissymmetry. And this dissymmetry is much more important and crucial in understanding the structure than the symmetry itself. I am surprised that though theorists of the so-called *Wertform*, the value form, sometimes allude to it, they make so little of it. Why? Because they do not go to the consequences of the fact that the commodity on one side is always given in what Marx calls 'the relative form', and the commodity on the other side is given in the 'equivalent form'. But the general name and materialization of the equivalent form is *money*. And on the other side, of course, you have all the commodities *except money*. Now we might indefinitely discuss Marx's conviction that money is also a commodity, but *functionally* the important fact is that it is *excluded* from the realm of commodities.[12] Therefore the typical form of exchange is not an exchange between commodities: it is an exchange between money and commodities. As a consequence, on the juridical side of the structure, you do not have 'exchangers', you have *buyers and sellers*! That is, you have people who own money and people who own something exclusively to be sold against money. So, I take it that the complete version of the structure is the one in which you have a buyer on one side of the juridical form, and on the other side of the juridical form a seller. And then, if we had the time, we could return to the discussion of the *commodification of labour*. For here Marx's reasoning is: the person who has no money must

12. See my essay 'The Social Contract among Commodities: Marx and the Subject of Exchange', chapter 9 of *Citizen Subject*, pp. 185–201.

find something he or she can sell. What the changes in society, the emergence of the capitalist system, offers him or her is the possibility to acquire money not through selling themselves, of course, but by selling their 'labour power'. However, in the *use* of the commodity – that is, the implementation of the labour force ('labour' itself) – the difference can become practically very thin; or so thought Marx, observing the situation in workplaces, and reading the Factory Inspectors' Reports. Except for the intervention of *class struggle*, where 'force' in the bioeconomic sense becomes a 'force' in the political sense.

With this interpretation we are completely rid of the idea that law is a superstructure. Law is not a superstructure. There is a kind of *chiasmatic relationship* between the juridical form and the value form. Or a double mediation, if you like. The juridical form does not work by itself, as in Kelsen; it is *not autonomous*. But it is also *not derived*, an 'expression' of something else. The question you will no doubt ask next is: what is the relationship between this representation of law and the question of force – not labour force, but *violence*? This is another thread we can follow in *Capital* to do with the other side of the juridical form: it is always the exercise of some sort of *Gewalt* – the German word that encompasses force, power (state power for example) and violence in its most extreme and cruel forms. At some point all this progressively enters the pattern. The great moment of reversal being the chapter on the 'working day', where we find the extraordinary formula subsuming a *legal* process under a 'law' of violence: on one side there is a buyer, and on the other side there is a seller, and each of them is fully entitled to promoting and defending his right against the other. Then you have this fantastic formula: 'right against right, what decides? Force [*Gewalt*]'. This includes everything from the relationship of forces in the class struggle to the regulating intervention of the state to prevent the antagonism from imperilling the social and political order. The reverse

side of the legal form is conflict, force and violence. Marx does not ignore that. You might even suggest that if this articulation of right and violence did not exist, the juridical form by itself would have no efficacy. But this does not destroy the idea that I want to promote, that the structure is *neither* economic *nor* juridical; it is made of the permanent interaction or chiasma of the two forms.

Q&A

MICHELE SPANÒ Thank you for that. There are plenty of things I would like to discuss but I will limit myself to three points. To begin with, among the references that could be evoked or mobilized to think through what you have discussed, starting from your 'Social Contract among Commodities' essay, Antonio Negri's essay 'Rileggendo Pasukanis: note di discussione' (in *La Forma Stato: Per la Critia dell'Economia Poitica della Costituzione*) comes immediately to mind. There he makes a similar move by suggesting that Pashukanis's field is that of Marx's chapter on exchange in *Capital*. He too supports the idea that Pashukanis is the first Marxist who is not carrying out the critique of law through the critique of ideology – as Marx did in 'On the Jewish Question' – but rather with the tools of the critique of political economy, which is to say of *Capital*. Then there is also Umberto Cerroni, who translated Pyotr Stuchka, the great antagonist of Pashukanis, for one of the greatest publishing houses in Italy as well as an anthology of Soviet debates. My second point is a general one. In my view, most of the concepts that Pashukanis and Marx use do not come from Hegel, but rather from Savigny. I think that the concept of *Verhältnis*, of relation, is Savigny's crucial, let us say, speculative invention. The idea is that the legal subject is not the source of the law, but is the source of a legal relation. That the law is a system of relations and not a

system of norms is precisely the Savignyan idea, and it appears in both Marx and Pashukanis. The link between property and contract, or property and obligation, is the core of the idea of *Vermögensrecht* in Savigny. So maybe here again the genealogy might be more a Savignyan one than a Hegelian one. My third point is that another Marxist who is really at odds with these authors, but has a similar intuition – against himself really – is E.P. Thompson in *Whigs and Hunters* (1975). This is a text in which Thompson's task was to confirm the 'vulgar' idea that law is nothing but the mystification of social relationships and that criminal law, penal law, is the core of the law as brute force. However, in the end he stumbles upon the idea that, in fact, law has been everywhere along the way. So in a sense he concludes with a certain ubiquitous force of private law. Here again we find an interesting dialectical relationship between private law and criminal law in an author who we might have expected to be very much against this idea of abstraction through legal forms.

ÉTIENNE BALIBAR Yes, Michele, absolutely, thank you so much. I was sure that you would both rectify and enrich what I said. I must confess I haven't read Stuchka closely, largely only commentaries. I believe he was more interested in public law, whereas Pashukanis concentrates on private law. As for Savigny, this is crucial and it will prompt me to rethink the genealogical side. There remains the complex problem of the influence of Savigny and his school on Hegel himself – especially regarding the articulation of 'property' and 'possession' (*Eigentum* and *Besitz*). There is an important book on this by the Italian scholar Aldo Schiavone: *Alle origini del diritto borghese: Hegel contro Savigny* [1984].

COOPER FRANCIS We have discussed that most recognizable in Rome is this matter of private law, so primarily institutions

of person, property, patrimony and contract. We also find, long before the Industrial Revolution, the legal institution of an abstract and alienable labour as a commodity, which is to say as a generic capacity separate from the contracted production of particular goods, separate from the human body and its efforts. This means the legal object whose exchange will define capitalist relations of production did not have to wait for the free labourer, but rather was defined in terms of the slave, who could not at the same time be a 'subject' – paterfamilias and citizen of Rome – but could legally be multiple persons: namely, their owner and/or any potential lessor of their labour on the market. This helps us see that the final precondition of the first 'productive' or capitalist investment in large-scale agriculture, millennia later in the British Isles, is not that the worker be a modern subject. In addition to legal personhood and dependence for the necessities of life – as a slave is in contrast to the peasant – it was required only that this also not be a direct dependence, as Roman slaves were dependent on the provision of food by the paterfamilias. In many ways the modern biopolitical moment is thus a contradictory 'letting live' (coupled with the entirely other question of demographic expansion). As you suggest, Michele, it might thus be Savigny more than Hegel who defines these times of the apparent eternity of the Roman-bourgeois legal institution of the civil, subjected to the anarchy of international accumulation and its never-ending crises.

EB Thank you, Cooper. I will reply in the same manner as to Michele: I am a taker of all these suggestions. I have one immediate reaction, perhaps marginal, which is that Marx was continually obsessed with what he described as the 'paradox' of Roman law, and here perhaps the early German investigation of this history (in Niebuhr and others) is important for him. He described this as a retrieval of the Roman notion of law and, yes,

contract and property. The paradox arises from why this ancient institution had to be adapted to the functioning of the capitalist system of social relations. In the 1857 Introduction to the unpublished *Critique of Political Economy*, there is a famous passage on Greek art, running against any historicist viewpoint, that asks why we are so moved by Antigone, who belongs to a completely different epoch. But there is also a similar remark regarding Roman law. And in the *Grundrisse* there are two very interesting pages, perhaps there are others, where Marx asks: where does this wage form originate? It originates in the organization of the Roman armies where you have for the first time a form of wage labour, except the payment was not in money but in land, which makes a huge difference. So there are two genealogies that he tries to construct: one which, like it or not, owes something to Hegel, but also to other authors, which has to do with the idea that pure private property emerges with the dissolution of traditional communities, which leads to a capacity to become proprietor of one's own person and goods without limitations. This presupposes that 'the common' has been dissolved and destroyed. Another, which contradicts the first, or at least does not match the first in the linear representation of history (which, like it or not, is very strong in Marx), is the idea that the juridical form was already there in the past, as a 'tradition' to be retrieved and adapted to the needs of the capitalist mode of production.

You are certainly right, Michele and Cooper, in emphasizing Savigny and returning to the Roman sources, but there's something else, in addition, I cannot help but think is crucial. That is Napoleon, the Civil Code and its German equivalent, the Prussian Code that Marx commented upon in the early 1840s. The concept of property in the Civil Code is not totally unlimited. The implicit Marxian idea is: what does it mean to own something? It means to have money. Full stop. Of course, you could ask a preliminary question: what is it that makes it

possible for any of us to acquire money, even if you don't have any? Are there any constraints or rules on that? There existed for a long time – and there are still societies in this world that are capitalist in the fullest possible sense of the term where this is so – a situation in which women cannot have money without the authorization of their husbands. In fact, when I married my dear wife (or she married me) there still existed in France a definition of matrimony which looked more like the Kantian one than the pure concept: namely, there was a *chef de famille*. So the estate is not something you can liquify in any possible manner. The Civil Code does not entirely liberate the concept of private property from every form of social limitation and condition, and Hegel does not want to go to the extreme in that sense. But it certainly marks a very important threshold. In the end I lament the fact that Marx did not follow one of his inspirations which would have been to write a critique of law, or a critique of legal theory, and not only a critique of political economy.

GERARDO MUÑOZ I was struck by the dates, since 1922 is of course the year that Carl Schmitt published *Political Theology*, which is not only a response to Kelsen on sovereignty and authority but also, more fundamentally, an account of what Schmitt sees as a new form of immanence in politics. If I understood you correctly, you mentioned Pashukanis's insistence on the immanence of the juridical order against the stability of norms. Do you think that the forgetting of Pashukanis has to do with the fact that, after the Second World War, in the wake of Eurocommunism, the position of an immanent order of legality, based on a critique of capital, becomes a political question, which is what we see in Santiago Carrillo's *Eurocommunism and the State*, where the question of immanence is set aside and it becomes an idea of 'Okay, let's play!' That's what Schmitt is also interested in, in his late essay on 'legal world revolution': let's

play with state legality, because, as he said, 'Marx discovered a surplus in economy, but I discovered the surplus in politics.'

EB I am not completely happy with my own formulations about immanence and externality. What Schmitt seems to introduce is a higher order of transcendence at the foundation of the legal system, whose form derives from theology but whose matter is, so to speak, completely political. In Kelsen, as I understand him, you have instead a theory, not of the autonomy of politics, but of the autonomy of law. The legal order is self-referential, self-contained. It applies to all sorts of matters and subjects, but the norm itself is defined through this complementarity of obligation and sanction. Whereas Pashukanis, and perhaps Schmitt as well in a completely different manner, do not believe that law is an autonomous, self-referential system. What I tried to find in Marx was a complementarity of the value form and the legal form – that's why I used the term 'chiasmatic relationship'. If you separate the two sides of the machine it does not work. There is a terrible tendency amongst very clever Marxists to think in terms of the self-movement or the autonomous capacity of the value form to generate its consequences without referring to any legal mediation. The quasi-final chapter on the 'expropriation of expropriators' raises another big question: whether law plays a role in the expropriation of expropriators. Apparently, in Marx's text it is pure violence. It is close to the sentence that has an origin in Jewish Kabbalah: 'violence is the midwife of every old society that bears a new one in its womb', as if an old society could bear something in its womb... I wrote an essay on this formula, the 'expropriation of expropriators', in which I tried to make sense of the fact that in *Capital*, Volume 3, there is a passage on cooperatives, where Marx uses *exactly* the same categories and the same description of the 'immanent reversal of the law', except that the end is not a revolutionary outbreak and

destruction of the world order. It is the possibility to transform big corporations into workers' cooperatives through the use of generalized democratic credit institutions. In any case, yes, I am trying to push as far as possible the idea that there is a crucial heteronomy or heterogeneity in the core of the theoretical machine that Marx is using in *Capital*.

PETER HALLWARD I want to go back to your central claim and ask whether there is not a dimension of law that does play a superstructural and ideological role. Because the core of the operation is not just the buying and selling of labour power, but the *stealing* of labour power. The theft of unpaid labour. That is the decisively critical operation. First, there is setting up the position of buyer and seller at the outset, which is achieved through 'so-called originary accumulation', which is just conquest and theft with no legal pretence. Second, in what appears as chapter 6 in the English edition, when we go into the hidden abode of production, we see these actors wearing the masks or the personae of the legal buyer and seller, as if they might be equal in some way, But that changes very quickly and one comes out having been skinned alive, essentially, by the other. That is an operation of violence and theft that has no real legal cover; or, if it does, it is just a cover – a legal form of disguise.

EB *Capital* is full of crucial arguments concerning the core idea of exploitation, which deal with the idea of the reversal of the initial or official contractual process into its opposite. With or without comparisons to slavery, which, to us now, appear problematic because the more time you spend explaining that this is a kind of disguised 'slavery', the less you spend discussing the role of actual, contemporary, slavery. There are several such passages. One that I evoked too quickly concerns what Marx calls the 'despotism in the factory'. The fact that capitalist and

individual, labourer and capitalist firm, make a contract seems to imply that they remain free interlocutors, which is absolutely not the case. It begins with the insistent idea that already the 'normal' labour contract involves something that breaks with the appearance, and perhaps the fiction, of an *exchange* of commodities – namely, the fact that the buyer of the labour power/force does not pay to be able to consume. So there is a permanent *credit* the worker gives to the capitalist. And then, of course, this is used as a power instrument to exert every form of constraint and violence on the worker within the labour process. If you do not accept this or that discipline or technology, you are not paid. So the labour force is now in a position of subjection. But this is not the end of the story: the 'class' as such, in the form of unions, strikes, struggles, enters the process to create a legal counter-power – something completely impossible in slavery, where the only counter-power is rebellion. And then there is the crucial idea, which emerges in the chapter on machinery, that labour power – this fictitious commodity – bought and sold, does not remain unchanged, if you look at the process of capitalist production in its actual history and technological content. The core of what Marx calls *machinery*, as a consequence of the Industrial Revolution, is that the capitalist remoulds the labour force, and you arrive at a moment – which Marx sees as a preliminary for a communist transformation – when, if the proletarian does not *sell* his labour power, he owns nothing. Because *this labour force exists as a power, an energy, only if it is combined with machinery*. Finally there is the fact about which Negri and others have made such a big fuss, and rightly so, that takes us back to the efficiency of the juridical form: what the capitalist buys is the *individual* labour force (with very few exceptions in agriculture, which are considered archaic). The key aspect of the wage form is to completely individualize the relationship between the capitalist and the worker. By definition, every increase in productivity

deriving from the fact that there is cooperation and the workers are not isolated workers but work together (and form a 'general intellect' in Negri's terms) is the 'property' of the capitalist. You are suggesting to me that I should try and retell the same story, not in the modality of the implementation of the juridical norm but rather in that of its continuous reversal and breaking. This would be less structural but more dialectical. However, that would not be to suggest that the juridical norm is irrelevant.

5

Praxis and counter-finality: beyond Sartre on institutions

XENIA CHIARAMONTE

Instituting is not the same as institution. This chapter attempts to isolate this active element, a praxeological matter that is difficult to grasp. In doing so, it explores the dynamics of instituting and qualifies it as a social praxis that finds its quintessential form in law. As an action and not only the result of an action, instituting exhibits what is being produced in the midst of its production.

The field of studies known in the anglophone world as 'Law and Society' – or, in this case, 'Law and Social Movements' – needs to be intertwined with an approach that properly values the praxis and transformative potential of instituting and that considers law as the instituting technique par excellence. Here, this approach is adopted within the ambit of contemporary ecological discourse and ecological movements. In contrast to the past, the use of law is not 'exterior' to contemporary movements and social struggles. Law is often perceived negatively, as somehow inimical to these movements. Research on Law and Social Movements often comes at the cost of a certain sociologism that examines law and society in an almost mechanical way. It asks 'Which comes first?' Here we will not offer any solutions to that ill-posed problem – rather, we will start from different assumptions.

Instituting praxis

In 'Instituting Praxis', chapter 10 of their monumental work *Common*, Pierre Dardot and Christian Laval advocate for instituting the commons, an entirely artificial construction of practices of commoning, devoid of any naturalism.[1] Why? In order to find a praxis without an author which could thereby detach itself from any personalism and thus truly serve the cause of the common, rather than the 'sovereign' one. In this chapter, Dardot and Laval highlight the sociological reduction of institution to the instituted and then use Sartre's writings to isolate the concept of praxis. They do so on the assumption that Sartre is the thinker who understood praxis as the basis of any ontology of the institution and that he treats this element in a dialectical way 'in contrast to classical sociology'.[2]

Classical sociology, the primary discipline to have addressed the institutional question, never really made it a problem as such. It took the presence of institutions in the social world for granted without focusing on their formation. Enquiries into the sociological institution typically focus on what has already been instituted. At the same time, the institution becomes synonymous with domination and power, and institutions thus appear only as sovereign forms of control, untouchable once established and yet always already established.

The classical sociologists Mauss and Fauconnet suggest that the word 'institution' can be best understood as ways of acting and thinking which individuals find ready at birth and are transmitted through education. Institutions are consecrated by tradition and imposed on newcomers early on.[3] Although Mauss and Fauconnet acknowledge the transformation of institutions,

1. Pierre Dardot and Christian Laval, *Common: On Revolution in the 21st Century*, Bloomsbury, London, 2019.
2. Ibid., p. 284.
3. Paul Fauconnet and Marcel Mauss, 'La Sociologie: Objet et Méthode', 1901, *Grande Encyclopédie*, vol. 30, in M. Mauss, *Œuvres*, vol. 3, Éditions de Minuit, Paris, 1994.

they also note that these variations are merely static variations. This demonstrates two prejudices: that institutions envelop the whole of society and that they are more or less static sources of control. This thought confuses historically concrete actors and oppressive institutions with what is and cannot but be. We might call this 'oppressive thought' about institutions. In fact, we can also see this in Sartre, who expresses the essential lines of such an oppressive thought. Despite the potential beauty of another world, it is simply not possible: we are oppressed and cannot help but be oppressed. What oppresses persists despite all adversity and attempts at its negation.

Praxis and matter

Sartre's thought on institutions is encapsulated in the relationship between praxis and inertia.[4] In *Critique of Dialectical Reason* Sartre attempts to isolate the moment when an institution arises by focusing on the organized group that he believes immediately precedes any institutional formation.[5] In Sartre's view, the 'group-in-fusion' is at the apex of praxis and without inertia. The institution, on the other hand, is the result of the group's inevitable passage from the first state to the second and the subsequent petrification of its praxis. It appears, for Sartre, as a pure corpse. While praxis represents totalizing activity, the

4. My argument here is indebted to a paper by Alberto Toscano that ultimately adopts Sartre's perspective on the human–matter relationship, bringing us closer to ecological issues and the new materialism. See Alberto Toscano, 'Antiphysis/Antipraxis: Universal Exhaustion and the Tragedy of Materiality', *Mediations*, vol. 31, no. 2, 2018, pp. 125–44. Recently, after decades in which Sartre was almost forgotten, his philosophy, existentialism, his relationship to Marxism, and new interpretations of the dialectic are being proposed in various disciplines. See Philippe Cabestan, *La philosophie de Sartre*, Vrin, Paris, 2019, and 'De l'Être et le néant à la Critique de la raison dialectique: le tournant "marxiste" de Sartre', *Alter* 29, 2021, pp. 85–100. See also Jean Bourgault, 'Repenser le corps politique: "L'apparence organique" du groupe dans la *Critique de la raison dialectique*', *Les Temps modernes* 632–634, 2005; Hervé Oulc'hen, *L'intelligibilité de la pratique. Althusser, Foucault, Sartre*, Presses Universitaires de Liège, Liège, 2017.

5. Jean-Paul Sartre, *Critique of Dialectical Reason*, Volume 2: *The Intelligibility of History*, trans. Quintin Hoare, Verso, London and New York, 2004, ch. 6, 'The Institution'.

practico-inert is its opposite: alienation and inertia. Praxis is an exclusively human activity, authored by potentially collective subjects, but a dialectic ultimately grounded in the individual. The practico-inert, on the other hand, constitutes a pure objectivity for the latter and thus contributes to her alienation. Matter becomes alienated praxis, as the subject, through work, invests part of itself into inert matter, thus becoming a quasi-object. Sartre begins with the individual's needs, asserting that humans must work given an inescapable context of penury or scarcity.[6] The institution is inscribed in this scarcity. Sartre writes:

> It is always scarcity, as a real and constant tension both between man and his environment and between man and man, which explains fundamental structures (techniques and institutions) – not in the sense that it is a real force and that it has produced them, but because they were produced in the milieu of scarcity by men whose praxis internalises this scarcity even when they try to transcend it.[7]

Through scarcity, a more general point is made: the negativity of scarcity is a way of expressing the negativity of matter. Scarcity becomes synonymous with negativity and material reality is fundamentally perceived as absolute otherness, forming the basis for both change and subjugation. In the context of the inescapable state of scarcity, the Other is no longer the same as us but becomes 'anti-human' and is perceived as belonging to another species, our 'demonic double'.[8] In other instances, Sartre uses the term 'inhuman' to describe matter, specifically stating that other species are also deemed inhuman.

While there would appear to be useful elements in Sartre's analysis, ultimately it is grounded in a negative view of the practico-inert as the foundation of alienation. When

6. Ibid., p. 125. On this point, see S. Moravia, *Introduzione a Sartre*, Laterza, Rome & Bari, 1983, pp. 116–17. Penury, writes Moravia, appears as a 'metastructure located on this side of history' that is not even the fate of some individuals but is the 'fate of Man'. This is by no means a logic that one might expect to find in Marx.
7. Ibid., p. 127.
8. Ibid., p. 132.

transitioning from the group-in-fusion to the institution, a change occurs that can be easily transposed onto the work–matter relationship. Just as human activity becomes alienated and quasi-objective, so does the group become alienated after the Dionysian moment of fusion and it is compelled to reduce its praxis once more to the practico-inert that constitutes the institution, so Sartre argues. The transition from a group of fused individuals to a group forming a collective entity inherently results in a loss. No resources emerge from the establishment of an institution: individuals lose their freedom, spontaneous fusion ceases, and the process of rendering praxis passive results in alienation. This outcome is inevitable because of the scarcity we are condemned to live with. We can observe that this is not just a thought of oppression, but a thought that is itself restraining in the way that it portrays the unavoidability of certain dynamics.

> Every praxis is primarily an instrumentalization of material reality. It envelops the inanimate thing in a totalising project which gives it a pseudo-organic unity. … If the unity persists, it does so through material inertia. But this unity is nothing other than the passive reflection of praxis … the object produced reflects the whole collectivity. But it reflects it in the dimension of passivity.[9]

Sartre offers the well-known example of 'sealing' an object to signify ownership and authenticity that, upon performance, gives birth to the practico-inert, becoming a signifier that imposes itself on humans as a mere signified.[10] This unavoidable dynamic of praxis and inertia dominates Sartre's text, apart from a hypothesis he introduces which, though still an operation of the negative, he calls 'counter-finality'.

9. Ibid., p. 161.
10. Ibid.

Counter-finality

Sartre unexpectedly affirms that matter, no longer limited to crystallizing into a practico-inert material substructure, is also capable of exhibiting a certain kind of 'action'. We are not talking about agency – attributing this term to Sartre's thought would be excessive – but the question of counter-finality does lead towards a partial re-evaluation of the oppressive dynamics of institution in general.

Alberto Toscano focuses on this aspect of the problem in his article 'Antiphysis/Antipraxis: Universal Exhaustion and the Tragedy of Materiality', where he works through contemporary Marxist ecological thought and ultimately examines Sartre's *Critique*.[11] Toscano's article raises the question: how ought we analyse contemporary ecological discourse with a materialist lens? With which Marx, or within which Marxist line of thought, would this analysis be made most forcefully? Toscano investigates the thought of two leading Marxist ecologists today, Jason W. Moore and Andreas Malm.[12] Positioning himself against both positions for, respectively, a holistic naturalism (in the case of Moore) and dualistic humanism (in the case of Malm), Toscano also criticizes Sartre's concept of counter-finality, which he takes to be representative of a broader adoption of the tragic form.

To illustrate the phenomenon of counter-finality, Sartre offers the 'ecological' example of Chinese peasants, who

> for four thousand years, have been appropriating arable land on the frontiers of their territory, from Nature and from the nomads. One aspect of their activity is deforestation which has been going on for centuries. This praxis ... inscribes itself on nature, both positively and negatively. Its positive aspect is that of the soil and the division of cultivation. Its negative aspect is a signification of which the

11. See note 4 above.
12. See Jason W. Moore, ed., *Anthropocene or Capitalocene: Nature, History, and the Crisis of Capitalism*, PM Press, Oakland CA, 2016; Andreas Malm, *Fossil Capital: The Rise of Steam Power and the Roots of Global Warming*, Verso, London and New York, 2016.

> peasants themselves are not aware, precisely because it is an absence – the absence of trees.

He adds that 'their goal was conquest of the soil' and that they saw no lack but 'only the plenty represented by their harvests', which was for them only a liberation from scarcity through 'elimination of an obstacle', a pursuit of security that developed into a 'lack of protection'. In other words, the 'positive system of agriculture was transformed into an infernal machine' and the peasant became his own enemy. At the moment of its lived unfolding, however, the peasant's action did not 'include this consequence, either intentionally or in reality' and so 'for counter-finality to exist', Sartre argues, it must be foreshadowed in a kind of '*disposition* of matter'.[13]

Sartre cautions that we cannot be sure that the absence of deforestation would have prevented floods. Nevertheless, counter-finality, considered outside this example, seems to echo the inevitable negativity that envelops humanity as it transitions from the individual to the institution, save for the brief moment of fusion. Deforestation itself assumes here the role previously held by the institution. As Sartre writes, continuing the example of the Chinese peasants: 'In being realised, human ends define a field of counter-finality around themselves.'[14] This occurs either in the initial stage when praxis is inverted by joining with matter through labour or in the second stage when, as in the Chinese case, individuals become their own enemies through their own labour.

The next step is decisive: since counter-finality is posited by matter, by a certain 'disposition' of matter, it designates an 'absurd future' in so far as it encroaches on humanity from the 'inhuman'.[15] How does inert, passive matter possess such

13. Sartre, *Critique of Dialectical Reason*, vol. 1, pp. 161–3.
14. Ibid., p. 164
15. Ibid.

a disposition that it determines the encounter with humans and not the other way around? If floods could help produce a 'river civilization', then at this level matter indeed appears to express an 'inverted praxis'.[16] To illustrate this, Sartre uses the example of Spanish colonialism and the discovery of Peruvian mines, which, unexpectedly, led to misery and inflation back in Spain. He criticizes Braudel's naturalistic explanation of Spanish price fluctuations as caused by the 'hostile distances' separating Florence from the sea. Distances only matter when techniques to overcome them are lacking. Sartre notes that matter is no longer a 'limit to signification' and has become a 'mediation between significations', such that 'it is in and through matter that significations (crystallised praxis) combine into new but still inert syntheses'.[17] However, Sartre seems still to have doubts about the supposed inertia of matter, especially in passages such as the following in which matter 'as the receptacle of passivized practices is indissolubly linked to lived *praxis*, which simultaneously adapts to material conditions and inert significations, and renews their meaning, *reconstituting* them by transcending them, if only to transform them'.[18] This oscillation between a matter that cannot but influence human praxis and an inert matter warrants further exploration. The aim is not to remain within a strict interpretation of Sartre, but rather to push Sartre's thought beyond and against itself. What if the group-in-fusion, the positive moment, did not have the practico-inert as its antithesis, but a generative, productive and positive *infrastructure*?

For Sartre, the institutional dimension is a necessary outcome of the passivity that tragically seizes the group-in-fusion, consolidating what is ultimately an absence of freedom. The group-in-fusion's spontaneity is eliminated as it becomes an institution,

16. Ibid, p. 165.
17. Ibid., p. 167.
18. Ibid., p. 168.

leaving just the individual – the collective can only be viewed through its spontaneity and immediacy. Because he takes the institution to be the epitome of the practico-inert, encompassing sovereignty, authority and bureaucracy as three inevitable components of institutional forms, Sartre posits a vertical otherness inherent to institutions, which, upon formation, would derail the horizontal and immanent fusion of the group. The institution implies hierarchy and the oath is its seal: it is the degradation of the common. But could we not offer our own counter-finality to Sartre's logic that would work against his assumption that the institution is always authoritarian and sovereign, such that we might conceive of institutions differently?

Institutions and/as the social

To do so, we will develop his own locution: *praxis without an author.* For Sartre, any such authorless praxis is essentially debased, enslaved to the thing, passive. He writes:

> Every praxis is a unifying and revelatory transcendence of matter, crystallising in materiality as a signifying transcendence of former, already materialised, actions. All matter conditions human praxis through the passive unity of prefabricated meanings. There are no material objects that do not communicate among themselves through human mediation, and no person is born outside a world of humanised materialities and materialised institutions.[19]

Let us try to identify what connects these 'humanised materialities' and 'materialised institutions'. First, we will demonstrate how the absence of institutional authorship plays a positive role and then we will address the ecological thread mentioned above.

For Sartre, the denial of authorship is a requirement of institutions, one aspect of the being of things that are specifically 'materialised'. His voluntarism, however, makes it difficult

19. Ibid., p. 169.

for him to perceive any positive aspect to this loss of authorship, dispersed and petrified within institutional structures. Let us approach this differently, keeping in mind that when Sartre discusses institutions the existence of a group always precedes it. Two texts that can help us move beyond the Sartrean impasse are the young Deleuze's 'Instincts and Institutions' and Yan Thomas's *Les opérations du droit*.[20] Each radically reopened the institutional question and infused it with performativity.

Deleuze situates institutions within the social sphere and establishes them as the origin of society. He claims that instincts and institutions have a resemblance, since both can be defined as processes of satisfaction. According to Deleuze, instincts are processes that satisfy tendencies and needs, passing through an operation of extraction from the external world that directly satisfies them. Institutions, on the other hand, also serve as means of satisfaction but result from an operation of elaboration. In this case, the initial tendency undergoes a transformation, resulting in the insertion of the tendency into a different realm – not nature, but an organized system of means.

This immediately presents a paradox: an institution satisfies a tendency, but the established institution does not determine the tendency that generated it. If we approach the institution logically, it may seem easy to justify money in terms of exchange, marriage by sexual relations, and the aperitif as a brilliant solution for addressing hunger in the late afternoon. However, we can quickly see that the desire to whet one's appetite does not sufficiently explain the aperitif, sexual desire certainly does not explain marriage, and the need for exchange does not explain money. The problem here is that this reasoning tends towards

20. Gilles Deleuze, 'Instincts and Institutions', in David Lapoujade, ed., *Desert Islands and Other Texts (1953–1974)*, Semiotext(e), Los Angeles CA, 2003; Yan Thomas, *Les opérations du droit*, EHESS–Seuil–Gallimard, Paris. Ten essays by Yan Thomas have recently been translated into English by Anton Schütz and Chantal Schütz, collected under the title *Legal Artifices: Ten Essays on Roman Law in the Present Tense*, ed. Thanos Zartaloudis and Cooper Francis, Edinburgh University Press, Edinburgh, 2021.

a naturalization that overlooks the fact that institutions are not given but are rather instituted. This implies that instead of existent institutions there could have potentially been a myriad different ones that in fact can yet be created. Deleuze affirms that institutions are 'things' that undergo historical processes and for this reason end up 'hiding' the sense deposited in them and the needs that allowed them to emerge. The forms of the instituted are mistaken for given and uncreated forms when, on the contrary, they were invented, emphasizing an aspect of openness to the future and transformative potential.

Because they are invented, institutions are not just social but 'original' for Deleuze. They compose an 'organised system of means' which, in contrast to the negative element of needs outside the social realm, constitutes a positive model of society as the element in which needs are satisfied. This model of institutions would be opposed to another, namely that of law. This opposition represents the eternal debate between contract and institution as the foundations of society.

For social-contract theory, society functions as a limit, a brake, and a sanction of the totality of rights guaranteed in nature. Society is the negative aspect to be accepted in order to live together. The positive element (rights) is then taken as a natural given. Society intervenes to prescribe limitations to the enjoyment of rights and to sanction the limit. Law, then, sanctions the boundlessness of any such enjoyment. The negative element is made to reside in society, while the positive element exists outside of it in natural rights. Deleuze does not explicitly define law (he sometimes writes 'the contractual limitation') in the introduction to 'Instincts and Institutions', but we can infer its meaning by examining the attributes of his concept of institution. Deleuze draws a stark opposition between laws and institutions, suggesting that the law does not belong to the broader set of institutions. He is interested in the original status

of society and he opposes the primacy and privilege attributed to law understood as contract.

There are several problems with this perspective. First, institutions are portrayed as creative and inventive while laws merely limit, restrict and prohibit. In this dichotomy, what is usually attributed to institutions as a limit, block or brake on praxis is now merely attributed to law. Such an insistence on a binary distinction between law or social contract and institution risks reasserting the origin-focused thought that much of twentieth-century philosophy tried to undermine, ultimately re-naturalizing institutions as original facts. While Deleuze argues that institutions are necessary for and even create society, he does not address *how* institutions are instituted and thus by what sort of instituting praxis society is formed. To avoid this, we will need to think about an origin that is itself instituted, rather than any founding myth or naturalistic origin of society. To emphasize the practice of instituting is to assert the primacy of process, technique and medium. Deleuze, on the contrary, seems to hypothesize an immediate institutional formation without any mediation, as if society and institution could emerge together without first an instance allowing the institution to be formed.

Praxis without an author

In contrast, Yan Thomas does not accept any opposition between laws and institutions or between what is social and what is non-social within institutions. If he isolates a duality it is between what is given and what is instituted, where the latter is understood to be equivalent to the social without remainder. Thomas explains very clearly that from the point of view of the institution there is no place for what Durkheim called a *social fact*, because for the institution nothing is in fact given and there

is always a need to first construct those distinctions and categorizations necessary for value judgements and action.[21] Facts and relations first must be subjected to an operation that constitutes them as artefacts graspable within processes of collective deliberation – that *makes them social*. Without a *mise en forme* of social matter, which is always a political and not a 'natural' elaboration, there can be no institutions.

We call this art of shaping 'law'. At its origin is language as an act: a performative use of language that uniquely does what it says while saying what it does and so enables institutional constructions to take place. Because they are constructed through distinctions, social objects can be said to be instituted and *therefore* social. The *ars iuris* is that language which names and decides, a vocabulary that invents the words it uses to order the social world. It is essential to understand that there is a linguistic-historical *a priori* that coincides with an all-embracing praxis. The assumption that the things of the world are already there, offered, given, and only legally qualified later through logical reasoning, is itself a construct.[22]

Deleuze has provided us with the coordinates for thinking about the institution and moving away from the contractual hypothesis, but this is not enough. With Thomas we can additionally ask whether we should not see the institution in a genuinely institutionalist way. This would amount to asking *how* an institution is instituted. If the answer is that in the Western world law has been the essential tool for forging institutions, then let's ask ourselves whether and how it makes sense to ask the question of its own origin.

Yan Thomas argues that law presents itself as having been always already transmitted, without origin. While it may in fact

21. See Yan Thomas, *Los artificios de las instituciones: Estudios de derecho romano*, Eudeba, Buenos Aires, pp. 9–12.
22. This issue is more fully developed in Xenia Chiaramonte, 'Instituting: A Legal Practice', *Humana.Mente: Journal of Philosophical Studies* 41, 2022, pp. 1–23.

have one, it is certainly not an origin in the singular. European law finds its roots in Rome, the space where it was invented. The practices that arose and that we now call law materialized within Rome's walls, *ab urbe condita*. Our understanding of law's origin as a medium is limited to its birth within this spatial framework. Law is that text which dematerializes its origin and depersonalizes any potential authorship. Civil law is an extension of casuistics that abstracts the authorial *lex* (from *legere*, 'to read') from its legislator or magistrate, transforming it into text – a *ius* – as a fungible and acephalous norm. Its inventors are now nameless agents who succeed one another in service of a continuous translation. Calling the law into question can help us to picture the ambiguous *praxis without an author* that Sartre failed to see in perspective.

Paolo Napoli highlights the point that legal techniques do not embody any predetermined ideological perspective.[23] Instead, they are versatile, inherently adaptable to various uses and irreducible to the needs of a particular class. Yan Thomas articulates this awareness as follows: 'If the question is how abstraction, norm, and mediation emerge, this is the answer. The rest is ideology.'[24] Ideology's adventures have perhaps been too glorious. It could prove advantageous for the transformation of institutional practices and social struggles to be able to count on a more innovative vision than we have been able to find in a dogmatic legal Marxism. It is with this in mind that one might today dust off the praxeological autonomy of legal operations. As Napoli states, the materialism of the first thesis 'On Feuerbach' does not exclude law: as praxis, law's operations meet the criteria for a materialist approach. Ultimately, legal instruments should be viewed as 'weapons' which can be employed in various ways

23. Paolo Napoli, 'L'histoire du droit et le commu: Quelques éléments de réflexion', lecture presented to the seminar 'Du public au commun', 6 April 2011 (unpublished).
24. Yan Thomas, 'The Law between Words and Things', in *Legal Artifices*, p. 69.

without an inherent telos directing them towards an exclusive goal.

Legal techniques serve as both products and resources of expertise that can be utilized by ideologically and spatially distant subjects to achieve diverse objectives. This does not eliminate the issue of contextualization, taking into account the material, social and cultural resistance each environment may present against the dominance of means and the self-sufficiency of instrumental rationality. Nevertheless, these means should not be seen as distractions that mystify reality and its necessities; their techniques instead shape the plane of immanence where praxis is organized as innovative creation. These techniques can be repurposed and transformed within historical dynamics, ultimately eluding association with socio-political power focused on the subject.[25]

Napoli effectively demonstrates that concentrating analytical attention on the *means* represents a theoretical choice and not just a methodological one. It is a question of admitting that processes are intelligible, starting from that layer of know-how situated between subjects' intentions and the ends they intend to pursue. These means are condensed meanings, readily available for actions that possess a life relatively independent of human intentions.[26] They constitute nothing less than that *praxis without an author* that Sartre failed to recognize due to his ultimately voluntarist view of history.

25. Napoli, 'L'histoire du droit et le commun'.
26. Paolo Napoli, in Adalgiso Amendola and Paolo Napoli, 'French Theory e Italian Theory: l'impatto della filosofia contemporanea sul diritto', *Rivista critica del diritto privato* 4, 2014, pp. 591–614.

Neither one nor two

In conclusion, let us briefly revisit the ecological implications of this change of perspective on the institution. If the new 'new materialism' is not satisfied with Marx's 'old' new materialism, this is because of the way the latter treated the problem of relations. Re-examining the Chinese peasants' example, we can derive a different conclusion from Sartre's. It is within an infrastructure of relationships that practices are inscribed. Once we recognize that deforestation facilitates and accelerates water flow, we can identify the systems, techniques and practices that address this new, human and material-induced condition. The interpretation will not be vaguely 'agential' when considering natural entities, such as would look to re-establish any dualisms or primacy of matter over humanity. Instead, it will once again focus on relations. We are com-posed or, keeping with the preferred grammar here, *co-instituted.*

In Sartre's view, potential assemblages are only thought of as counter-finalities or unwanted occurrences. Matter is almost wilfully and tragically opposed: only the negative enables one to think composition. It is only the tragic consequences of unconscious practices that allow for the contemplation of human–matter assemblages. On the other hand, the latest new materialism seeks to rethink the relation in various, albeit often problematic, ways. We cannot discuss the variety of proposals here, but it is worth noting the political and *legal* implications of the work of Jane Bennet.[27] Bennet, like Latour, argues that the actor and the network must be intertwined so that political responsibility is understood to rest within a human and non-human assemblage.

27. Jane Bennet, *Vibrant Matter: A Political Ecology of Things*, Duke University Press, Durham NC, 2010.

However, if taken seriously, it is not just a matter of determining 'what relationship they or we are in', but also of examining 'what effect that relationship has'. This crucial consideration is also a legal problem because it is unclear how to attribute harm to someone in the context of an anonymous matrix of harm and diffuse interests (such as ecosystem destruction). In doing so we must highlight that assemblages can no longer be considered inert. The implication this has for how we are to think the relationship is critical. Slavoj Žižek counters Bennet in his caustic manner by stating 'We can think of Auschwitz as an assemblage – in which the agents were not just the Nazi executioners but also the Jews, the complex network of trains, the gas ovens, the logistics of feeding the prisoners, separating and distributing clothes, extracting the gold teeth, collecting the hair and ashes, and so on.'[28] Should we attribute responsibility for Auschwitz solely to the entirety of this assemblage?

As Donna Haraway brilliantly puts it, 'One is too few, but two are too many!'[29]

28. Slavoj Žižek, *Absolute Recoil: Towards a New Foundation of Dialectical Materialism*, Verso and New York, 2014, p. 8 n8.
29. Donna Haraway, 'A Cyborg Manifesto: Science, Technology, and Socialist-Feminism in the Late Twentieth Century', in *Simians, Cyborgs and Women: The Reinvention of Nature*, Routledge, New York, 1991, pp. 149–81.


JUST SAY
NO
TO FAMILY VALUES

TRANSLATIONS

6

The union of the sexes and the difficult transition from nature to law: an interview

YAN THOMAS

A prolific researcher, Yan Thomas was not a 'public intellectual'. The present text was published by the French journal *Le Banquet* in October 1998 – which is to say only a year before Chirac would sign into law the 'civil solidarity pact', providing preliminary closure to a decade-long legal struggle over the social rights of cohabiting gay and lesbian couples in the context of the Aids crisis. There was debate not just within the movements, but between philosophers, civil law jurists and psychoanalysts over the role of law in 'instituting life' and thus its relation to a 'symbolic order'. This text is essential because it is one of the few places where Thomas was able to direct his gaze, trained for so long at an 'anthropological distance', on contemporary institutions. What does it mean that our institutions are not 'mere reflections' of an underlying mode of production, but arise as provisional solutions to concrete problems of the past? How ought one to understand the relation between movements and institutions if not according to the model either of an ever-expanding state recognition of new social actors or of 'withdrawal'? If we must not accept existing institutions merely by virtue of their duration, the question ought not to become that of a perfectible order of institutions – 'social utopia', as Adorno called it disparagingly – but of how we can consider the figure that Adorno refers to in this volume as 'maturity': what it means to consciously bring the instituted physiognomy of our social world into the reach of judgement, both scientific and political.

LE BANQUET Does the idea of a common life project, as expressed in the civil solidarity pact, have any precedents in Western law?

YAN THOMAS It is to be hoped that the current project will allow for more flexibility, fiction and institutional operability [*d'opérativité*]. The institution must be freed from its entanglement with the organic, where it has been mired for centuries. What is regressive in some projects is to view new regulations as the recognition of a homosexual relation taken as such in its purely sexual dimension; it is a certain propensity to very concretely link a particular mode of institutional bond with a particular type of sexuality. While the latter is of course a matter of importance, we will have made progress if we avoid its inscription in the law as such, since it is not a matter here of addressing legal prohibitions, which pose completely different problems.

Let us start with the formula 'civil solidarity pact'. It is important because it means that we are situated in a political order. The idea of solidarity between two people united by civil bonds is inscribed in the most orthodox tradition. I refer here to Roman law and the medieval institutional constructions to which it later gave shape, in the obviously very different context of Christianity. Marriage is defined as a life partnership, which quite accurately translates the formula *consortium vitae.* The only properly legal definition we have of it is that it is a contract of exchange concerning life. In the Latin tradition on which Western law depends through the mediation of mediaeval glosses and commentaries, there is no other legal definition than this one. This idea of a 'life partnership [*société de vie*]' is not without importance for the contractual definition we now have of marriage. Through the concept of partnership, the notion of contract could be applied to marriage, as partnership [*société*] was one of the four consensual contracts in Roman law,

along with sale, lease and mandate. But even before marriage was thought of as a contract as opposed to a sacrament, it was a partnership – that is, the sharing of a good that is none other than life itself. Adding to this is the fact that Roman law specified that the matrimonial exchange took place on both a civil and a religious level (referring to the rites that extended beyond the purely civil exchange), making it easy for mediaeval commentators of these texts to include not only the shared human assets in marriage but also divine assets – that is, in their understanding, the sharing of a common religious practice.

Let us note right away that this is not about sexual and organic life, but about social life, to which the parties contribute through contract. In other words, the concrete idea of heterosexual marriage is subsumed under the *euphemized* concept of a social life for two. Of course, ancient jurists knew that marriage served to produce legitimate children, but when they defined marriage they curiously abstracted from it: only the idea of organizing a life for two is present. This regulation of life for two does not necessarily imply any conjunction of the sexes, or at least such a conjunction is not what is primarily on display. However, it is not just a euphemism. It is necessary to see in it an essential root of, I would say, the 'intellectualist' conception of marriage, which in modern times developed through a contractualist representation. Indeed, these ancient constructions constitute a reference point for contemporary liberals, allowing for some distance from the sacramental and institutional definition that is later grafted onto the institution in the Middle Ages, and that fully refers to the flesh and sex – I will come back to this shortly.

Nevertheless, it was against the background of this abstraction that jurists, keen to emancipate social from organic nature, could conceive of the 'life partnership'. It even became possible for them to consider, within a civilization as attentive to carnal

ties as the mediaeval West, all sorts of unions that did not involve any sexual sharing and that were, like marriage, true communities of life based solely on the consent and commitment of the parties, more or less ritualized. For example, they would allow two neighbours, regardless of their sex, or two siblings, even ascendants and descendants, to enter into a life partnership in order to manage and transmit their assets. This concretely implied living together and cohabiting for at least one year and one day. It is not a question of bed, but of table. Numerous operations were thus made possible; for example, the affiliation contract by which a man with assets associated with a younger person for a common life project that, of course, involved rural exploitation. All these types of association had very specific goals, but if we stick to the abstract level at which jurists have defined these unions it is a *consortium vitae* between two people who commit to providing assistance to each other in the long term. We could also mention the contracts of *affrèrement* or fraternity by which men or men and women united their destinies for at least one year and one day, not to mention the chivalrous contracts evoked in the songs of deeds, where warriors committed to helping each other, saving each other's lives and sharing the same coat of arms. Let me be clear: it is obviously not a question of comparing social practices where there exists no common measure, but of considering the legal instruments that, across such diverse contexts, can have a lasting significance, precisely because of their great formal abstraction. It is in this sense only that we can identify in the medieval customary tradition – and even more so in the Roman idea of a *consortium vitae* that furnished the common notion to all of these contracts – something quite analogous in terms of institutional flexibility and the erasure of any sexual reference to what French legislators intend to do today with the civil solidarity pact.

LB Should a ritual dimension be introduced?

YT It should be recalled here that the solemnization of marriage is the counterpart to its sacredness. The declaration of the spouses' consent before the civil registrar, established by the laws of 1792 and taken up in the *Code civil* of 1804, is what remains of a sacramental character affirmed and organized by the Council of Trent. No sacrament without publicity – but all publicity, one might conversely say, marks the passage from private contract to institution. The consecration of the exchange of consents by a priest and then by a civil registrar implies control, but above all ratification. The state, like the Church before it, occupies the position of the third party here: the civil registrar represents the law and enunciates it. The essential difference between canonical marriage and civil marriage lies in the secularization of the rite – since all the elements of the former can be found in the latter – in such a manner that marriage nonetheless remained indissoluble, after the revolutionary period from 1792 to 1815 through the nineteenth century and up until the Republican law of 1884.

Does the current bill retain any trace of this ritualization? I do not believe so. The initial project provided for a joint declaration to be received at the town hall. To avoid any metonymic reminder of marriage, the registry of the court was preferred. In any case, the planned declaration has little more than a probative purpose: it does not solemnize anything; it only aims to prove that people live together. Simply put, the civil solidarity pact 'acknowledges' the bond uniting people who 'live together'. The legislator clearly wanted to minimize the symbolic significance of a declarative and non-constitutive act – and the substitution of the court for the town hall confirms this desire for absolute neutrality: there will be no parallel marriage to the true marriage. However, even reduced to a probative function, this declaration still produces an authentication of the private bond.

The legislator was not satisfied with simple possession of status such as would not have had any less legal value, but which would have given the *appearance* of a mere fact to the law. Here we must say appearance only because possession of status cannot be a fact, but its legal qualification.

Marriage and procreation

LB What is the difference between the civil solidarity pact project and common law marriage?

YT The first difference is obvious. Even if the Civil Code does not require a difference in sex, it is still implicit since it concerns 'him' and 'her'. Next, marriage creates filiation, whereas it is excluded from the pact in question. On the other hand, it is only through laziness of thought – and institutions encourage laziness – that we believe marriage aims at procreation. Jurists know perfectly well how to distinguish between the social objectives of an institution (i.e. that marriage aims to establish a family) and the institution itself, reduced to its formal essence and thus adaptable to an infinity of contents. To better understand this, let's go back to Roman law. When people married in that world to which our texts refer, it was undoubtedly to have children: it was, as the Greeks say, to 'cultivate the field' of the wife. Roman law explicitly stated that women's dowries had to be guaranteed in order to fill the city with children and that remarriage allowed the same woman to put her procreative capacity at the service of several lineages. In the case of canon law, there is no need to emphasize the obvious link between marriage and generation, but at the same time canonical marriages have never been annulled due to a lack of procreation or for the absence of sexual relations. On the contrary, chastity in marriage is a matter that the canonists often discussed. In canon law, two spouses can

very well decide to live chastely – and thus not to achieve the social or religious goals of marriage – while remaining spouses. If we stick to a more formal than social analysis of the institution of marriage – an analysis that allows us to universalize this legal form by giving it a maximum of abstraction – it must be acknowledged that neither procreation nor sex necessarily forms part of it. The relationship between marriage and sex is less evident than one might think, even if canonical marriage, apart from what I have just said, is obviously based on the union of bodies.

LB You said 'to have children'. In fact, it would be more about having legitimate offspring, regardless of biological parentage.

YT Yes. Having children means producing them for a lineage and beyond that for the community in which that lineage is inscribed. Anthropologists have always and often studied the exchange of women: humanity, they say, is born with language and exchange. However, there is one point that anthropology has hardly analysed and that has nothing to do with exchange and everything to do with the law. This is paternal filiation, which in our society is traditionally based on a presumption. This is a radical invention in the history of humanity, but few anthropologists have seen the immense scope of this legal artifice, on which Bachofen nevertheless built his entire work. It is obviously not a matter of imagining that, in any human society, the role of the progenitor in procreation was unknown and then, after discovering it, it became socially sanctioned. To reason in this way would be to believe that social organizations base their foundation on the recognition of biological constraints, whereas it is exactly the opposite that happens. The mother is immediately identifiable by childbirth, while the father is not. What designates the latter is not the body but marriage, which is to say an institution. The

husband may not be the progenitor, but he is nonetheless the father as long as the children born to his wife are attributed to him – in the West, this is to say as outlined by Hippocrates and taken up by Roman law. Marriage, therefore, serves only to attach children to a father. It serves less to 'produce' children than to attach the children of the parturient to her legitimate spouse. In its legal structure, marriage does not necessarily require, at the limit, that husband and wife sleep together. The presumption of paternity is legal and the question of blood and sperm is normally avoided. The institution covers over nature and even conceals it.

LB We could relate what you are saying to contemporary debates on adoption, which define a relation of filiation independent of biology.

YT Western societies have had difficulty accepting adoption only since the Middle Ages: they see it as a substitute filiation, somehow second-rate. From the moment marriage is anchored in sex and filiation in blood, adoption becomes difficult to conceive. There is a very strong and persistent link established in the twelfth and thirteenth centuries between marriage and flesh, filiation and blood, and a concomitant avoidance of adoption. It is a Western anthropological constant from which it is very difficult to break.

LB It remains that, in contemporary law, the possibility to break a union for lack of sexual relations is legally provided for.

YT Yes, but we must trace its anthropological genealogy. Jurisprudence certainly admits that marriage can be declared null for lack of normal sexual intercourse (Article 180 of the *Code civil*). Refusal of conjugal duty or impotence can also be grounds for

divorce for fault. This is not an invention of the Civil Code since these reasons appear as early as the thirteenth century. Non-consummation or impotence become grounds for the nullity of a marriage – at least if the two spouses are not satisfied with their chastity. Canon law is extraordinarily inventive here, especially in the field of evidence: impotence had to be proven on the very day of the marriage, since impotence arising in the course of married life could come from the charm of a witch. Here is an essential chapter missing from the Foucauldian history of sex: that of the sexual fundamentalism of the canonists, of which the Church still offers some belated examples today. There is a reduction of marriage to the sexual bond that goes back to Augustine and the foundation of marriage in Latin patristics. What is of divine institution is the union of the flesh. In *The City of God* we read that God had planned that Adam could have an erection at will – Viagra finally fulfils this programme. But we must not forget that there is a competing tradition, let us say spiritualist to be brief. This spiritualist tradition, which still survives in the Middle Ages, is perfectly embraced by some theologians. For example, Peter Lombard's twelfth-century *Sentences* recall that marriage and flesh have no necessary link, relying on a text of Roman law that says that consent and not the bed makes the marriage: *non concubitus, sed consensus.* Around the same time, Gratian's *Decretum*, a great canonical compilation from which marriage law was built, confronts texts of the Augustinian tradition, which emphasize the flesh, with Eastern texts from John Chrysostom and Emperor Maurice, who recall the marriage of Mary and base indissolubility on the sole strength of the pact: 'It is not coitus, it is the will that makes the marriage.' Thus, an entire legal and theological tradition excludes in marriage not the reality of the flesh, but the relevance of this reality to the definition of institutions. There is a very ancient tendency to denaturalize legal relationships, which does not mean that

they are devoid of any natural reference; it is simply that the social and legal relationship is built independently from it. This tradition is interesting in itself, especially because it has been obscured. The dogmatic tradition of Christian marriage has completely repressed it in a very scholastic synthesis: the flesh is a sign of consent.

LB The Civil Solidarity Pact can be analysed both as the revival of a lost heritage, that of contracts which removed marriage's monopoly over life projects, and as a glorification of marriage on which it is modelled since it remains today the only point of reference, including for filiation. Our contemporaries in this debate possess a naturalistic vision, concerned with recreating naturalness through fiction.

YT Presumption as the traditional foundation of paternal filiation (a foundation now shaken, as we know) is enough to show the gap from something natural. In this Roman and Romanist tradition, adoption certainly represents the peak of will and the triumph of institutional fiction over nature. I think the same is true for the strength of will in the constitution of marriage. Let us remember the formula: consent, not the bed.

LB You have just identified another important divide today, that which separates consent from the state of affairs. The dimension of voluntary action is also fundamental: is it a matter of will or of a statement, such as the statement of possession of the status of cohabitants?

YT The possession of status is not a fact, but the legal qualification of a fact: it serves to prove marriage or other personal statuses recognized by law or jurisprudence. In this sense, the possession of status is no more natural than any act drawn up

before a civil registrar. It is a choice that the law offers to the parties to prove their status. There is no naturalness or even factuality that is specific to the possession of status. Let it be clear that the status of cohabiting partners is not merely the factual state of a couple. It is this fact in so far as the law decides to give it effects. In other words, it is the factual condition of a norm, like marriage itself and like any other legal fact. In law, there is no fact more factual than another. Every fact is necessarily predetermined by the law. There are only distinct legal qualifications – in this case, that of marriage and of cohabitation. Cohabitation is no more a fact than marriage and no less an institution than marriage. Simply put, it is a different institution.

Marriage against homosexuality?

LB We are, however, in the political context of a demand for recognition, with the deep conviction that the fact is there: the Court of Cassation does not recognize homosexual cohabitation.

YT This means that it refuses to extend the legal category of cohabitation to facts of a homosexual nature. But the fact that two people live together, regardless of their sex, does not in itself impose the need for legal qualification. If it is simply a matter of society knowing that two people of the same sex live together there is no need for a law. Society cannot, in this sense, fail to recognize homosexual relations since they exist. Still considering the matter only in this purely factual sense, the refusal of recognition in fact represents only another way for society to let it be known that it knows such facts exist. Another matter is *legal* 'recognition', which consists of qualification. Let us avoid confusing registers: what is demanded is obviously not merely knowledge of a fact, but legal recognition. Of course, everyone knows in principle how to distinguish between fact and law. But

very few, on the other hand, know how to draw the civil and political consequences of this distinction. The legal recognition of a fact is of a political nature in the sense that it involves a value judgement and a public decision. It is up to the legislator to imagine a legal apprehension of the fact that there are gay couples and this apprehension can be done through universalizable or specific categories, which is a political choice: one could imagine a civil union contract, one might prefer the path of cohabitation. Any solution could be adopted and potentially just, provided it is not merely based on the idea that one cannot avoid acknowledging what exists. The operability [*opérativité*] of the law never consists in ratifying a social fact. If it were only a matter of that, one could just as well say that the mad exist and so we must somehow accommodate them. No factual argument will ever serve to construct a civil status. In the category of fact, there is great ambiguity. When one says that homosexuality is a fact, it is often meant that it is a legitimate fact and no longer a criminal one. The judgement given is in reality a value judgement, even if it is sometimes obscured by what we scarcely dare to admit as value judgements.

LB There is a shift within the movements from a desire for recognition as such to a demand for the recognition of their will. That is, they want the recognition of their ability to create a rule of law that they have chosen. Recognition, here, would be understood as the ability to develop new law.

YT Indeed.

LB Let's return to the legal genesis of our representations. Why did Roman law, which did not condemn homosexual relationships, not recognize gay marriage? Is this related to the dual status of men and women in Roman law, which seems to be a

status made for marriage? Isn't legal evolution logical since this difference in status no longer exists in the city?

YT 'Man' and 'woman' were, in Roman law, legal qualifications. Of course, they covered natural data, but that was not enough to enter the realm of law. Jurists imagined cases in which they had to decide, in place of nature, who was a man or a woman. They imagined an intersexed being equally divided between these two sexes, whose gender was undecidable. Then a decision had to be made. This is a casuistic and obviously not experimental way of saying that it is up to the law to establish the sexes. In current debates on homosexuality and filiation, the data from which we work are almost always taken as natural, such that the legal and social construction of the sexes is obscured. On the contrary, we can show how the human is a perpetual agent of self-invention, not least through legal technique. The first to forget this are often the jurists themselves. When they refer to nature, they ignore that they are the first to have left it. From the moment that the law, which has nothing to do with a symbolic order, decomposes into technical operations and non-natural effects, one can wonder why the Western tradition, which is the most artificialist, refers so often to the division of the sexes. This is because this division is legally instituted. The law decides that one can only be a man or a woman and thus, on this legalized truth, the law of filiation is built. Let us avoid, here, confusing nature with the legalization of nature: these are two distinct orders of reality.

For my part, I do not see why, since we have already recognized that belonging to genders is legal, we could not recognize today other affiliations than to genders. This is, moreover, what the project we are discussing contributes to doing. This project carries forms of social organization that transcend the division of the sexes. Let's say that the couple will now concern abstract persons. For once, the law will not be interested in their sex or

their sexuality. In the debates that will follow, we must not forget that institutions have never been natural – which does not mean that institutions can do anything as such.

LB At what point in the history of Western law does marriage find itself in the situation of a monopoly? Can we have a historical representation of the way that the other tradition was obscured?

YT We can reconstruct some pieces of the puzzle. Let's go back to marriage. In Roman law, marriage served to create fathers, which is a rather limited function. Paul Veyne has shown that, in Rome, it was really a little-practised institution. It was practised mainly by those for whom filiation mattered, which is to say the dominant orders of society. For them, marriage was not only an institution, but an obligation: a senator was obliged to take a wife so that his children were legally attached to him. The link between marriage and the transmission of citizenship in the higher orders was very clearly circumscribed. It was a political institution more than a social one. Moreover, it was not necessary to be a legal father to be recognized as a social father: the foster father, for example, is an extremely important figure. Outside of the father who transmitted his inheritance and name, there were foster fathers who only gave their affection. Marriage existed, but it was not a necessary mode of social life. On the other hand, if we consider canon law, marriage becomes necessary as a mode of sanctifying life. Marriage extends divine creation and, for all those who are not clerics, it becomes a necessary status. Earlier, I mentioned the fraternal pacts of *affrèrement*: they are not incompatible with marriage, but complement it. The 'brothers' who contract such a life in common have often been nonetheless married. These unions were not contradictory to one another: it was enough that they were not formally recognized in the same way. Our civil solidarity pact is

reserved for two partners and so ultimately resembles a conjugal pact. The historical pacts I am discussing allowed several couples to associate and to form real families. The plasticity of their institutions gave them a capacity to create social fiction greater than ours. The more that the institution of life relationships has been circumscribed to a two-sex union, the more the field of social malleability has been reduced.

LB The first group to draft the social union contract were not closed to the possibility of unions involving multiple people, but the issue of taxation narrowed the range of possibilities. The pact of social interest proposed by Jean Hauser seemed to open up possibilities by not ruling out the ability to enter into a contract with people who are otherwise married. However, this was politically perceived as a denial of conjugality and the sexual bond.

YT The image of Adam and Eve has shaped our representation of the couple: the isolated union of a man and a woman. Western anthropology, religious or not, has integrated this image. Neither the Greeks nor the Romans ever imagined a first founding couple of humanity or society. They perceived the origin of all society as a gathering of several – even Aristotle's political monad assumes at least the spouses, descendants and slaves. The original couple always comes back to us as a model of social organization and what we call the narrow family proceeds from it. It is onto this elementary organization that power is grafted, a fundamental theme among *Ancien Régime* jurists. Power was the power of one, the husband who is the father; society was organized around one, the monarch and the father. To the king the kingdom, to the father the family. Power presupposed an extraordinary simplification of the legal criteria for social differentiation. Two paradigms were essentially sufficient to analyse difference and classify people in the world of law: the sexes and the generations.

LB Hence the fact that marriage has become the 'canonical' fiction. It is when roles appear less marked, as with homosexual conjugality, that this paradigm no longer works.

YT Sexual roles are indeed less marked. But let's not forget that this destitution of elementary differences began with generations and ages. The French Revolution was the first attempt to break out of this differentiation scheme. First, the federation of subjects that constitutes the nation itself denaturalizes beings. Next, within the family, the abolition of paternal authority (partially reintroduced in the *Code civil*) means that fathers and sons who have reached the age of legal majority are indistinguishably citizens: there are no longer generations in the political order. The French Revolution demonstrated an extraordinary rejection of the traditional order of generations. This example should be considered when discussing gender equality today. It is not so much about equality as it is about political indistinction.

A marriage tied to sexuality

LB All of this calls into question what some call the symbolic order. We should also return to the history of how canonical marriage led to the prohibition of homosexual relationships in the West. At what point in the history of Western law does sexuality come to be tied to marriage?

YT Since when has marriage been related to sexuality? But always! However, it's an entirely different question to ask whether sexual union is a constitutive condition of marriage – this understanding developed slowly. We must go back to the two spiritualist and carnal traditions since the jurists have produced contradictory texts. For some, marriage is linked to consent – this is the Roman law taken up by Saint Ambrose and Saint Jerome, which views

marriage as an agreement of souls with the flesh being free to dispose of itself; while for others, the Augustinian tradition let's say, sex constitutes marriage. Jurists then try to reconcile the two traditions using the scholastic method. The point of convergence of these traditions is the notion of engagement: commitment obliges marriage, and marriage gives each spouse a right of disposition over the other's body. Marriage is thus realized in two stages. First, there is the *initium*, the driving cause, so to speak, which is based on consent: this is the engagement. Then there is the consummation, which fulfils this commitment, gives it a carnal form, and makes it irreversible: the *ratum*. But it can also be said that sexual intercourse is sufficient because it constitutes a presumption of consent. With the scriptural bases available to canonists, marriage could be reduced to carnal coupling. Marriage is an invention of the states themselves, enemies of clandestine unions, misalliances and rebellion against paternal authority. Kings impose, for the peace of families, that marriages be celebrated publicly, a requirement that the Council of Trent eventually incorporated into its canons. The public exchange of consent then becomes necessary. Publicity becomes a constitutive element from the moment that the reconciliation between consent and the act of consummation appears subversive to social order. It was no longer enough for a girl and a boy to have their carnal union blessed to be considered married.

LB Why is this carnal bond so indissolubly linked to marriage? All the more so as we witness the liberalization of morals and relationships outside of marriage. Why this attachment to the central figure of marriage despite everything, including among those who have broken with the canonical conception?

YT In our institutional culture, the image of incorporation and therefore of the flesh is fundamental. The consummation

that ratifies consent to marriage, the refusal to recognize as true any filiation that is not inscribed in blood, the requirement of a carnal presence of the father in the son – all of this forms a coherent whole. For this institutional anthropology, nothing is more significant than incarnation and the dogma of real presence. The flesh of Christ is a paradigm that remains present in the horizon of legal scholars from the scholastic tradition. The state itself is embodied. The body, which had never been considered by Roman law, becomes a central figure in the institutional and political field during the Middle Ages. In the fourteenth century, genuine forensic medical expertise is attested to establish, against the presumption of paternity, the truth of real filiation, which is to say the truth of seed and blood. The triumph of these new representations ensures the development of legal actions through which individuals disavow or deny parental responsibilities, especially challenges to paternity on the part of third parties. This long-term institutional construction explains why it has become so difficult for us today to think of marriage outside of the carnal bond and of filiation beyond blood. Canon law and the Christian interpretation of Roman law have produced a culture that remains at the heart of contemporary representations. We have become fundamentalists of the body, sex, blood and genetic truth. Medically assisted procreation procedures even reinforce this trend: technology certainly does not help us escape this purely biological representation of filiation. But we cannot attribute to technology the enduring representations it serves: it supports what has long been realized in the institutions themselves. We can no longer imagine elective bonds between individuals that can be legally validated without any reference to their bodily substrate. We think of our family institutions in an organic way, rather than on the grounds of fiction, which is much more conducive to social invention. Our institutional arrangements resemble the manipulation of

natural objects, as evidenced by what our recent legislation (I am thinking in particular of the 1994 laws in France) has done to the body, life, the reproduction of life, and death: we are dealing only with organicity. What strikes me as remarkable in Roman legal invention, by contrast, is this ability to create social bonds outside of the flesh. Adoption is the prime example of this creativity. Returning to marriage and the current project of civil solidarity pacts, we can see that the difficulty lies in the lack of any sexual reference. The idea of a specifically 'gay marriage' keeps coming back because we believe that sex is necessarily a matter of law.

LB Are we to understand, then, that canonical marriage has instituted a sort of unique legitimate sexuality?

YT Indeed, marriage and the necessity of carnal relations between spouses imply a sense of legitimate sexuality. At the same time, the negative figure of the sodomite emerges, disturbing the natural and especially political order. Yet marriage is not, as such, the origin of the prohibition on sodomy. In Genesis, sodomy is not the reverse of marriage. Homosexuals have been more the victims of a certain mode of the state than of marriage. The punishments for homosexual relations are not correlated with marriage, but to power and more specifically to the majesty of power. The introduction of the concept of 'unnatural' in the use of sex has nothing to do with the institution of marriage. This idea, very present among the Church Fathers and legislators of the fourth and fifth centuries, reappears in the dramatic context of the mediaeval Inquisition, where sodomy becomes a crime of lese-majesty and heresy. Sodomy is then related to treason against the state. Most trials for lese-majesty, from the fourteenth century onwards, involve the imputation of the act of

sodomy, whether the individuals are married or not. We should not link the valorization of marriage, or even the social obligation for Christians to marry, with the prohibition of homosexual relations. Sodomy disturbs the political order and, beyond that, a natural order, which is also political since it is instituted. An attack on the natural division of the sexes is a rebellion comparable to an attack on the natural power of the princes: it is a rebellion against an order willed by God. The world-view simplifies and all the prohibitions which have distinct origins compose a landscape in which one must decide. The network of prohibitions appears so tight that marriage emerges as a central point of reference. However, if we focus only on marriage, we do not understand much about a history that unfolds on the grounds of heresy, lese-majesty, power, and the construction of the Church and the state. The canonical law of marriage is just one piece in a vast ensemble that fundamentally concerns political prohibition. The idea of legitimate sexuality, as we can see, is quite complex. It is less linked than we think to the idea of any reproductive purpose to sexual union. It is more related to the construction of the inquisitorial or absolutist state. But we have diluted this history, we have desacralized it. In place of the terror of the crime of majesty, we have naturalized the heterosexual norm.

LB Irène Théry's solution, based on cohabitation, relies on a form of sexual relationship tied to what is socially licit. The law would follow contemporary social recognition here.

YT It is true that this solution is based on the presumption that members of a couple, married or not, share the same bed. There is no doubt that this presumption corresponds to a fact. So the real problem is whether society accepts or not

to recognize – to validate – such a use of the bed. But can we imagine a bond that the law would validate without going through this presumption – that is, without the presumed presence of the bed being constitutive of the bond itself? For another approach to be possible we would have to abandon this presumption and, with it, the representations it carries. I do not, however, know if this is possible and the solution of cohabitation is certainly defensible: in the current state of the law, it is even the most progressive. If there is an alternative to such a solution, it can only be realized by ceasing to put a reference to sexuality. This commitment to abstraction seems to be, at least partially, the legislator's stance. For my part, I welcome it; I see it as progress towards a less organic, more abstract, and ultimately more civil citizenship. But it is not certain whether in forthcoming debates, in the demands that some will make and the refusals that others will oppose, the question of recognizing the bed will not again become central. It is not certain that fantasy as such – the incandescence of the bed – will not regain its eminently orthodox place as a legal object in our culture. Cohabitation where heterosexuals and homosexuals would be put on an equal footing or an abstract relation that does not refer to sex are, in my opinion, the only alternatives. A specifically gay marriage is certainly conceivable, but it has against it this internal contradiction which consists in referring to sex as an institutional object while denying that the difference between sexes is institutionally relevant. In short, such a proposal or anything resembling such a proposal would bring to the centre of the debate, once again, the problem of what concerning sexuality is or is not integrable into civil law. I have the feeling that, on the contrary, we must go beyond this question and take advantage of this debate to advance reflection on citizenship as such.

Symbolic order or theological order?

LB What do you think of the hostile reactions to the civil solidarity pact that emphasize the fact that it would disturb the symbolic order?

YT For there to be a symbolic order, there must be two registers, one of which represents the other, which would be absent by hypothesis. A given institution, then, must represent a nature external to itself. This is conceivable in a system of natural law, where the law is a pale representation of a more real and truer order, like the shadows projected on Plato's cave. It is a world where social organization necessarily fills an irreparable loss. A world where the organization of law presupposes heteronomy rather than autonomy. Many still have nostalgia for this world of loss and incompleteness and such a nostalgic hypothesis is at the centre of many jurists' reflections. However, Roman law has allowed us to escape metaphysics, and from this point of view modern law continues to be Roman. For there to be a legal institution, there must be a human creation of something that is not related to anything external to it. Such is the greatness of the law, as well as its arbitrariness and its terrible danger. We have moved from the order of reference to the world of political and technical fiction. To speak of a symbolic order raises the question: symbolic order of what? Of what other than what men themselves deliberately and freely institute? What is this immobile half from which the law would be separated? What is this invisible whole of which the law would be the visible part? This question would then have to be asked about all institutions – but there is no possible answer to this question, except a theological one.

Denaturalizing filiation

LB What are the relationships between marriage and filiation, especially in canon law?

YT Generally speaking, marriage serves to designate the father. That said, canon law does not directly deal with filiation. The major contribution of canon law in this area is the adaptation of the model of incarnation, which I mentioned earlier. Jurists incorporate the father into the son. From then on, adoption disappears, not only from social relations but from the law itself, which opposes true and natural filiation to a fictitious and in a way deceitful filiation. From this moment on, there exists a true filiation and a false filiation. This opposition between the biological and the legal is an interpretative distortion of the Roman tradition. The ancient texts on which the jurists of the Middle Ages relied refused to distinguish these two modes of filiation according to their degree of reality or truth. Better still, they made adoption the very model of legitimate filiation. Filiation existed either through the fictitious route of attributing the child to the mother's husband – even if, in fact, the husband was not the real progenitor; for example, if he was impotent or even a eunuch, which shows that the Roman institutional construction fully assumed all the possible gaps with natural reality – or through the even more fictitious route of adoption. In this sense, adoption represents the quintessential Roman institution, for it is not bound by any natural limit. Everything in it is artificial and legal. First, it was not, strictly speaking, a man who adopted, but a citizen. Next, this citizen adopted even if he was not married. If he was married, he did so as a citizen, and not as a spouse: his wife was not present at the act. Even better, a man could potentially adopt a son older than himself. Here, the law produces what Roman religion called a 'monster':

a reversal of the generational order. This was a monstrosity understood and designated as such by the Romans themselves, whose representations were not limited to the law: religion played a significant role. The pontiffs rejected this mode of adoption, which civil law, on the other hand, accepted. Nothing better illustrates the extent to which the law is subject to a political decision from which religious concerns are deliberately excluded. Civil law is victorious here since the son thus produced against nature still inherits from his father. Numerous texts even provide that an impotent or infirm old man could adopt a son. This was a way of saying that one did not need to be a progenitor to adopt, that filiation had nothing to do with the order of bodies. Natural law is really not a creation of Roman law! However, a text stated that a castrated man could not adopt as a penalty for his mutilation. Mediaeval jurists extensively questioned the scope of this enigmatic text. The only solution for them was to fabricate a forgery. Exegetes and commentators erased a syllable from *castratus* to replace it with *castus*: a *chaste* man could not adopt. But what is the difference between a chaste man and a castrated man? One is chaste by nature, the other by accident: the knife has damaged his fully virile body, his fully sexual nature. This is what the law now takes into account: the natural body, as God created it. Such is the paradigm and such is the limit. This subordination of law to organic nature was fundamentally carried out by mediaeval jurists in the field of filiation.

LB In France, the 1994 bioethics law, in its provisions regulating human sperm study and conservation centres (CECOS), requires that to donate sperm one must already be a father.

YT There is, if I may say so, an institutionalization of sperm, since it is not taken in its natural state but linked to the person

of a father. But at the same time, one can say conversely that one cannot imagine semen and paternity separately.

Filiation and homosexuality: for a general reform of adoption

LB The question of filiation in relation to a gay couple remains: recognizing it, would it not disrupt the entire law of filiation?

YT In France today, anyone can adopt, even if the Council of State recently considered whether the gay lifestyle was balanced for a child – but it is not certain that the European Court of Human Rights will accept their reasoning. The right to adoption does not require a heterosexual couple. No principle links adoption to one's sexual lifestyle. Therefore, if we were to stick to the rules of civil law, an individual with a same-sex partner should be able to adopt freely. The only difficulty concerns the status of the partner: the only problem being considered is whether to authorize or prohibit *joint* adoption in this case.

The issue is not only the right for a partnered homosexual woman to undergo artificial insemination (this right being denied to single women), but also the right for her partner to be recognized specifically as one of the parents of the planned child. If the desires of some activists were satisfied here, we would indeed have adopted a new mode of filiation, an unprecedented mode, unless we accept that the father's partner is another father, or the mother's partner another mother. The child would not have a father and a mother or simply be raised by a same-sex couple, but have two fathers or two mothers. These are the terms of the problem and there is no point in trying to avoid this by demonstrating that two adults of the same sex can very well raise a child and make them happy. All images of laughing children on the shoulders of a father or a mother

holding the hand of a man or a woman are purely for advertising purposes and tell us nothing about the reality they are unable to represent, because such a reality can only be expressed in words, not images: what is a child for whom a father takes the place of a mother, or a mother of a father? No matter how many social surveys and psychological studies are conducted, the civil and political problem cannot be avoided: can we deprive a child of the right recognized for all others to have a father and a mother as parents? We should not rely, here, on sentimental and psychological arguments. On legal and political grounds it assumes that we accept inequality before the law. Worse still, it assumes that we accommodate an inequality rooted in birth and origin.

LB The question of the claimed right to know one's origins is raised here, with the distinction between biological parents and legal parents.

YT Indeed, but we must go further. Gay couples who want to specifically be co-parents reason within the narrow framework from which they claim to emancipate themselves: the matrimonial couple, the nuptial couple, which they want to imitate at all costs. From this point of view, gay marriage would be an imitative fantasy; it represents the height of what can be expected from a petite-bourgeois culture. The solution is to recognize the multiplicity of relationships. The homosexual partner of a homosexual parent should recognize the position of their partner's child without pretending to demand that a reality be denied, namely that this child has another parent, father or mother. This limit would be the counterpart of the right that this person would have to be recognized, including by the child, as the spouse or partner of one of the two parents. However, we encounter here a difficulty similar to that posed by adoption when judged by the standard of genetic parentage.

The prevalence of biology in parentage means that we can hardly escape the dead ends except through the imitation of biology. If we were capable of accepting a broader system of adoption, one that is outlined by simple adoption rather than full adoption, we could recognize that the same subject can have several parents, adoptive parents and natural parents, and that their parentage can be multiple. If we were capable of opening ourselves to this less exclusive conception of parentage, the rest would follow. For example, a man or woman could establish legally recognized ties with the child of their same-sex partner, either in the form of a simple adoption or any other form yet to be devised. The solution is certainly not in imitating traditional parental structures, but in opening up to new relationships. We should not confine the child in a narrow prison that combines the closure of the couple with the similarity of the sexes. We must envision a universal solution in which same-sex parents would find their rightful place. To achieve this we must begin by working on the law of parentage and adoption, starting from the child's perspective, meaning focusing first on the rights of the individual whose parentage is in question.

INTERVIEWED BY MARCELA IACUB,
YVES ROUSSEL & NICOLAS TENZER

TRANSLATED BY COOPER FRANCIS

7

Inoperosità: on the use and misuse of a negation

ÉTIENNE BALIBAR

We translate below Étienne Balibar's intervention at the colloquium 'Homo Sacer: Giorgio Agamben and the Use of Metaphysics' on 8 April 2016 at Université Paris–Diderot, published in an issue of the journal *Lignes*, edited by Anoush Ganjipour, under the collective title *Politique de l'Exil*, in 2018. That volume represented perhaps the most serious engagement with the completed *Homo Sacer* project – and its concluding notions of 'destitution', 'use' and 'inoperativity' – until the January 2023 issue of *South Atlantic Quarterly*.[1] Only Jean-Luc Nancy's conference contribution, 'Restitution', has thus far been translated into English. It serves to demonstrate the esoteric aspects of Agamben's political thought, contrasting the arguments of *The Use of Bodies* with his semi-public address to the youth at Tarnac for the 2013 event *Défaire l'occident*, 'Unmaking the West'.[2] Agreeing that our situation is marked by an 'abandonment' of and 'contempt' for politics (that 'retreat of the political' diagnosed in Nancy's collaborative work with Philippe Lacoue-Labarthe during the 1980s), Nancy elliptically concludes that we need a 're-situation' or 'restitution' of our historically 'destituted' political institutions. Balibar here offers a sustained political and philosophical engagement with *The Use of Bodies* itself.

1. Kieran Aarons and Idris Robinson, eds, *Destituent Power*, special issue of *South Atlantic Quarterly*, vol. 122, no. 1, Duke University Press, Durham NC, January 2023.
2. Jean-Luc Nancy, 'Restitution', trans. Philip Armstrong, in *Ill Will*, illwill.com/restitution, 2021.

At the end of the ten books of *Homo Sacer*, Agamben concludes with Spinoza, who has become 'the philosopher' (instead of Aristotle):

> We understand the essential function that the tradition of Western philosophy has assigned to contemplative life and to inoperativity [*inoperosità, désœuvrement,* or the 'absence of work'][3]: the form-of-life, the properly human life, is that which rendering inoperative [*désœuvrées*] the works [*œuvres*] and functions of the living, transforms them, so to speak, into an empty space … opening the possible. Contemplation and inoperativity are in this sense the metaphysical operators of anthropogenesis that free human life from any biological or social destiny and any predetermined function … Politics and art are no longer tasks or 'works', but name the dimension in which linguistic and bodily operations are *deactivated* and *contemplated* as such, freeing inoperativity from its imprisonment. This is the sovereign good that, according to the philosopher, man can hope for: 'a joy born from the fact that man contemplates himself and his own power to act'.[4]

This final quotation is found in Definition 25 of the 'Affects' in the third part of Spinoza's *Ethics* (*acquiescentia animi*).[5] There it forms a couple with the definition of *humilitas* as 'sadness arising from the fact that man [or: a man] contemplates his powerlessness or weakness (*imbecillitatem*)'. Thus it is conceived in the form of a *differential* of activity and passivity, which is the *conatus* itself. It returns in *Ethics* V, 36 Scholium, in a sense taken absolutely (without its opposite) to characterize the intellectual Love of God or 'knowledge of the third kind':

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3. As far as I know, Agamben almost never quotes Blanchot in connection with this term, whose origins, we shall see, he seeks instead in Pauline theology. As always, such a silence can indicate either a very great proximity or a will to demarcate, or both.

4. *Translator's note.* Throughout the article, Balibar quotes and retranslates from the Italian edition of *L'uso dei corpi* (*Homo Sacer*, IV, 2), Neri Pozza Editore, Venice, 2014 (here p. 351); hereafter *UC*. We have similarly provided our own more literal translation from the Italian that can help the reader to understand certain conceptual tensions that are not always obvious in the published English translation. Most notably, that between something passive (an absence of work, *desœuvrement* or *inoperosità* in Latin languages) contrasted with an active undoing of the work (a de-instituting or 'destituent' process, if not power).

5. 'Laetitia*, orta ex eo, quod homo se ipsum, suamque agendi potentiam contemplator.*' Spinoza, *Ethics*. III, Def. Affectuum 25.

> We understand by this ... in what consists our salvation, or beatitude, or freedom (*salus, seu beatitudo, seu libertas*), namely a constant and eternal Love towards God, that is to say in the Love of God for men. And it is this love or beatitude that is called Glory in the sacred books, and not without reason. For ... it is rightly called satisfaction of the Soul (*animi acquiescentia*) ... for, in so far as it relates to God, it is a Joy, if it is still permissible to use this term, which is accompanied by the idea of oneself ... Then because the error of our mind consists in the sole knowledge (*in sola cognitione*), whose principle and foundation is God.[6]

The text is immediately followed by Proposition 36: 'There is nothing in nature that is contrary to this intellectual Love, that is to say, that can suppress it.' In this sense it is indestructible and, as is demonstrated further (in Proposition 39), it is precisely what makes the third kind a beatitude, relating all the affections of the body to the idea of God, which constitutes or determines the greatest part of the Mind to exist in the mode of Eternity at the same time (the *simul* of the Spinozist 'parallelism') as the aptitude of the body to do a great many things (*corpus ad plurima aptum habet*), by ordering its affections according to an intelligible order (*concatenandi Corporis affectiones secundum ordinem ad intellectum*).

Agamben's last word is therefore identical to what Bernard Rousset called 'the final perspective of the *Ethics*', or, more precisely, it appears to proclaim itself as such.[7] *Détournement* of a prestigious formula? Synthetic interpretation that projects a new light on both the place of Spinoza in the history of metaphysics and the meaning of Agamben's enterprise since the *coup de théâtre* of *Homo Sacer I*? Let us leave this in suspense and first examine the meaning of these terminal formulations in their context.

We must first consider two groups of remarks on Spinoza, appearing earlier in the book, which can be supplemented

6. Balibar quotes *A Spinoza Reader: The Ethics and Other Works*, trans. Edwin Curley, Princeton University Press, Princeton NJ, 1994, p. 261.
7. Bernard Rousset, *La perspective finale de 'L'Ethique' et le problème de la cohérence du spinozisme: L'autonomie comme salut*, Vrin, Paris, 1968; reissued 2005.

by others, notably in *Il Regno e la Gloria*.[8] First, there are the developments concerning the *Hebrew Grammar.*[9] The *active reflexive verb* expressing an action in which agent and patient are identical, stating a *middle voice* (as in Italian, *se passeggiare*, 'to walk around'), can serve to think what Agamben calls 'use' as a 'new figure of human praxis' in which subject and object would be deactivated as such (or neutralized in their distinction or opposition) and 'rendered inoperative' (*resi inoperosi*).

> In use, human being and world are in a relation of absolute and reciprocal immanence; in using something it is the very being of the one using that is first of all at stake ... to the affection that the agent receives from their action corresponds the affection that the patient receives from their passion.[10]

This middle voice corresponds to the idea of an immanent causality and an ontology in which 'means and ends, power and act, work and inoperativity (*opera/inoperosità*)' are indeterminate. This practice on oneself or of the self is the same as that found in the Foucauldian ethical project of a care of the self, which is, in sum, the project to *walk in life* by simply living life, by exercising its 'livability', without subjecting it to an external standard. The difficulty of thinking it lies in the prevalence of ontological dualisms, including that of being and nothingness, implied in the onto-theological idea of creation *ex nihilo*, which perhaps explains why Heidegger, who exalts nothingness, always avoided confronting the philosophy of Spinoza, despite the apparent proximity between his concept of *Dasein* and a certain possibility of thinking the *conatus.*[11]

8. Giorgio Agamben, *Il Regno e la Gloria: Per una genealogia teologica dell'economia e del governo*, Neri Pozza Editore, Vicenza, 2007; hereafter abbreviated to *RG*.
9. Agamben, *UC*, pp. 54–5 and 143–4. Baruch Spinoza, *Hebrew Grammar*, trans. Maurice J. Bloom, Philosophical Library, New York, 1962.
10. Agamben, *UC*, p. 55.
11. Ibid., p. 227.

Here we find a second series of references to Spinoza. Immanent causality is what gives meaning to the idea of *conatus*: the effort of each thing to persevere in its being is expressed in a middle voice (that of the deponent verb *conari*) which can be translated as 'demand on oneself' or 'of oneself for oneself'; or desire related to oneself, to one's own modifications or expressions, in which simply consists the self. This Agamben also compares to the Wittgensteinian idea (of Franciscan origin, as we shall see) of a *rule identical to life*, in which being does not precede itself as will or as intention, but includes a constituting principle immanent to the constituted and which remains coextensive with it.[12]

All this leads to a modal ontology or ontology of the 'mode', understood as modifications of the single substance which is not separate from it (hence the opposition to creationism as well as to emanationism): an action in which 'the agent and the patient fall together'.[13] This means that in the modes the substance 'makes itself living, existing', or, if one prefers, *walks through existence* through the variations of its mode of being which preserve its form or figure. This is what Agamben calls 'use of oneself' or 'use' in short, and which he interprets in a Spinozist or quasi-Spinozist way as *conatus sive habitus sive ductus*: an effort or power to live that is not a productive activity of something, but a way in which being contemplates its own potentiality or its own conduct, analogous to a rhythm (Benveniste) or to a mobility that nevertheless preserves the figure or style of the same self in the process of constituting it.

The avid reader of Spinoza cannot fail to be seduced, even renewed in their understanding, by the connection of these texts; in particular the brilliant invocation of the *Hebrew Grammar* in support of an interpretation of Spinozist ontology.

12. Ibid., pp. 222–3.
13. Ibid., p. 214.

They will perceive, however, a double difficulty from which we can open the investigation on *inoperosità*, as the neutralization of the typically dualist opposition of the work or operation and an absence of work or inoperativity. First, does a *habitus* (that is to say, in Aristotelian Greek, a *hexis*) allow us to think about what forms (to the second power or reflexively) the content of the idea of *perseverare in suo esse* in Spinoza: not only the tension but the conversion (or 'effort') to pass from the minimal power to act to the increased (or accrued) power which will be the object of *acquiescentia*? Subsequently, how can we interpret what has just been described in terms of immanence to a constitution in order to dismiss the hierarchical exteriority (the domination) of a norm in relation to life, as nevertheless expressing not a 'constituent power' (and ultimately a *praxis*) but a 'destituent power' and a resumption of the idea of contemplation, which defines the philosophical life for Aristotle? I will consider these points in a textual and progressive way.

A 'destituent' Spinoza?

How can we interpret Spinoza in terms of 'destituent power'? This involves examining closely the epilogue of *The Use of Bodies* by going back to its presuppositions, in particular to the uses it makes of Walter Benjamin and Saint Paul.

A 'destituent' power is a power that destitutes itself, or marks itself with im-potence, in the sense that it forbids itself to succeed and to realize itself in any command or appropriation (an *imperium* or a *dominium*), but that nevertheless remains haunted by the idea of a negativity, even of a destructiveness, heir to the idea of the 'great refusal'.[14] This explains the need to

14. Agamben, *UC*, p. 338: 'potenza di non'. See Étienne Balibar, 'Blanchot's Insubordination' for an attempted genealogy of this notion of the 'great refusal', in Étienne Balibar, *Citizen Subject: Foundations for Philosophical Anthropology,* trans. Emily Apter, Fordham University Press, New York, 2016, pp. 256–72. In another work, Agamben

ultimately oppose it to the sovereignty that characterizes more than ever the various uses of the idea of 'constituent power' (whether it is the sovereignty of the subject, the people or the multitude, that is to say either of the One or of its reverse, the Multiple), and even to the idea of 'government' (despite the references to Foucault). Whatever one says, constituent power always remains oriented towards the institution of a constituted power: a *potestas* whose model predisposes the *potentia* to actualize itself. *A fortiori*, this is the case for *revolution* as well. Yet this is only so if we admit that the idea of constituent power always repeats the original gesture by which a pure destituent power, 'abandoning' itself to *inoperosità*, is captured and neutralized. We must therefore think of a neutralization of the neutralization, if not a negation of the negation, to locate the modality of the Agambenian 'withdrawal'.[15]

Walter Benjamin is summoned here, above all for the enigmatic essay of his youth, 'Zur Kritik der Gewalt', 'Critique of Violence'. With respect to the 'divine violence' – whose political model for Benjamin was the Sorelian general strike and, more generally, revolutionary anarcho-syndicalism – that he develops in opposition to the 'mythic violence' that founds the law through the state of exception, Agamben translates *Gewalt* as 'destituent power', but also 'destituent violence'.[16] He thus echoes the Benjaminian idea of a 'violence of pure means'; that is to say, means that do not aim at any end or any realization, but that content themselves, so to speak, to exposing by counter-attack the internal relationship between violence and law (which logically also entails power, state, property), thus thinking *the*

comments on the meaning of the renunciation of Celestine V (the patron pope of Franciscan 'spirituals'), generally considered the model of the 'great refusal' stigmatized by Dante. Giorgio Agamben, *Le mystère du mal: Benedict XVI et la fin des temps*, Bayard, Paris, 2017.

15. Agamben, *UC*, pp. 336, 338.

16. Ibid., p. 340.

anarchy of law and turning it against itself.[17] However, there are several ways practically to interpret this enigma of the violence of pure means. One can do so with Kafka, describing in a 'neutral' way the powerlessness and inaction of officials, angels and ministers.[18] Or with Saint Paul, by asking what paradoxically joins these two figures of messianism that everything seems to separate. The latter is obviously the most important reference.

We must pause on the developments concerning the *katargein* of the law in Paul's texts (in particular, Romans 3 and 7:1, and Corinthians 15): that is to say, the advent of the end of time when Christ gathers men to his Glory by uniting with them to the Father through the same love.[19] What is said in *The Use of Bodies* constitutes a recapitulation and simplification of the long developments proposed in *The Kingdom and the Glory* under the title 'Archaeology of Glory', where both the culmination and the reversal of the principle of economy, which is the government or governability of the world, are revealed. It is there in particular that the difficulty of translating *inoperosità* becomes manifest, *oscillating between* a neutralization or inactivation that operates after the fact, and an inoperativity that would always already

17. Ibid., p. 341.
18. As Agamben did in *RG*, p. 185.
19. Here are the corresponding passages:
(a) Rom. 3:3: Τί γαρ ει ηπίστησάν τινες – Μη η απιστία αΐτων την πίστιν του θεού καταργήσει (For what if some did not believe? Shall their unbelief make the faith of God without effect?)
(b) Rom. 3:31: Νόμον ουν καταργουμεν δια της πίστεως – Μη γένοιτο: αλλα νόμον ιστωμεν (Do we then make void the law through faith? God forbid: yea, we establish the law).
(c) Rom. 7:6: Νυνι δε κατηργήθημεν απο του νόμου, αποθανόντες εν ω κατειχόμεθα (But now we are delivered from the law, that being dead wherein we were held; that we should serve in newness of spirit, and not in the oldness of the letter).
(d) 1 Cor. 15:24: οταν καταργήση πασαν αρχην και πασαν εξουσίαν και δύναμιν (Then comes the end ... destroying every rule and every authority and power).
Bailly gives two definitions for καταργέω, but in two different states of language: (1) To leave inactive, χέρας; to leave one's hands unoccupied, τους καιρούς; to neglect opportunities; (2) To annul, to repeal, to abolish (a law); passive καταργηθηναι απο του νόμου; to be freed from the law. He also gives 'absolute refusal' (which one might be tempted to draw toward 'great refusal') for καταργια. There is a striking analogy, noted by Agamben, between the unity of opposites gathered in the *katargein* and what Hegel deliberately inscribes in the dialectical *aufheben*, although the terms are not at all synonymous.

have been at work in the action itself. It is symptomatic of the difficulty of the concept of negation present in the idea of destituent power: taken to the extreme in the confrontation of the Pauline *katargein* – even if the frequent translation of 'destroying' or 'annihilating' the powers and the law itself (correlative to the idea of creating them) is debatable – with the Jewish messianic idea of the Sabbath as rest, which Agamben brings closer to Aristotelian contemplation. This synthesis is precisely the representation of messianic time: not the fulfilled time, the 'end of time' or *eternity*, but the 'time that remains' of an unassignable duration, analysed in one of Agamben's most beautiful books as a time of fiction in which human beings, 'dispossessed' subjects, act as if they did not act or no longer acted, which is to say, live not as if they were dead, or not alive, but rather as if they were already living beyond the finitude of death. But again, can we interpret Spinoza's 'contemplation of the power to act' (*acquiescentia*) as a messianic fiction, and moreover as the fiction of an eternal rest?[20]

'Deactivating' relations

This double meaning of *inoperosità* seems to be at work in several metaphysical discussions. In *The Highest Poverty*, we read this about what Franciscanism bequeaths to us:

> how to think of a form-of-life, that is to say, a human life totally withdrawn from the grip of law, and a use of bodies and the world that never substantiates itself in appropriation: or how to think of a life that can never be an object of property, but only of common use? Such a task will require the elaboration of a theory of use ... and from it a critique of this operative and governmental ontology which ... continues to determine the fate of the human species.[21]

20. Agamben, *RG*, p. 274: 'eternal life' is presented as the 'inoperative centre of the human' against the Aristotelian distinction of *Zôè* and *Bios*, or of bare life and survival. See also Agamben's book on St Paul: Giorgio Agamben, *The Time That Remains*, trans. Patricia Dailey, Stanford University Press, Stanford CA, 2005.

21. Giorgio Agamben, *The Highest Poverty: Rules and Form of Life (Homo Sacer, IV, I)*,

It is very clearly a matter of thinking use against work, which includes all ideas of operation, transformation, labour, realization and the effectuation of power. It is therefore a matter of thinking about use as that which 'un-works the work' or renders it inactive. But is the ambiguity of *inoperosità* lifted for all that? In *The Use of Bodies*, we can read: 'what deactivates the *operosità* [the work, or, perhaps even better, the working] is certainly an experience of power ... but which holds firm its own powerlessness or power to say no, and exposes itself in its own non-relation to the act.' While in *The Man Without Content*, which this time does quote Blanchot, we can read: 'is not Rimbaud's glory shared, as Blanchot rightly observed, between the poems he wrote and those he refused to write?'[22] We see that the basis of ambiguity is the issue of the ambiguous relationship between *inoperosità* and *vita contemplativa*, and, ultimately, it is the very meaning of the adjective 'contemplative' (*theôrètikos*) and the verb *contemplare*, which we find in Spinoza.

Let us begin by dividing this difficulty. A first aspect refers to the question of the *archè* (origin) and therefore of anarchy, or of a life 'without principle'.[23] The performative contradiction of Rainer Schürmann trying to think of a 'principle of anarchy'– that is, to activate the *archè* so as to deactivate it – is criticized (not without admiration) by Agamben.[24] Could we not, however, say that it has a symmetrical equivalent in the thesis taken from

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Bibliothèque Rivages, Éditions Payot, Paris, 2011 (abbreviated hereafter to *THP*), p. 10.

22. Agamben, *UC*, p. 349. Giorgio Agamben, *The Man Without Content*, Stanford University Press, Stanford CA, 1999, p. 8.

23. An 'unprincipled', *anarchic* life or politics is not at all the same thing as a life or politics whose principle remains indeterminate or unlimited, as expressed in the Aristotelian *archè aoristos* – the radical democratic moment of his definition of citizenship, which can be traced back via Hannah Arendt. (See my study of Arendt in *Equiliberty: Political Essays*, trans. James Ingram, Duke University Press, Durham NC, 2014, pp. 165–86.) A 'radical' conception of democracy that draws from this source does not challenge the equivalence of politics and power or command, but seeks under what conditions it can become 'indeterminate' – that is, universally available – or non-monopolizable.

24. Reiner Schürmann, *The Principle of Anarchy* (1982), republished by Editions Diaphanes, Berlin, 2013. Agamben, *UC*, pp. 348–9; *RG*, p. 80.

Benjamin according to which 'destituent violence' does nothing but manifest the internal anarchy of power, and thus of law and the state? A second, much more developed aspect refers to the problem of poverty and common use. Here we find a certain critique of Marx: it is neither production (or labour) nor property (or appropriation) that is 'common'.[25] Discussing the 'deactivation of law' in *The Highest Poverty*, Agamben gives a magnificent but restrictive interpretation of the Franciscan rule conjoining *usus pauper* (poor use) to *abdicatio juris* (abdication of law), so as to be able to then, in *The Use of Bodies*, overcome its limits: that is, the turning of legalism against the law itself, which constitutes the 'ruse of Franciscan reason'.[26]

The impolitical ontology of the inappropriable is then developed under the three species of the body (the 'proper body' is fundamentally improper, an object of discomfort and disgust), language (whose appropriation is loss, expropriation)[27] and landscape (as an environment neither animal nor human). Agamben refers to Sade ('common is first and foremost the use of bodies'),[28] and redefines use as intimacy or use of intimate parts, in order to state: there is in fact today not so much common use, as understood in the Marxist and socialist tradition as a use in common or of a collaboration (thus of a 'work' or labour) that uses the 'common'. For this common is the inappropriable. We see the point of articulation between the Franciscan idea of a life 'which can no longer be distinguished from the rule' and the idea of poverty, which is to say, of use without appropriation (neither appropriation of its means, nor appropriation of its results, nor ultimately of its agents), which can lead to asceticism: it

25. Agamben, *UC*, pp. 130–31. One could argue, however, that through his admiration for Fourier, Marx retained something of the 'utopian' idea that communism coincides with the limit where production merges with enjoyment – which can nevertheless go in many directions...
26. Agamben, *THP*, p. 167; *UC*, pp. 114–30.
27. One recalls Derrida's invention, applied to the same object: 'ex-appropriation'.
28. Agamben, *THP*, p. 129.

is *dominium* as power and as appropriation, turning one face towards the law, the other towards efficiency and realization. Now what the monasteries (and especially the Franciscans) invented against it is not 'work', but a threshold of indistinction between work and *otium*, or again the passage from a deferred use, waiting for its result, to an immanent use, analogous in this sense to a praxis. But, as *The Highest Poverty* continues, the 'conceptual distinction' regresses from the opposition between *dominium* and *usus* to one within use itself, which 'divides in two'.[29] What, then, is a use that is not a *ius utendi* but a simple *usus facti*, or, as Agamben says, a 'being made of time'? He takes the example of drinking and eating, 'pure existential(s) that must be freed from the signatures of law and office'; in other words, from duty, obligation.[30] Is there not, then, a risk that the operativity driven out with appropriation will reappear in the use itself (for example, in the pleasure it gives)? We can give this aporia a practical form: what are the positive acts prescribed by the negative precept that is *inoperosità* (or which are simply implied in it)? We will find this problem again with Spinoza: what does he mean exactly when he speaks of 'determining by reason the actions [of bodies] that are [first, usually] determined by the passions [or imagination]'? Where do we find, in this sense, the key to the active becoming of bodies? Or, more precisely, it seems that these two apparent difficulties are reversed, because with Agamben it is a question of finding the key to an inactive becoming that always seems to have to elude the remaining activity and transformation implied by any form-of-life.

At this point we must focus on the difficulties of the idea of relation (and so implicitly the question of 'social relation'). If we struggle to detach life from activity without reducing it to passivity, is it not because we think of life in terms of relation

29. Ibid., pp. 168ff and 178ff.
30. Ibid., p. 184.

– including a constitutive relation, always already involved in individuality, whether in the form of a relationship to the environment, a being in the world, or an anthropological transindividuality? On two occasions in *The Use of Bodies* Agamben returns to the idea of a 'critique of the concept of relation' (the counterpart of which is a 'theory of hypostases', or reversals of the metaphysical relationship between essence and existence, whose aporias his own modal ontology attempts to overcome).[31] The relation in general or the relationality of being must be thought neither on the model of exchange, reciprocity, recognition, nor on that of a 'lack of being' (or, as Blanchot says, interruption), but on the model of contact: 'we must instead think the form-of-life as living its own mode of being, as inseparable from its context, precisely because it is not in relation but in contact with it'.[32] The relation, whose concept commands that of social relations and therefore politics in the traditional sense, is always the horizontal, intersubjective or, even better, transindividual realization of a transcendental (hypostatic) distinction between 'life' and 'bond' (hence institution, law). It therefore implies the reduction of forms of life to the conditions of complementarity of social functions, which leads straight to the 'state capture of the absence of bond'. There is no 'relation' (or being towards*: pros ti*) that is not 'representative'.[33]

This criticism naturally applies to the reciprocity that underlies Aristotelian politics: that of 'powers' (*archai*) and 'discourses' (*logoi*) and their respective modalities, symmetrical or asymmetrical, egalitarian or inegalitarian, which precisely have as their reverse the hierarchy in the city of ways of life (*bioi*),

31. Cf. *UC*, pp. 189ff and 341–5.
32. Ibid., pp. 296, 301–3.
33. Ibid., pp. 301–2. Opposition on this point can be found in Blanchot, whose great text on 'relations of the third kind' (reprinted as Part 1 chapter 7 of *The Infinite Conversation* (1969), trans. Susan Hanson, University of Minnesota Press, Minneapolis, 1993, pp. 66–74) exposes the possibility of thinking a 'relation' distinct from either unification or dialectical opposition, by associating it with the thought of the neutral, therefore of an idleness.

rising progressively above the 'bare life' of the slave or at least of his life as an *organon empsuchon* ('animated instrument', or better 'living tool'), already close to animality although still remaining human. For Agamben (close in this to what could be drawn from a reading of Lacan of the sort proposed by Bertrand Ogilvie), the common is not a relation: it is neither a social relation nor even a 'being with'. His argumentation is the opposite of the dialectical tradition and in particular Hegel, for whom – in the *Phenomenology* at least – the 'common' is thought of as the relation that always 'lacks' the universal.[34] So what is it, then? It is the 'one-on-one with oneself' which from Plato to Heidegger has connoted intimacy, but also the mystical unity of sexual love and contemplation that makes the philosopher an *apolide* or a 'stranger', 'banished' within the city.[35] On the horizon of this elaboration, the need arises for a discussion of the relations of opposition and complementarity between use and exchange, particularly as revived by the difficult legacy of the Marxist theorization of 'value'.[36]

We can then come to the idea of the form-of-life as a 'proper use of the body'. It is a matter of reversing the institution of *bare life*, which Agamben, throughout his *Homo Sacer* series, has ceaselessly shown to be the institution as such, or at least what founds it and, at the same time, antinomically destabilizes it.[37]

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34. See my explanation in *Citizen Subject*, pp. 278ff.

35. Agamben, *UC*, p. 300. Here Agamben refers to Aristotle's *xenikos bios.* In *The Highest Poverty* he adds to it a reference to Plato's *Theaetetus*: 'assimilation to God is virtually an exile' (*THP*, pp. 76–7).

36. We can say, as a first approximation, that each of the two terms is likely to exceed the other (even if the movement of capitalism is clearly the subsumption of use *under* exchange, and at the limit to think of itself *as* exchange, *not without a 'remainder'*, however). But each also exceeds itself, in two opposite directions that lead to the extreme: on the side of use, towards expenditure and destruction, on the side of exchange, towards 'gift' or, on the other hand, towards indefinite accumulation. I think it is important that Marx does not confuse, in general, 'use' and 'utility', even if the first term covers some of the functions of the second in economic theory; which, at the same time, has undertaken the contrary movement to dissolve entirely the first into the second.

37. Rather than a reversal in the mechanical sense, it is moreover a *disjunction* bearing on the *energeia* and the *chresis* which, since Aristotle, maintain an ambiguous 'complicity'. However, as this disjunction must put an end to what appeared as a *separation* or a

It is a matter of 'construct[ing] a form-of-life, which is to say a life so closely linked to its form that it appears inseparable from it'.[38] We must return again to the question of why the institution of slavery is the paradigm of separation that all Western politics (and metaphysics) has established between life and what is above life (law, norms, ends and, above all, meaning). This can also be said in the form: there is no true life, 'worthy' or 'recognized', having a 'meaning', except through the degradation of a 'purely biological' life, both inferior and dominated. At the meeting point of Aristotle (the body instrument of the soul) and Foucault (the soul prison of the body), Agamben speaks of the choice between a politics of divided life or, on the contrary, undivided life.[39] Two questions then arise: one, that of the relationship between the 'slave' use of life (the distinction *Bios/Zôè*) and that of the proper work of man, which means that humanity realizes itself through the accomplishment of its work by means of its 'life', or in the course of its life; the other, that of the difference between modernity and antiquity with regard to the representation, discipline and use of the 'proper' body. Does modernity virtually make each individual the user of his own body as an 'instrument' adapted to a determined end (which would properly be an *operosità*, or even 'entrepreneur of oneself' as is said today?

These questions impose a confrontation with Marx. It would not be at all impossible to make a reading of Marx oriented by the question of 'bare life' or slave life. It would be based on the analysis of the separation of 'labour power' transformed into an exchangeable commodity and on the descriptions that identify (modern) 'wage slavery' with the production and reproduction

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scission, one continues to wonder if it is not, in general, a modality of 'negation of the negation'.

38. Agamben, *THP*, p. 8.

39. Agamben, *UC*, pp. 22, 257. Other confrontations are necessary here: with Muriel Combes, *La vie inséparée. Vie et sujet au temps de la biopolitique*, Editions Dittmar, Ouistreham, 2011, and Pierre Macherey, *Le sujet des normes*, Éditions Amsterdam, Paris, 2014.

of an exceptional body, as soon as 'overexploitation' becomes the condition of exploitation itself.[40] Despite the powerful political indication that the Franciscans' *usus pauper* is an extension of the Roman tradition's right of necessity, one may wonder whether there is not just as much, if not more, in Marx than in Francis of Assisi regarding a theorization of the state of exception that is realized in the very life of bodies when they are stripped and dismembered by force. Here begins what could be called a misuse of negation. Agamben writes:

> It is not a matter of thinking a better or more authentic form-of-life, one principle superior to another … inoperativity is not one work that supervenes on another in order to deactivate it: it coincides entirely and constitutively with their destitution, with living a life.[41]

We see that it is very difficult to escape the negation of negation when trying to think about disalienation, freedom or 'happiness' (*beatitudo*) from the standpoint of the present. Agamben could, of course, answer me from his discussion of liturgy,[42] that there is no negation of negation because it is not a matter of surpassing anything, but of manifesting the point of indetermination or tipping point where life can either divide or unite, either submit to the *archè* or become properly anarchic.

Use and praxis

We have seen that in *The Use of Bodies* use is given, with reference to Spinoza, as a 'new figure of human praxis'.[43] It would be necessary here to write a chapter on the historical

40. I borrow this expression from Sidi Mohamed Barkat (*Le Corps d'exception: les artifices du pouvoir colonial et la destruction de la vie*, Éditions Amsterdam, Paris, 2005), who uses it in relation to the colonized subjected to the violence of the colonizer. But wage labour as described by Marx (and as it exists at the 'limit') has dimensions of 'internal colonization'.
41. Agamben, *UC*, p. 350.
42. Agamben, *THP*, pp. 93–121.
43. Agamben, *UC*, p. 55.

transformations of the Aristotelian typology which relates *praxis* to *poièsis* to *theôria*. To what extent has the meaning of *praxis* been transformed by post-revolutionary German idealism (from Kant and Fichte to Hegel and Marx), which introduces the idea of a collective becoming (or collective subject) of individuals who 'liberate' themselves from work by the mutation of work itself into a revolutionary historical 'work'? 'An I that is a We, a We that is a I.'[44]

If we examine things from the point of view of this question, as it presents itself today, we come to the idea that 'constituent power' and 'destituent power', as they are theorized today on both sides of the great dividing line in 'Italian Theory', appear to have been produced by the decomposition of that revolutionary praxis which was lodged in the heart of the grand narrative of history's meaning in the nineteenth and twentieth centuries. They respectively retain either (in the case of constituent power) the teleology of the inevitability of communism, or (in the case of destituent power) the eschatology of messianic time, 'neutralizing' in both cases as much as possible the materiality of the power relationship, thus the state and more generally institution, which they somehow make 'wither away' in advance. It seems that Agamben believes that in Marx *praxis* always remains defined, as in Aristotle, by its opposition to *theôria*, even if the hierarchical value of the two terms has been reversed. This is at least the thesis that emerges from the passages about *poièsis* and *praxis* in *The Man Without Content*, which preceded the first volume of *Homo Sacer* (1996).[45]

Over the course of Aristotle's *Nicomachean Ethics*, *praxis* enters into two successive triads: first *praxis–poièsis–épistémè*,

44. 'Ich, das Wir, und Wir, das Ich ist' in the *Phenomenology of Spirit*, which thus gives the generic formula, associating it with the metapolitical idea of the *Tun Aller und Jeder* (the action that is indivisibly of each and all). See my commentary in *Citizen Subject*, pp. 209ff.

45. See Agamben, *The Man Without Content*, p. 42.

then *praxis–poièsis–theôria*.[46] From the fact that Marx 'merges' *praxis* and *poièsis* (action and work, revolution and labour) in the historical being of the proletariat, Agamben concludes that one can think of an 'inoperative' or 'unemployed' use in the face of this couple on the model of a *theôria* understood 'negatively'. He identifies this reversal of praxis through reference to Spinoza. On the other hand, there is no longer a place for *épistèmè*, which is to say the 'second kind of knowledge' that, placed under the title of 'common notions' by Spinoza, is the condition *sine qua non* for access to the third, the 'intuitive science'. The history of German idealism, including Marx, and its conception of 'human' subjectivity are thus not short-circuited, but turned inside out, towards their starting point, which the Spinozist formulations would have, in sum, repeated while affecting them at the same time with a liberating deviation.

This assumes, however, that in the light of the *usus pauper* or the 'highest poverty' one makes not only a teleological use (the 'sovereign good'), but a properly eschatological one (the 'exit from servitude'), essentially directed against the Marxian and more generally 'socialist' idea of communism as the production of human wealth which emerges from the development of productivity, abundance and the satisfaction of needs; but also and above all from the multiplication of 'exchanges', which is to say, as in the *German Ideology*, of the *Verkehr* between men intensified by the division of labour, or the development of inter-human relations that produce and increase 'capacities' as well as 'activities'. Is this possible? Under what conditions? I would like to conclude with some considerations on this point.

Agamben responds in advance to any 'Marxian' criticism, not only by taking up Spinoza in the name of the contemplative

46. See my article (with Barbara Cassin and Sandra Laugier) '*Praxis*', in Barbara Cassin, ed., *Dictionary of Untranslateables: A Philosophical Lexicon*, trans. Stevan Rendall et al., Princeton University Press, Princeton NJ, 2014.

life, but by diverting him towards the idea of an indeterminate potentiality, inherent in the inseparable form-of-life, no longer bound by law or institution. Such a 'power' does not therefore transform into *energeia* or especially into *idion ergon,* which is to say into a 'proper of man' that would assign him in advance a place (or places) in the cosmos (or even on its edge, as a 'foreign' philosopher). Let no one see in this notion of diversion any recrimination or disqualification: to divert is to think (and perhaps, in the end, to think is to divert). It is only a matter of understanding Agamben's speculative operation. Spinoza's thesis, which makes the increase of the power to act a greater bodily (and thus mental) capacity to be affected, is exactly at the tipping point and indeed threshold between several conceptions of power and praxis, either as transformation of the world, appropriation of things, or as a culture and 'practice of self'. But can we confer on it for all that an eschatological significance, which would make it the name of a kind of exception with respect to the 'state of exception', established by the law itself in its entanglement with violence, a way of extracting oneself from its 'generality'?[47]

I would say 'yes and no'. In Spinoza, as Rousset states, it is indeed in the fifth part a matter of a 'final' perspective, which comes after the fact, to elucidate the element of teleology or 'internal finality' inherent in the definition of *conatus* as an immanent effort to acquire a mode of life. As we have all experienced, however, its meaning and interpretation remain suspended on the resolution of two enigmas (at least) of which one might think that the end of the *Ethics* only proposes the 'name' or the 'cipher', rather than resolving them, strictly speaking.[48]

47. Giorgio Agamben, *State of Exception*, trans. Kevin Attell, University of Chicago Press, Chicago, 2005, pp. 60–64.

48. It is, moreover, quite possible to ask seriously whether Spinoza's aim is to *solve* these enigmas, rather than simply to formulate and name them in order to inscribe them reflexively in the very effort of thinking and hence of living.

There is always the enigma of an identification or a correlation between *acquiescentia in se ipso* as 'contemplation' for each of the *potentia* that it exercises, and as 'friendship' based on reciprocal utility between men in the city (or, better still, *the use* they can make of each other).[49] From this follows both the recurrence of difference and, on the other hand, the inseparability of *potentia* and *potestas*, contemplation and institution. For Spinoza, unlike Aristotle, the philosopher cannot be (as) a stranger or 'outcast' in the city. He must get actively involved. The philosopher is therefore a citizen without restriction. And yet, even before the 'last barbarism' (*ultimi barbarorum*) arises, he must *refuse exchange* with the 'ignorant', who are also citizens (*Ethics*, IV, Prop. 70). A citizen may not always (until the end) be a con-citizen. The status of 'wisdom' (and its own contemplation) is therefore uncertain with regard to the antithesis of the individual and the collective: what is the 'middle voice' here?

There is still the enigma of an *intellectualization* of the power to act which is at the same time an intensification of the *capacity of the body to be affected*; which certainly does not mean that intellectual activity goes hand in hand with bodily passivity, but points to the enigmatic idea of a 'transmutation' of passivity into activity by the detour of intelligibility. Such is, as we know, the *vexata quaestio* of the interpretation without remainder of Proposition 59 of the fifth part of the *Ethics*: how to perform by 'reason' the same actions to which, previously, one was passively determined by 'passion'?[50] The status of affection certainly belongs (alongside the 'finite mode' with which it ultimately coincides) to a conception of power that does not tend *a priori* towards a single 'form', any normative or normalized

49. There is here both a certain, perhaps irreducible, difference with Franciscan representations of minority, incapacity, 'childhood', and a troubling analogy with Sade, which Agamben has rightly pointed out. See *UC*, pp. 129–30, but also pp. 29 and 296; *THP*, p. 151.

50. As Agamben indicates, this problem is also that of Averroes, from whom perhaps Spinoza inherits it. See *UC*, p. 297.

individuality; but it is difficult to claim that it does not involve any 'proper' in the sense of identity. Above all, it is difficult to understand that intellection (said of the essence, or of the singular essence) would be the *renunciation* of this identity.

Agamben is obviously not wrong to think that the name or concept of this capacity is the rhythm or the *ductus* that allows a change of figures in the conservation of an inner proportion or relation: but does this resolve the question of how one can 'effectively' convert the meaning of passions or 'practice *inoperosità* in the work'? That is to say: how to 'follow' a model of life (*exemplar humanae vitae*) that one constructs for oneself through the intellect, the Spinozist equivalent of the form-of-life which still squints towards the *rectissima norma humanae vitae* of the Franciscans?[51] Perhaps there is an irreducible anthropological difference there, even if it does not declare itself as an opposition between *Bios* and *Zôè*, which is to say between 'good life' and 'bare life'.

In the end, I am tempted to conclude not so much that Agamben was wrong to invoke Spinoza and so, in a certain way, to have wanted to appropriate him (after so many others), but rather that, no more than any other, he has not *solved* the problem of Spinoza upon which the possibility of thinking the 'chiasm' of reason and passion, the activity of the body and that of the mind, otherwise seems suspended, at least in the West. Yet that is not for lack of applying a new theoretical machine, extraordinarily powerful in its kind. His work ultimately offers us, instead of the classical antitheses (including that of *theôria* and *praxis*), an ethico-political difference of undeniable topicality: that of the two derivatives of *usus* (usage), utility and use, the concept of which we still have to fully elaborate.

TRANSLATED BY COOPER FRANCIS

51. Agamben, *THP*, p. 134.

8

On the problem of the family

THEODOR W. ADORNO

1. The family is both natural relation and social relation.[1] It is based on social relations and biological descent, often without consciousness of duration, but it becomes something permanent, objective, independent – an 'institution'. Modern French sociology of the Durkheim school, especially Marcel Mauss and Claude Lévi-Strauss, in contrast to older views, did not derive the prohibition of incest, which is fundamental for the family, from so-called natural or psychological conditions, but determined it as a 'total [*totales*] social phenomenon', essentially from the needs of an exchange society according to fixed property structures. If, however, such results are true, then the family in the form with which we are familiar is itself socially mediated and not a mere natural category. It is therefore subject to social dynamics and must not be hypostatized by science. The social dynamics of the family are twofold. On the one hand, the increasing socialization, 'rationalization' and 'integration' of all human relations in late, fully developed exchange society tends to push back as much as possible the – socially considered – irrational-natural, partial element of the family order. On the other hand, however,

1. 'Zum Problem der Familie' (1955), in Theodor W. Adorno, *Gesammelte Schriften* 20.1, *Vermischte Schriften I*, Suhrkamp, Frankfurt, 1986, pp. 302–10.

with such progressive socialization, the more strongly controlled drives rebel more strongly against their institutional control and break through at the point of least resistance. But this is what, under the conditions of contemporary [*gegenwärtigen*] society, the family has become. Today it finds itself equally attacked by the progress of civilization and by sexuality, which the sacral claim of marriage can no longer tame.

2. The crisis of the family cannot be dismissed as a mere symptom of decay and decadence. The family is presented with the bill not only for the crude oppression so often inflicted by the head of the family on the weaker woman and especially on the children up to the threshold of the modern age, but also for economic injustice, the exploitation of domestic labour in a society that otherwise obeys the laws of the market, and for all those suppressions of desire, which family discipline imposes on its members, without this discipline always being justified in the minds of the family members, and without their having much faith in the prospect of being compensated for such renunciations, for example, by secure and tradable property, as seemed to be the case at the height of the liberal age. The loosening of family authority, especially as one of the sexual taboos, is due to the fact that the family no longer reliably guarantees subsistence, and that it no longer adequately protects the individual against the increasingly overpowering encroaching environment. The equivalence of what the family demands and what it provides is threatened. Every appeal to the positive powers of the family as such therefore has something ideological about it, because the family no longer accomplishes, and can no longer accomplish for economic reasons, what it is praised for.

3. As a social category, the family has always been the agency of society, especially since the beginning of the bourgeois era. It alone has been able to produce in individuals that work

ethic, that identification with authority, which had hardly been needed in feudal times with their direct rule over bondsmen. By translating the demands of society into the interior of those entrusted to it and making it their own, the family 'internalized' human beings. The concept of the individual in the sense with which we are familiar can hardly be separated from that of the family. But the crisis of the individual today, the replacement of its autonomy by the adaptation to collectives, does not leave the family untouched. There is a contradiction between the type of human that is spreading today and the form of the family. The American mother cult, called 'momism' by Philip Wylie, signifies not so much the breakthrough of primordial family forces as a questionable reaction formation to the experience of decaying family relations, which only recently erected its puny monument on 'mother-day' [in English in the original]. Conventional exaggeration and emotional coldness correspond to each other. Like all forms of mediation between the biological individual, the atomic individual and the integral society, the family is also deprived of its substance by the last, similar to the economic sphere of circulation, or the category of education, which is deeply connected to the family. As a category of mediation, which in truth, even if without being aware of it, often only brought about the business of the entire totality, the family, apart from its eminent function, always had something illusory about it. And bourgeois society as a whole remained sceptical about the family as an ideology, especially in so far as it made social demands on the individual that seemed arbitrary and unreasonable from the individual's point of view. This scepticism first found its social expression, however dull, in the youth movement. Today, the negation of the family gains the real upper hand. In fact, there is no longer the conflict between the powerful family and the no-less-powerful ego, but rather the gap between the two is equally small. Family is experienced less as a power of oppression then a

residuum, a superfluous ingredient. It is no more feared than it is loved: not fought against, but forgotten and just tolerated by those who have neither reason nor strength to resist.

4. The family, according to its concept, cannot divest itself of its natural element, the biological connection of its members. But from the point of view of society, this element appears as heteronomous, as a nuisance, so to speak, because it is not completely absorbed in the exchange relation, although sexuality also resembles the exchange relation, the reason of give and take. On the other hand, the natural element can less than ever be asserted independently of the social-institutional one. That is why, in late bourgeois society, the family is not so different from the corpse that reminds us of the relation to nature in the midst of civilization, and that is either burned hygienically or prepared cosmetically, as shown in Evelyn Waugh's *The Loved One*. The cult of the family, especially of the 'chaste housewife and mother of children', has always lent the halo of voluntary sacrifice and goodness to those who are oppressed and forced to sacrifice in reality. But as every actual ideology is more than just a lie, so is this one. Not only did it bestow honour upon the subjugated, confer upon them a dignity which finally urged their own emancipation as human dignity, but it also concretized the idea of real equality amongst human beings, which leads to the concept of real humanism. The crisis of the family in its present form is therefore at the same time a crisis of humanity. While the possibility of the full realization of human rights, of an emancipation of women by virtue of the emancipation of society instead of a mere imitation of the patriarchal principle, is becoming foreseeable, no less foreseeable is the relapse into barbarism, into that mere state of nature which seems to remain at the end of the family alone, into chaos.

5. The decline of the family is an expression of a major social tendency, not an ephemeral contemporary phenomenon. The

indescribable sensation caused by Ibsen's *Nora* seventy years ago can only be explained by the shock caused by the image of a woman leaving her husband and children in order to no longer be a mere object of patriarchal disposal, but to be in control of herself. At that time, the unleashing of economic productive forces, which forms the background of Ibsen's drama of emancipation, already threatened the family to the utmost. That the family nevertheless kept itself alive was due first of all to the perennial irrationality of the principle of rational society itself, which needed the help of irrational institutions like the family to achieve the appearance of its natural justification. But the dynamics of society have not allowed the family, which is as immanent and cohesive to society as it is incompatible with it, to survive unchallenged. In Germany, at least since the first inflation and the accelerated expansion of women's professional work, the family has reached its crisis. It is therefore wrong, as in a widely read American book, to blame the patriarchal German family structure for National Socialism. Not to mention the fundamental inadequacy of such psychological explanations, Hitler was by no means able to build on a firmly established tradition of family authority. In Germany in particular, taboos such as that of virginity, the legalization of cohabitation, and monogamy were probably much more thoroughly shaken after 1918 than in the Catholic-Romanesque countries and the Anglo-Saxon countries steeped in Puritanism and Irish Jansenism, perhaps because the memory of archaic promiscuity survived more stubbornly in Germany than in the thoroughly bourgeois Western world. In terms of a social psychology of the family, the Third Reich signifies an exaggerated substitute for a family authority that no longer exists, rather than one adhering to it. If the theory of Freud's 'Group Psychology and the Analysis of the Ego' is correct, according to which the father imago can be transferred to secondary groups and their leaders, then the

Hitlerian Reich offers the model of such transference, and the violence of authority as well as the need for it were virtually summoned by its absence in the Germany of the Weimar Republic. Hitler and modern dictatorships are indeed, to use the term of the psychoanalyst Paul Federn, the product of a 'fatherless society'. How far, however, the transference of paternal authority to the collective changes the inner composition of authority, to what extent it still represents the father and not already what Orwell called Big Brother, is open to question. In any case, it would be nonsensical to equate the crisis of the family with the dissolution of authority as such. Authority is becoming more and more abstract; but also more and more inhuman and inexorable. The gigantic, collectivized ego ideal is the satanic antithesis of a liberated ego.

6. In so far as the family still has real functions today, it maintains its resilience. In larger families, for instance, where father, mother and older children earn something, it is cheaper to run a joint household than if each were to merely look after themself; they therefore remain under the same roof, preserving an inner cohesion. But this rationality of the family is limited; in the city it extends almost exclusively to the sphere of consumption. In the countryside, where family labour is cheaper than free wage labour, according to the results of numerous studies, the offspring begin to revolt against their 'underpayment' for work in the family estate and migrate to other occupations. In any case, the family, even the one still relatively intact, is undergoing deep structural changes. One sociologist has aptly formulated that its form has changed from that of the nest to that of the gas station. This can perhaps be seen most drastically in the function of education. This is obviously no longer adequately fulfilled by the family, because it lacks the inner persuasive power that enabled children to truly identify with the images of their parents. If

today one hears again and again, even about children from the upper classes, that they 'got nothing' from home, and if one has to observe as a university teacher how little substantial, really experienced education can be assumed, then this is not due to the alleged levelling of the democratic mass society and certainly not to a lack of information, but to the fact that the family has lost the protective, nurturing moment that was only able to develop a child's talent in silence. The tendency now, however, is for the child to withdraw from such education as an unhealthy introversion and to prefer adapting to the demands of so-called real life, long before these are even brought to him. The specific moment of frustration [*Versagung*] that mutilates individuals today and prevents them from individuation is no longer the family prohibition, but the coldness that increases as the family becomes more riddled with holes.

7. In extreme conditions and their prolonged consequences, for example in the case of refugees, the family has proved to be strong in spite of everything; in many cases it has proved to be the powerhouse of survival. Thrown back to the most primitive natural conditions of self-preservation, the family showed itself as an adequate form of its realization. But just as being thrown back contradicts the state of social productivity to the utmost or is rather one of the cruel figures of the price which humanity has to pay for its progress, so it is probably also about a renaissance of the family which owes itself to such regression. It is itself a phenomenon of regression, comparable to the touching, impotent gesture with which the dying man gropes for his mother. To rely on such regression as a regenerative force would be like hoping for a religious renewal from the invocation of God by soldiers in extreme danger. On the contrary, the justification of the largely irrational natural relations of the family by a rationality that demonstrates that it is actually easier to survive

this way attacks as rational precisely the irrational substance that it itself glorifies. Such a line of reasoning would have to give way if social forms other than the family were to become more favourable to survival than the family, surrendering its eternity. To doubt the sacramental character of the family, but to advocate it because its sanctity is good for people, is not very convincing. Moreover, studies such as the Darmstadt Community Study lead to the assumption that the generally shaken institution of the family was only strengthened for a short time by the solidarity of the state of emergency. The number of divorces as well as the number of so-called 'incomplete' families is far above the level before the Second World War. The tendency to limit oneself to a 'nuclear family' – a precondition of childless marriage, which is generally regarded as a symptom of the decline of the family – no longer applies only to the upper classes, but can be observed throughout the population. In the countryside, the archaic multiple-generation family, as opposed to the single one, seems to be noticeably receding. Everywhere the traditional elements of the family relation are gradually being displaced by 'rational' ones. The more the family is transformed into a mere association of convenience, the more it loses those features of the 'primary' group which until recent developments were attributed to it as invariant. Some phenomena of the war and post-war years have undoubtedly had a delaying effect on all this; on the whole, however, it is also true for the family that extreme situations tend to reinforce overall social tendencies; that in them, as it were, what has slowly been formed from within is often enforced from the outside at one stroke.

8. Speculations about the future of the family are exposed to almost prohibitive difficulties. If, in fact, the family is so interwoven with the process of society as a whole, its fate will depend on this process and not on its own existence as a

self-sufficient social form. Moreover, not even the concept of an immanent developmental tendency, which has been applied to the family, may be hypostatized. Just as, for example, economic developments are able to take a different direction than that of their own lawfulness, as soon as the unconscious play of forces of the economy is controlled in a planned way for better or for worse, it is conceivable that, for example by totalitarian dictatorships breaking in again, the 'trend' of the family will change, be it restoratively, be it also by accelerated dissolution in favour of radical statist control, which no longer tolerates an intermediate authority between itself and the social atoms. A total state would not even have to shy away from combining the two incompatible possibilities. This much seems certain, that the preservation of everything that has proven itself in the family as humane, as a condition of autonomy, freedom and experience, cannot be conserved simply by giving up the outdated features. It is probably an illusion to think that a family of 'equal status' can be realized in the midst of a society in which humanity itself is not mature, in which human rights are not established in a far more fundamental and universal sense. One cannot preserve the protective function of the family and eliminate its disciplinary features as long as it has to protect its members from a world imbued with mediated or direct social pressures, communicated to all its institutions. The family suffers from the same as everything particular that pushes for its liberation: there is no emancipation of the family without the emancipation of the whole. In a free world, however, a family of freedom is conceivable, a social sublimation of the mere natural relation in what Wilhelm Meister called the 'firm thought of duration'; a form of close and happy coexistence of individuals that protects against barbarism without doing violence to the nature that is suspended in it. But such a family can be imagined as little as any other social utopia.

TRANSLATED BY JACOB BLUMENFELD

9

Is sociology a science of man? A dispute

THEODOR W. ADORNO & ARNOLD GEHLEN

Towards the end of the following conversation, Theodor Adorno presses Arnold Gehlen to discuss the important role of institutions in his sociology, indicating that it was one of the reasons Adorno wanted to enter into discussion with him. That Adorno felt compelled to engage with Gehlen's concept of the institution, on public radio, highlights how seriously he took the implications of Gehlen's thought, which he wanted both to distance himself from and to criticize. This was particularly pressing for Adorno given many of the premisses and diagnoses shared between himself and Gehlen that become apparent earlier on in the conversation. Yet these similarities – of which some are fundamental, others more superficial – betray the deep fault lines that separate Adorno's and Gehlen's positions both internally to sociological method and outside of it. It is here that the question of an anthropological concept of 'man', which gives the debate its overall frame, becomes central.[1]

1. The conversation was recorded by Südwestfunk and broadcast by SFB (Sender Freies Berlin) on 3 February 1965. It was broadcast a second time by Norddeutschen Rundfunk (NDR) on its regional channel on 21 March 1965. The transcription translated here was published in Friedemann Grenz, *Adornos Philosophie in Grundbegriffen: Auflösung einiger Deutungsprobleme*, Suhrkamp, Frankfurt am Main, 1974.

GEHLEN Is sociology a science of man?[2] Well, of course we both know that there is also a sociology of animals with which neither of us is concerned.

ADORNO I even less than you.

GEHLEN So we must have had a certain idea in choosing this exact formulation. Now, let's start our conversation and I can ask you to comment.

ADORNO Yes, that sociology deals with 'man' – that is, with socialized man – goes without saying. I had something far more specific in mind when I suggested this formulation. Namely, whether the essential moments of society and, above all, the critical moments in society that you, as well as I, have been noticing for a long time now can be traced back to the essence of man [*Wesen des Menschens*] or whether they are rooted essentially in relations, which – although somehow originally made by human beings – have developed an independence of their own. Now, I know that we also have largely similar views with respect to the process of their becoming independent [*Verselbständigung*], but I believe one can only fruitfully work out differences if one also has a certain stock of common ground, and perhaps it would not be a bad thing if we first of all wanted to emphasize precisely those commonalities, so that the differences and the reasons for them can be drawn out.

2. *Translator's note*. The word *Mensch*(*en*) in German can mean both 'man' and 'human'/'human being', a difference that is both subtle and rarely clearly delineated in the course of this discussion. Given one of the key aspects of Adorno and Gehlen's conversation is nonetheless the ambiguity of the expression *Mensch*, I have at the outset retained the conventional 'man', since it is less tied to the notion of the 'human species' and thus open to more speculative possibilities and determinations – despite its gender-exclusive ideological connotations. On occasion, I have marked this usage by inverted commas; on others I have reverted to the expression 'human being' or 'human' where its specific use is more obvious; sometimes, I have opted for 'men and women' where the single term 'men' might previously have been used; at other times, especially in the context of the final section, I have preferred the gender-neutral 'people'.

GEHLEN Yes, Mr Adorno, that is a large undertaking. And I would like to approach it step by step. First of all with the question: so you would not, as Max Weber did at the time, regard sociology as an essentially cultural science or science of culture [*kulturelle Wissenschaft oder Kulturwissenschaft*], but rather as an anthropological science?

ADORNO No, not at all.

GEHLEN Not at all.

ADORNO Not at all, on the contrary. I would say that sociology is essentially a science that refers to or involves cultural moments and is not something that can be reduced to the 'essence of man', to anthropology. According to the tenor of your books, with which I am very familiar, one would have expected that you stand for anthropology in an extended sense, and I do not. But I would like to say straight away – so that we do not argue about things that we do not need to argue about – that we agree from the outset with one another regarding one essential point: namely, that there exists – and I may quote you on this – 'no pre-cultural human nature [*menschliche Natur*]'. I would say, though, that it lies in this: that there cannot be sociology as a pure anthropology – that is, as a science of human beings – nor as a science of relations that have become independent of men and women.

GEHLEN Okay, fine. I would think that the expression 'man' is also not unambiguous.

ADORNO God no.

GEHLEN So we have to give listeners who want to follow our conversation an idea of the way in which we work sociologically. And here, first of all, I believe there is indeed this difficulty: that many of our basic concepts have, in the course of time, become

vague. Now, as far as it concerns man, it just came to me that a colleague of ours said in his book on technology that there is today a 'myth of man' [*Mythos Mensch*], and this myth is a natural secretion of technological progress.

ADORNO Yes. I have said something quite similar, only formulated more viciously, in *The Jargon of Authenticity*; far more viciously, for I said that, today, man is the ideology for inhumanity. That's not so different in substance, only far more vicious.

GEHLEN Exactly. We want to distance ourselves from that.

ADORNO So, from the 'myth of man', from the reverent ogling or eye-batting that arises when one simply says 'everything depends on man', we want to distance ourselves from that at the outset.

GEHLEN Exactly. It would therefore be a matter of science, so to speak, bringing reason – knowledge [*Kenntnis*] and reason, perhaps also experience – into our responsibility for man, in so far as we have a responsibility.

ADORNO Yes, but I believe we should attempt here to make the concept of man a little more precise compared to the naive outlook. I completely share your view that one must be constantly cautious about using this concept of man in an irresponsible and vague manner. And I would thus say: first of all, 'man' is a historical being [*Wesen*], namely a being that is formed by historical conditions and historical relations to an infinitely greater extent than the naive idea accepts, which is satisfied, so to speak, with human beings having not changed all that much in their physiological constitution over very long periods of time.

GEHLEN I agree, Mr Adorno. When you look at human beings, one has the feeling that history never passes.

ADORNO Yes. But in actuality the human being, right down to the innermost core of their psyche, is formed by history, and that means essentially by society.

GEHLEN Precisely. And it never goes away, so to speak.

ADORNO And I believe this to be the basis, this presupposition, therefore, of the actual historical nature of 'man', right down to the innermost categories, which is the presupposition of what we, in general, want to discuss.

GEHLEN Now we are getting closer. Would you now concede that culture as well as history – and therefore also 'man' – is open, so to speak, to the future?

ADORNO Yes. I mean, to say what man is is absolutely impossible. If biologists are right – that it is precisely characteristic of the human to be itself open and not defined by a determined field [*Umkreis*] of objects of action, then it also lies in this openness that we cannot at all foresee what will become of the human. And that applies to both sides, including the negative. I recall Valéry's statement that inhumanity still has a great future.

GEHLEN Yes, that also lies within the problem. Now that we have agreed on this, would you also recognize a thesis that I am quite happy to represent, namely that with industrial culture – which is of course a broad concept of facts – a new unfolding of human possibilities, let us say, has entered into appearance, the likes of which has not been seen before?

Technology, exchange relations and progress

ADORNO Well, I would agree with you that something has occurred in culture, which you now call industrial culture, that had previously not existed in this way and that you essentially determine – and, incidentally, very similarly to the way I would too – through the concept of the domination of nature and through the connection of technology to science. But perhaps I may note something here that sounds pedantic but that is perhaps not without merit for our discussion: I would not, for my part, use the expression 'industrial society', which is very popular today.

GEHLEN What would you say then?

ADORNO Well, let's see. I would first of all like to say: in this concept two moments are interlocked which, although they have a lot to do with each another, cannot simply be equated. First: the development of technology; that is, the unfolding of the human productive forces that have been objectified in technology. Technology is, as has been said, an extended arm of 'man'. But likewise present in industrial society is the moment of the relations of social production: that is, in the whole Western world it is a matter of exchange relations, and in the Eastern world in this case…

GEHLEN Yes, but Mr Adorno that is what one means when one says industrial society.

ADORNO Yes, but if one does not separate these moments – and perhaps I may say this by way of explanation – if one does not separate these moments – productive forces and relations of production – there easily exists the danger to which Max Weber, of whom you spoke earlier, already succumbed: namely, that one predicates things of something relatively abstract like 'technical

rationality' – burdens it with things that, in actuality, do not lie as much in the rationality [*Ratio*] itself as in the peculiar constellation that rules between this rationality and a so-called exchange society.

GEHLEN Mr Adorno, you are now proposing a closer determination of the concept of industrial society and we do not want to lose sight of the new kinds of human phenomena that have emerged in the process.

ADORNO We are in complete agreement on that.

GEHLEN I would like to explore the space where we agree and where we do not. We can then argue about the other things. I would for now only say the following: with the means of modern society, means of transportation, with the means of information, with the technological means of every kind, it is the case today that, for the first time, humanity meets itself head on, gets to know itself through getting to know each other, and in its full scope. And so there are no more isolatable events.

ADORNO Sure. However, as an irrepressible sociologist, I do have some doubts as to whether humanity really meets itself to its full extent. I must say that it always amazes me, when I go to the opera, that there is not the slightest restriction on the exchange between countesses and Gypsies, for example. I do not want to say that the world resembles the opera. If one knows American society somewhat – and this is as familiar to you as it is to me, of course – selection mechanisms already exist that make it impossible for people, at least in the upper classes of society, to interact at all with those who do not roughly belong to their income group. So, I don't know, you are talking about the phenomenon of the public [*Öffentlichkeit*]...

GEHLEN No, not that either.

ADORNO Good, then please explain.

GEHLEN I did not want to talk about the phenomenon of the public, about the fact – isn't it the case? – that today one can read about everyone, about Koreans and Russians and so on. I am not speaking about class distinctions either. I am speaking rather about the fact that – take an entity like the UN – that all concrete societies – European, Asian, African – not only enter into commodity contact, not only into political contact; they also enter into intellectual [*geistige*] and physical contact. That is dramatic enough in America, with respect to the 'Negro question'. I think that the dismantling of borders is happening on a broad front.

ADORNO So you mean the phenomenon of 'one world' [*English in original*].

GEHLEN Exactly. And this will allow for certain experiences about human beings to be had.

ADORNO Yes, sure.

GEHLEN It's also not that simple with the 'one world'. There are also trap doors.

ADORNO You could say that.

GEHLEN Yes, that's what I wanted to hear. This brings me, by the way, to a second thought: progress [*Fortschritt*]. I think we can agree that the 'one world' is – compared to closed-off, earlier cultures that did not know, or ignored, one another – for the first-time [*Erstmaligkeit*],[3] and in a certain sense, also a step

3. *Translator's note. Erstmaligkeit* is translated here with the somewhat clumsy 'for the first time' (and, later, 'first-timeness'), rather than the more obvious 'novelty', because Gehlen seems to be placing emphasis on the idea of something as 'first', rather than something being 'new', which would imply some relation to the 'old'.

forward [*Fortschritt*]. 'Man's' ability to live at least seems more favourable now…

ADORNO You are speaking of the concept of technological progress [*technischen Fortschrittsbegriff*]. According to the state of the technical productive forces, especially if one were to include the agriculture sector in earnest, there would be no hunger.

GEHLEN And I recently said: 'Today, progress accomplishes itself by itself.' I caused some offence with this. There were people who did not want to admit that. What do you think of this proposition?

ADORNO Well, the interests of self-preservation of particular groups always compel them thereby to introduce innovations in production, or otherwise practise certain ways of behaving [*Verhaltensweise*] which, in some way, benefit the whole, even if they do not at all want it. Incidentally, this was always the case in the history of bourgeois society.

GEHLEN That was the meaning of the statement. But it also has another meaning that aims somewhat further. What do I mean when I say 'progress accomplishes itself by itself'? Progress, what does it mean? It means that the material provisions of life and intellectual life-stimuli [*geistigen Lebensreize*] are becoming ever more accessible to more and more people. And I believe that this process runs almost automatically. You can't work in a profession today without being pushed to the front where either [the material provisions or intellectual life-stimuli] are produced, with the tendency: always more, and for more and more.

ADORNO You spoke earlier of the trap doors in 'one world'; progress certainly also has trap doors. So, if I may give an example…

GEHLEN Yes, please.

ADORNO You say that the possibility of stimuli – and that would necessarily mean also, of differentiation – is becoming accessible to more and more people.

GEHLEN Intellectual.

ADORNO Well, one would name them so-called educational opportunities.

GEHLEN Quite so.

ADORNO But when one looks at social reality, however, the countless mechanisms which preform [*präformieren*] men and women – that is, the entire culture industry in its broadest scope – the innumerable, more or less (how to say?) levelling ideologies that are bandied about, no longer make it at all possible for men and women to experience the countless things that approach them.

GEHLEN Yes, exactly.

ADORNO One can listen to radical modern music on the radio, but in the face of the overwhelming ideology, let's say, which stands behind the pop music industry and insists that it is an important event when the singer Iselpiesel sings 'Roses in Hawaii' – who then, amongst the barrage [*Trommelfeuer*] of these things, is at all capable of taking in truly progressive music, with its extraordinarily differentiated and individualized and, at the same time, spiritualized [*vergeistigten*] stimuli?

GEHLEN Yes, Mr Adorno, I cannot contribute when it comes to music…

ADORNO Then let's stay with painting.

GEHLEN When it comes to music, I'm missing a gyrus [*Hirnwindung*]. But in literature, for example, avant-garde circles are also pretty good at banging the drum [*Trommel*].

ADORNO Yes, they hit sometimes, perhaps ...

GEHLEN Well, they do bang around.

ADORNO ... but this 'around' is then not so awful. I don't think we should talk about it too much because it takes us a little bit away from our subject. But I would say that compared to the illustrated novel and the way of shaping consciousness, Beckett's plays do not get 'around' in the same way. This I would say in all modesty.

GEHLEN That's for sure.

ADORNO I mean, one needs to limit this.

GEHLEN Yes. But, generally, would you also say that the direction of progress or the trend of progress has an automatic character. I mean, they are also all...

ADORNO But perhaps it is therefore not real progress at all, precisely because it has an automatic character. There is a wonderful sentence of Kafka's: 'Believing in progress does not mean believing that any progress has yet been made.'[4] I believe that we could even agree on this, that progress – and Benjamin was probably the first to formulate this in the *Theses on the Philosophy of History* – in so far as one can speak of such a progress up to

4. *Translator's note*. It is unclear precisely which passage in Kafka Adorno is referring to. He could, however, be paraphrasing Aphorism 48 from Kafka's *Zürau Aphorisms*, which reads in full: 'An Fortschritt glauben heißt nicht glauben, daß ein Fortschritt schon geschehen ist. Das wäre kein Glauben.' (To believe in progress doesn't mean to believe that progress has already occurred. That would not be belief.)

today, is essentially a progress in the techniques of the domination of nature and in the knowledges of mastering nature. This would mean that progress is a particular progress, if you will, which in no way means, however, that humanity has thereby come to empower itself [*mächtig*], that humanity has come of age [*mündig*]. And progress would only begin at the point where this maturity [*Mündigkeit*], where humanity, one could say, constitutes itself as a complete subject [*Gesamtsubjekt*], instead of remaining, despite the growth of these arts and accomplishments, in a state of blindness; handed over, that is, to blind, anonymous processes of which humanity itself is not conscious. And that is precisely the reason why I said earlier, somewhat paradoxically, that progress accomplishes itself automatically; that is, men are blindly seized by progress as technological-scientific progress, without at all constituting themselves properly as subjects and thereby becoming empowered. That is probably the reason why 'progress' is not at all an actual one; that is, it is coupled in every second with the possibility of total catastrophe.

GEHLEN Okay, wait a minute. We do not want to dramatize things. One thing struck me…

ADORNO I remind you of the days we were in Münster together, where we really did not know what would happen in the next moment.

GEHLEN Yes, yes. One thing struck me: all nations and continents seem to be in agreement on the desirability of progress. That is to say, there are today certain currencies valid from New York to Beijing: equality, development, progress. I believe, Mr Adorno, that this is also the first time that such formulas of faith have no opposition to each other – that there are no enemies. The Greeks distinguished themselves from the barbarians, the Christians from the pagans, the enlighteners from the

feudals. But all are for equality, all are for progress, all are for development.

ADORNO Yes, and even if one attempts a critique of any categories connected to them, one has thereby already gone too far on the ground of these omnipresent categories.

GEHLEN Yes, but that's a strange thing, isn't it?

ADORNO It's an extremely odd thing.

GEHLEN So, above the table everyone is eating from the same bowl, and below the table everyone is kicking each other.

ADORNO You could say that, yes. May I come back to one point, Mr Gehlen, that I already touched on earlier and from which we have completely strayed again – in connection with this whole complex of industrial society, productive forces, relations of production. In your books you have repeatedly pointed to the phenomenon of deforming [*Entformung*]; that is, to the phenomenon that the qualitative moments within society – that is, simply the qualitative differences; I am not talking of value judgement – the qualitative moments are being ground down in the face of progressive quantification. That has been repeatedly observed.

GEHLEN I learned that from Max Scheler. Scheler's work is titled *Man in the Age of Equalization* (*Der Mensch im Zeitalter des Ausgleichs*).

ADORNO *Man in the Age of Equalization*, that's what it was called, yes. Now, I would say that this tendency does not lie in technology as such or in science as such, but rather lies essentially in a specifically social principle, a principle connected to the order of the relations of society: namely, the principle of exchange

[*Tauschprinzip*]. The universal principle of exchange: this is what dominates the world, at least our world, the Western world, today to an unprecedented extent. This principle of exchange cuts off the qualities, the specific characteristics of the goods to be exchanged, and thus also the specific forms of labour of the producers and the specific needs of those who receive them. This moment of levelling lies therein. What I mean, if I may, as a thought experiment: if one imagines a society in which nothing was exchanged – that is, humans no longer received goods through the market, but they are rather produced according to the needs of humans – then this moment of absolute equalization [*Vergleichlichkeit*], and with it the levelling moment, would also fall away and one could imagine that the 'qualitative' – and with it all the moments of form – that appears to be washed away by present society would reproduce and reconstitute themselves on a higher level. I would therefore say: 'deforming' is much more – if I may put it quite bluntly – a phenomenon of bourgeois society than a phenomenon that is, in itself, necessarily to be equated with industry qua advancing technology. That is the reason why I insist, in a slightly petty way, on this difference. For it has to do with something serious here.

GEHLEN That's a bold claim you are making. For me – you know that I consider myself an empiricist – what you are saying is, first of all, metaphysics. I will ask you a counter-question: don't you believe, then, that this pipe is so timeworn that it will burst under the fermentation of what is now coming our way?

ADORNO No, I do not believe so. I do not know if the possibilities are not being buried today by the violence of what is coming our way. I would certainly assume that possibility. I do not believe that here I am being more optimistic than you. But I would nevertheless say: exactly this image of a world no longer levelled through

exchange, this image seems to me to be quite accomplishable, if one first of all makes theoretically clear (and we are theorists and cannot avoid thinking, no matter how close we are to the empirical) such distinctions as, for example, those phenomena that are only *relatively* related to technology like industrialism and the principle of exchange. After all, an endless amount of things are pinned on either mere forms, such as the form of administration, or on what I call the technological veil – that is, the covering over of social relations by technology, which in actuality are still grounded, now as ever, in social relations – and I am old-fashioned enough to believe that much more can be made of a critique of society than a critique of technology as technics [*Kritik der Technik als Technik*]. Technology as a 'technics' is neither good nor evil; it is probably good. And the things to which one protests in technics loads on it – imposes [*aufnutzt*] on it, one might say if that's German at all – the moments that are actually due to the one-sided way they are practised in our society.

GEHLEN In the East we have, however, societies in which purchase and exchange do not play the role they do here. Do you believe that in China or Russia one is already noticeably further towards the individualization and greater qualification [*Hochqualifizierung*] of the individual than here?

ADORNO To pose this question is, of course, pure mockery. Of course that is not the case.

GEHLEN I did not mean to mock.

ADORNO No, and by God I do not want to defend the dreadful horror that is obviously spreading there. But I would say that the levelling that continues there is proof that the society they are operating there is a pure mockery of the idea [*Idee*] of a society truly liberated according to its substance.

GEHLEN Look, I do not want to put myself in the position (as, let's say, a convinced empiricist) of making difficulties for you, of hurling facts at you from below, so to speak – you being in the fortunate position of having a great utopian impulse. I say that without any intention to disparage or even to only doubt; I even envy it, in a certain sense. But at this point I remain hopelessly behind in our conversation.

ADORNO I do not know if I am not further behind, because the things I'm registering here are extraordinarily against the spirit of the times. So one can roll the dice.

GEHLEN Yes, we can play dice with that. So whoever points to facts today, to naked facts, shocks: just as nudity shocks. That's also risky. Maybe today it's already risky to say how it is; it immediately sounds provocative or cynical. That is a burden I always have to struggle with. But the thesis that if we abolish money, or if we change the relations of production in the direction of complete equality...

ADORNO We would have abolished what it is essential to abolish. Complete equality is an indifferent matter. Instead, production should be according to the needs of human beings. Then, indeed in a changed social organization, it would cease that needs are produced by the apparatus in the first place.[5]

GEHLEN I see.

ADORNO And it is precisely that needs have been produced by this apparatus that results in all these horrendous symptoms of the administered world, the phenomenology of which you and I together have written quite a bit about in our long lives.

5. Wenn wir das abschaffen, so wird damit das Wesentliche abgeschafft. Völlige Gleichheit ist gleichgültig. Sondern daß nach den Bedürfnissen der Menschen produziert wird. Dann, allerdings in einer veränderten gesellschaftlichen Organisation, würde es aufhören, daß die Bedürfnisse von der Apparatur überhaupt erst produziert werden.

GEHLEN That's precisely what I call this great utopian impulse, which I certainly want to respect, Mr Adorno. But look: when you argue like this, is the 'first-timeness' of our time really being honoured? Or are you not complaining about an old hat?

ADORNO Okay, as to the novelty of our time, I would say that (if you don't begrudge me speaking metaphysically again, very metaphysically) the quantity of these phenomena – that is, of bourgeois-industrial rationalization – is beginning to change into a new quality. I would concede that to you. On the other hand, however, I have to say that it is also – if I may express it very flippantly – an old hat. Since there has been something like bourgeois society, whether you read Bacon or even Descartes, this has actually always been contained in it and has only unfolded today to an extraordinarily extreme degree, in that the threat of this principle – namely, the sequestering [*Einziehung*] of the subject by an unleashed technical rationality and all that is connected to it – looms as an immediate possibility. This was always part of the entire structure of this exchange society. In this respect, I would be a little more sceptical than you are, especially with regard to the thesis of the absolute newness [*Neuen*] of what we are experiencing today, and indeed would say, well, when I read an author like [Auguste] Comte, for example, all the elements of this are already there.

GEHLEN Exactly. Mr Adorno, that's nice – here we agree again. I would certainly admit that. I would moreover say: industrial culture – you listed some categories at the beginning to define it – is new. It is also, however, already two hundred years old. It is a first [*Erstmalig*] and if it is so, that humanity has stepped up to this podium in the course of the last two hundred years for the first time, then there must be a lot that hangs on it. It is a favourite pastime of mine to search for what is then a

first-time-of-consequence. So, for example, the cold war. I don't think that really existed before. It's an expression that begins as 'dry war' before the First World War in the intermediate state of permanent mutual mobilization.

ADORNO Yes.

GEHLEN And so something has been conceived there, no?

ADORNO Yes.

GEHLEN So today there no longer exists a clean divorce of war and peace, which even the Scythians knew.

ADORNO ... they no longer exist.

GEHLEN So that is a first-time-of-consequence [*Konsequenzerstmaligkeit*]. Or when people ask harmlessly and nicely, 'Is that still art?'...

ADORNO Yes.

GEHLEN I find the same thing in it: the honouring of a 'first time'. It's never looked like that before, has it? Or the Pope flies to India...

ADORNO India.

GEHLEN ...because, at least *in cerebro*, one has an idea of interconnecting religions. These are all first times. And I think the appeal of sociology consists largely in seeing and describing these things, if only because words are lacking, for our words are from the past. We never have the right words for them. We struggle with language and with concepts handed down long ago to describe what ultimately now appears here and was never there before. Would you also accept that?

Institutions

ADORNO I would also accept that. But may I now again come back to what largely motivated me, in any case, for us to meet. That is the position of your sociology – if I may say so; I almost said your philosophy, and I think I could also justify that – on the concept of institutions, which has an extraordinarily central position in your work. Since time is getting on, I believe that we really owe it to our listeners – if only to ensure that they get their money's worth – to finally get down to the meat. That is to say, now we will spar. We agree that men and women [*Menschen*] today – and I would say to an unprecedented degree – are dependent on institutions, which means here, first and foremost, on the economy, which has been monstrously agglomerated; and secondly on administrations in a comprehensive sense, which themselves partly fuse with the economy and are partly modelled on it. Now I believe – and this is what prompted my specific formulation of the question, and please correct me if I misinterpret you – that you are inclined to principally affirm these institutions as a necessity on the basis of the deficient situation of 'man' [*Mangelsituation des Menschen*] and to say: it would not be viable without this superiority of the institutions that have become independent [*verselbständigten*] from men and women – or, as I would say, reified and alienated [*verdinglichten und entfremdeten*]. They relieve men and women, who otherwise would collapse under the weight of all kinds of things they can no longer manage. They give them all sorts of directives and more. Well, in contrast to that, I would say: on the one hand, precisely this power of institutions over men and women is what, in the old language of philosophy, was called heteronomous…

GEHLEN Exactly.

ADORNO They thus confront human beings as an alien and threatening power, as a kind of fatality they can hardly resist. You are now inclined, if I understand you correctly – there are individual formulations of yours, I can read you some – to accept precisely this kind of fatality as something destinal [*Schicksalhaftes*] and, ultimately, as something which refers back to the nature of the human. And I would say that this fatality itself is due to the fact that human relations and relationships between human beings have become opaque to themselves, and because they are no longer known – namely as relations between human beings – they have taken on this overpowering character as opposed to them. And precisely what you accept here as a necessity – partly pessimistically but also partly *con amore* – would have to be first of all countered by the analysis, the critical analysis of these institutions, and then finally by the question: if these institutions really stand against us as a blind force in the sense of the principle about which you also spoke earlier – that humanity is becoming independent and mature – whether they are not to be changed and replaced by institutions that are perhaps, to take up your terminology, less relieving for men than the institutions today? Institutions which are also not such a terribly oppressive burden that they threaten to bury every individual under them, and ultimately no longer permit anything like the formation [*Bildung*] of a free subject. I believe that this is actually our problem. So, when I ask 'Is sociology an anthropology?' I mean to question succinctly whether institutions really are a necessity of human nature, or whether they are the fruit of a historical development, the reasons for which are transparent and which, under certain circumstances, can be changed. This is the very simple question about which I would have liked to tarry with you.

GEHLEN Yes, Mr Adorno. I can, however, only answer with a somewhat longer explanation. First of all, I have the impression

that law, marriage, family are what endures [*Bestände sind*] – those institutions essentially connected to man, as well as the economy. These institutions look hugely different in space and time. But it is possible to comprehend them under notions such as 'family' and 'law', for there are similarities between them. And I would say that they are the essential features of man. But that's not really the point of your question.

ADORNO I wouldn't agree with that either, by the way. I would say that the differences that these institutions have undergone are so immensely important and central…

GEHLEN Well, yes.

ADORNO … that to insist on their invariance is already a bit dangerous.

GEHLEN Property would also have to be factored in too, Mr Adorno; it doesn't help…

ADORNO It has certainly always existed. There would also be something similar in a society of abundance, otherwise men would be inevitably poorer. But property would no longer have this independent power [*verselbständigte Gewalt*]…

GEHLEN Alright.

ADORNO … that people, in order to be able to have property, in order to be able to live, are made into agents of property.

GEHLEN Mr Adorno, I completely agree with you that these fundamental anthropological institutions [*Einrichtungen*] such as family, law, marriage, property and so on, economics, co-economies [*Zusammenwirtschaften*], offer a tremendously

diverse picture in history, and I also cannot foresee that these substances themselves will one day dissolve. They will continue to transform themselves. But, as I say, that's not the question you actually asked…

ADORNO No.

GEHLEN … but you ask more: why do I then insist so much on institutions? And that's where I have…

ADORNO So that there is no misunderstanding: in a certain way I also insist on them, because I also believe that the supreme power [*Obergewalt*] of institutions over people, at least for the situation today, is the key. It's just that we probably draw different consequences.

GEHLEN Yes, yes. Let's see. We have to finally find the point of contention. Perhaps it lies in the fact that I am inclined – like Aristotle, from whom I learned this – to grant a significant role to the aspect of security. I believe that institutions are restraints on humanity's readiness to decay [*Verfallbereitschaft*]. I also believe that institutions protect people from themselves. They certainly also limit freedom. But one sees time and time again that there are revolutionaries.

ADORNO You yourself once said of it: 'Institutions are preserving and consuming.'

GEHLEN Yes. Preserving and consuming. Exactly. When one thinks not only of people like us, who take their stability into their own hands, so to speak, but of the many people who think 'Oh God, you know, I'm actually searching for an honourable thing to serve', I still consider that as ethics.

ADORNO Yes. But that keeps us from knowing how this actuality itself is constituted, such that one can serve it. I think that this formulation is as seductive as it is problematic. Certainly, ethics is nothing other than the attempt to make good on the obligations that the experience of this entangled world places on us. But this obligation can also take the form of adaptation and subordination, which you seem to emphasize more strongly here than what I would emphasize more strongly, namely that in the attempt to take this obligation seriously one attempts to change that which hinders all humans living their own possibility within these given relations and thus realizing the potential [*Potential*] that lies in them.

GEHLEN I did not understand that exactly. How do you know what lies undirected [*ungelenkt*],[6] as potential, in humans?

ADORNO Well, I do not know positively what this potential is, but I do know from all kinds of partial insights – including scientific ones – that the processes of adaptation to which people are currently subjected amounts to the crippling of people to an indescribable extent; and I think you would also admit this. Let us take, for example, a complex that you have thought about a lot, namely technical aptitude. You tend to say – and Veblen already had the same thesis – that there is something like an 'instinct of workmanship' [*in English*], a kind of technological-anthropological instinct. Whether that is the case or not is very difficult for me to decide. But I do know that there are countless people today whose relationship to technology is, if I may express it clinically, neurotic; who are concretely bound to technology,

6. *Translator's note*. A *Gelenk* in German refers to a joint or hinge. The use of *ungelenkt* here could thus imply not being 'connected' to something, but, in doing so, also not being directed, or governed, by it. Gehlen seems to be asking what (or where) such a potential would lie that wouldn't always already be adapted or subordinated to institutional arrangements.

to all possible means of controlling life, since purposes – namely the fulfilment of their own lives and their own living needs – are largely denied to them. And I would say that the psychological observation of all the countless defective people with whom one deals (and the defect has become, I would almost say, the norm today) alone justifies saying that the human potentialities are being stunted and suppressed by institutions to an unprecedented extent.

GEHLEN I don't believe that. It's not true, we are both about the same age and we have all now experienced four forms of government, three revolutions and two world wars.

ADORNO Yes.

GEHLEN During this time a tremendous number of institutions have been shredded apart and dismantled. The result is a general inner insecurity and what I take to be 'subjectivisms with a minus sign' [*Subjektivismen mit einem Minuszeichen*]. I mean the inner surge. That is now becoming loud, that is the public. And opposed to that I have a therapeutic point of view. I am in favour – and now I'll use the word – of conserving what is still left of institutions. And within them everyone can indeed see from their own position that things improve here and there, but one cannot begin with that. If we wanted to try to reform the universities, for example, we would first have to serve there for a few decades in order to know where the sick positions are.

ADORNO We've been doing it long enough…

GEHLEN But one cannot say that the moment one receives their *venia legendi* one can initiate university reform programmes. And that's how it is in all areas: one first has to go in and swallow

quite a lot. In every institution there is much of what you call unfreedom and bondage [*Verknechtung*]. And then, after a while, one can see that one just has to keep pushing. You see, what is sought is an honourable cause that can be served. The difficulty is that we cannot say bluntly that it's this or that.

ADORNO I would concede that too. I just mean that the uncertainty is not so terribly far off. One says that often. They are so against clichés and against bland *convenus*. I would therefore say: the world in which there is nothing which one can hold on to, as Brecht says, is that also then not largely a myth? Actually, I observe in general that people move far too exactly along the predetermined paths, that they offer far too little resistance at all, and that, as a result, they are not so terribly unsure of reality. They have a certain real fear, which I could describe to you precisely: first, it is connected with the latent catastrophe which people all unconsciously know about; and then it is connected to the fact that within present economic conditions people are fundamentally superfluous to the preservation of their own society, and that we all know, deep down, we are potentially unemployed and being drip-fed – that is to say: it all runs without us. I think these are the greatest real reasons for this fear. But with the insecurity in an allegedly deformed [*entformten*] world…

GEHLEN Does the concept of fear, then, touch on the issue?

ADORNO Not 'fear' in the sense of a metaphysical state of mind, as with Heidegger, but rather fear in the sense that is not articulated consciously, but that refers to these tangible things, such as, first, the catastrophe, and second, each individual's replaceability [*Ersetzbarkeit*] and ability to be abolished [*Abschaffbarkeit*]. For in a functional society, in which people are reduced to their functions, everyone is also dispensable: what has a function can also

be replaced, and only the functionless could at all be irreplaceable. People know that very well.

GEHLEN That's a horrible thought that you are raising here, Mr Adorno. I first saw it in Hannah Arendt, this formula of the 'superfluity of man'. It is a ground that one hardly dares to tread…

ADORNO It is, however, also an illusion, which consists in the fact that people today are essentially appendages of machinery and not subjects of their own power. I want nothing other than that the world should be arranged in such a way that people are not its superfluous appendages, but – in God's name – that things are there for the wants of human beings and not human beings for the wants of the things that they themselves have made. And the fact that they have made it themselves, that the institutions ultimately point back to human beings themselves – that is, for me in any case, a very small consolation.

GEHLEN Yes, the child hiding behind the mother's apron is at the same time afraid and has the minimal or optimal security that the situation offers. Mr Adorno, you see here the problem of maturity once again, of course. Do you really believe that we should impose on everyone the burden of these fundamental problems – the effort of reflection, as such a towering and deeply affecting mass of existential mistakes [*Lebensirrtürmen*], which we would have to go through only because we tried to swim free? I should be very interested to know your views on this.

ADORNO I can give you a simple answer: yes! I have an image of objective happiness and objective despair, and I would say that for as long as people are unencumbered [*entlasten*] as they are now, and are not expected to take on full responsibility and full

self-determination, then for just as long their welfare and happiness in this world will be an illusion. And it will be an illusion that will one day burst. And when it bursts it will have dreadful consequences.

GEHLEN We have reached the exact point where you say 'yes' and I say 'no', or the other way around; where I would say that everything one that knows about human beings, since the beginning up until today, would indicate that your standpoint is an anthropological-utopian one, if also a lavish, indeed magnificent standpoint…

ADORNO It's not so frightfully utopian at all, but I would first of all say to that: the difficulties because of which, according to your theory, people are pushed towards seeking out relief [*Entlastungen*] – which I do not deny… – you know that I have completely independent of you and in a very different context come across the concept of relief myself, in aesthetic contexts. Interestingly, I am a critic of relief while you are a proponent of relief: the distress that drives people to seek out such forms of relief is precisely the distress that is put on them by the institutions – that is, from the arrangement [*Einrichtungen*] of the world that is alien to them and omnipotent over them. So, in a sense, it is like this: first they are chased away by the mother, sent away, out into the cold, and are under horrific pressure, and then, as a result, they flee behind the skirts of the very same mother, namely the society that chased them away. And that seems to me to be an ur-phenomenon of anthropology today, that people flee precisely to the power that is causing them the harm [*Unheil*] they are suffering from. Depth psychology even has an expression for this: it is called 'identification with the aggressor'. What seems to me – if you will allow me to put it this way – what appears to me to be the danger in your position, in which, God knows, I

cannot ignore the undercurrent of a deep despair, is this: I fear that you sometimes surrender yourself to this identification with the aggressor out of a kind of – yes, forgive me – metaphysical despair. That is to say, you theoretically identify yourself with the very power that you yourself, like all of us, fear; but in doing so you also side with a whole series of things, which I think – and which you would probably also think – are nevertheless tied to the disaster [*Unheil*] in a profound way.

GEHLEN Mr Adorno, we are now running out of time and have reached the end of our discussion. We cannot continue it any further.

ADORNO No, we can't…

GEHLEN But I would like to make a counter-accusation. Although I have the feeling that we are in agreement on certain profound premisses, I have the impression that it is dangerous, and that you have the inclination, to make men dissatisfied with the little that still remains in their hands within this whole state of catastrophe.

ADORNO Well, then I would really like to quote Grabbe's sentence in response: 'For nothing but despair can save us.'

TRANSLATED BY DANIEL GOTTLIEB

10

Institutional psychotherapy – a politics of madness: an interview

FRANÇOIS TOSQUELLES

François Tosquelles (1912–1994) was a Catalan-born psychiatrist and psychoanalyst who founded Institutional Psychotherapy. Having taken refuge in France at the end of the Spanish Civil War, in 1940 he began working at the Saint-Alban hospital in Lozère. His life tied together the essential moments of modern politics, art and philosophy through a fundamentally 'institutional' articulation. Indeed, it could be argued that much of French 'theory', from Fanon, Canguilhem and Foucault to Deleuze and Guattari arose as the articulation of, or in dialogue with, his praxis. If the idea of institutional psychotherapy was first formulated in a 1952 Portuguese text, its essential point of reference was nonetheless the work undertaken by Tosquelles, Oury, Fanon and others at Saint-Alban.[1] With Tosquelles we are confronted with the question not of any philosophical anthropology of the institution in general, but of a life in which political, institutional and theoretical praxis are inseparable. What has it meant at particular moments for human beings to pass judgement on particular institutions? And what would an order of human existence be in which such judgements are an integral part of institutional life? The text we present here was first published in *Revue Chimeras* and is the transcription of an interview conducted for a 1989 film, written by Daniele Sivadon and Jean-Claude Pollack and directed by François Pain.

1. See the texts co-written by Fanon and Tosquelles as well as the essential 'Social Therapy in a Ward of Muslim Men: Methodological Difficulties' in Jean Khalfa and Robert J.C. Young, eds, *Frantz Fanon: Alienation and Freedom*, Bloomsbury, London, 2018.

FRANÇOIS TOSQUELLES What characterizes psychoanalysis is that it must be invented. The individual remembers nothing. We allow them to talk nonsense. We tell them: 'Talk nonsense, talk nonsense my little one! This is called associating. Here, no one judges you; you can talk nonsense at your ease.' As for me, I call psychiatry 'nonsense-atry'. For while the patient talks nonsense, what do I do? In silence or by intervening – but especially in silence – I talk nonsense in turn. They tell me words, sentences. I listen to the inflections, the articulations, where they put emphasis, where they drop the emphasis... like in poetry. I associate it with my own nonsense, my personal memories, my various elaborations. I am almost asleep, they are almost asleep. We tell the person 'Talk nonsense!' But it's not true, they lie down, they want to be right, they make rationalizations, they tell precise stories of reality: 'My father here, my mother there...' And they never talk nonsense. On the other hand, I am forced to talk nonsense in their place. And with this nonsense that I produce – based on the emphasis and the music of what they say, more than their words – I fill my belly. And then, from time to time, I say to myself: well, if I were to give them this now, a little *interpretation*.

I have always had a theory: a psychiatrist, to be a good psychiatrist, must be a foreigner or pretend to be a foreigner. So, it is not coquetry on my part to speak French so poorly. The patient – or the normal person – must make a certain effort to understand me. They are therefore obliged to *translate* and take an active position towards me.

DANIELE SIVADON & JEAN-CLAUDE POLLACK A man of conviction and action, Tosquelles has always avoided the benefits and drawbacks of fame. What does he think of an enterprise that, in defiance of his discretion, could give him belated publicity?

FT Your project to make a film about me? I agree. It must flatter me somewhere. But, in fact, it's nonsense. Not that you are fools, no more than me. But when we try to tell our own story, write memoirs, explain things as we do in psychiatric or psychoanalytic clinics, what we evoke, without being radically false, is always false or distorted. Sometimes, the emphasis is placed on a kind of epic tone, as if we were an extraordinary hero and we only made it through thanks to some special *narcissistic power* and our *spiritual characterological values.* And sometimes the past is evoked in a miserabilist mode. 'Damn life!' – it's much more clear. Hero or zero, in short.

However, it is essential for everyone to take stock of their life, to be mistaken or to deceive others. And the analyst, besides, is not so naive that, when his patient tells him about his life, he feels obliged to believe him. He knows very well that it is distorted, even if it is very sincere. Sincerity is perhaps the worst of vices.

S&P Tosquelles was born in Reus in 1912, 120 km south of Barcelona. Very quickly he was to be affected by this vice that he judges constitutional: psychiatry. From the age of seven, he went every Sunday with his father to the Pere Mata Institute. This place of care for madness was run by Professor Mira, a man of great European culture, passionate about phenomenology and psychoanalysis. He will have a profound influence on Tosquelles. Catalonia had been affirming its nationality since the end of the nineteenth century. Tosquelles grew up in the midst of an intense cultural, social and political life: reading clubs, workers' cooperatives, political meetings with his father. Although the official language was Castilian, he learned everything in Catalan.

FT I also spoke Castilian, but worse, and even worse than I speak French today. Like the Arabs. When you live in an occupied

country, you naturally speak the language of the oppressors, but you distort it. There, we said 'municipal speech' because there were Catalan collaborators who were employees of the Spanish state and who, of course, spoke Castilian. So we imitated these fools who spoke Castilian so badly.

S&P In 1927 Tosquelles began his medical studies; he was fifteen years old. Spain was then under the monarchy and, since 1921, under the dictatorship of Primo de Rivera. Catalans can only be rebels. Catalan political life is animated by the struggle against dictatorship. A fragile alliance brought together the anarchists of the CNT and the FAI, the Catalan–Balearic Communist Front and its clandestine emanation, the BOC, Workers' and Peasants' Bloc, to which Tosquelles belonged and which was already developing a communism foreign to the official line of the Spanish Communist Party (PCE).

FT I was a member of the Catalan–Balearic Federation. Stalin, at one point, sent us a guy, a man we called Brea. I will always remember these clandestine official emissaries of Soviet control. This guy wanted us to go to Madrid and do propaganda in Spain – with the monarchy, with the military still in power – and to say in Castilian: 'all-power-to-the-soviets'. No republicans, no anarchists, no socialists are in power, nothing. 'All power to the soviets.' So, two or three of us – not the party, because it would never have agreed to do it officially – wrote to Stalin: 'My dear comrade, you are a very important Guide, but you don't understand anything about what is happening here. In Spain, there are no soviets.' So, to say 'all power to the soviets' is really providing only justification to the military and the king. A stupidity. Worse. On the other hand, we are not going to speak Castilian because the Castilians are our oppressors. If you want a slogan that resembles 'all power to the soviets' you should say 'all power to

las peñas'. *Las peñas*, these are the bars, the discussions in bars, those who wage war in cafés. In the past, when people went to the café, whether in France or in Spain, they would spend the entire day there; for the most important thing is to work as little as possible. Thus, as soon as one stops working, one must go to the café. People do not go there to get drunk or form parties, but to discuss. There were people from the right, the centre, the left, and they would talk for hours to remake the world. In 1931, thanks to the struggle of the Catalans, the Republic was proclaimed in Barcelona before it was in the rest of Spain. 1931–36 is a period of great popular creativity. Pablo Casals develops his Catalan worker concerts. All preconceived ideas and hierarchies were challenged.

S&P By 1935 Tosquelles was already a psychiatrist at the Pere Mata Institute in Reus, when he participated in the creation of the POUM, the Workers' Party of Marxist Unification, which was the only one to denounce the Moscow trials. Numerous refugees fleeing Nazism joined him. The Falcon Hotel, on the Ramblas, was the POUM headquarters. It would later become a prison for its militants. Since 1931, psychoanalysts leaving Berlin and central European countries had been settling in Barcelona. This little Vienna that was Barcelona between 1931 and 1936 has been forgotten. We pay tribute here to Professor Mira and to this group of psychiatrists and psychoanalysts from the most diverse schools that the paranoid anxieties embodied by Nazism brought to this city: Szandor Reminger, Landsberg, Strauss, Brachfeld and others. Among these emigrants, Tosquelles met, welcomed and protected the one who would soon become, despite the language barrier, his psychoanalyst: Szandor Reminger.

FT In 1933 I picked up an ear infection and my analyst came to visit me. One day my father also arrived. He was introduced

to my analyst and he said something like this: 'How can you analyse my son, since you speak Catalan and Spanish so poorly?' My analyst replied: 'It is enough to be in Barcelona for fifteen days to understand half of Catalan.' 'Half?' my father says.' I know that you central European men possess great gifts with languages, but I didn't know that much.' 'Yes, half,' continues my analyst, 'because the Catalans say every two words *em cago a Deu* or *merda*. So all you need to do is understand these two exclamations to know half of Catalan.' I waited a while before telling my analyst how much I owed to this extra-analytical encounter. For it was there that I understood that what matters is not so much what the patient says, but the break and the sequence. Putting a period – *mierda* – or putting a semicolon – *me cago en Deu* – is marking sequences. And what is interesting is to listen to the sequences of this music; what is said within them does not matter. It's not bad!

S&P In 1936 the civil war broke out. Tosquelles joined the anti-fascist militias of the POUM and left for the Aragon front. He was twenty-four years old. All his ideas would be put to the test of fire. Very quickly the POUM became the main target of the Spanish Communist Party, which was entirely subject to Moscow. As early as 1937 many of its militants were thus killed or imprisoned.

FT The war took on surrealistic aspects. The law of the surrealistic unfolding of war is that there is always something unexpected, unforeseen; that is to say, something that, precisely, cannot be put into science. Science is a behavioural disorder of certain types who become obsessed with it; they want to control everything through science. War is uncontrollable. But, as the surrealists would say, exquisite corpses appear here and there, which is to say unexpected, free associations, which are not purely fanciful: they are more real than the real.

So, let's talk about the war. I insist on the fact that it was not just any war, but a civil war. Civil war, unlike a war of one nation against another nation, is related to the non-homogeneity of the self. Each of us is made of opposed pieces, with paradoxical unities and disunities. Personality is not made of a single block – it would become a statue in that case.

What did I do in Aragon? I did not have a large number of patients; I avoided having them sent 200 kilometres from the front line; I treated them where things began, less than 15 kilometres away, according to a principle that could resemble sectorial psychiatry.[2] If you send a war neurotic 150 kilometres from the front line, you make him a chronic case. You can only treat him near the family; that is to say where there have been troubles.

Instead of treating these patients who did not exist, I got into the habit of treating the doctors so that these guys would lose their fear, and especially something more important than fear. Civil war involves a change of perspective on the world. Doctors, usually, have in their heads the stability of the bourgeois world. They are *petite* or *haute* bourgeois who want to live alone and make money, to be scholars. However, in a civil war like ours, the doctor had to be able to admit a change of perspective on the world, so that he could admit that it is the clients who determine his clientele, and that he is not all-powerful. So, I took care of the psychotherapy of normal men in order to avoid any crisis. You cannot do psychiatry in a sector or in a hospital if you keep a bourgeois and individualistic ideology. A good citizen is incapable of doing psychiatry. Psychiatry involves an anti-culture; that is to say a culture having another perspective than that of

2. *Translator's note*. Sectorial psychiatry developed in France throughout the 1960s and concerned the care of patients outside the hospital, especially with rural workers or through voluntary work schemes involving patients of psychiatric institutions. This was an undertaking which was central to Tosquelles through his work to decentralize or 'sectoralize' children's homes, instituting self-managed life groups with special-needs educators.

the subject. Its nature otherwise does not matter – that's what I learned in those early years.

S&P Professor Mira obtained, against the advice of the Communist Party, control of the psychiatric services of the army and the organization of the sectors, both on the front line and in the rear. Tosquelles was appointed chief physician of the psychiatric services of the army. He was sent to the southern front, which extended from Valencia to Almeria, passing through Madrid. He created a therapeutic community in Almodovar del Campo and organized the recruitment of nursing staff, avoiding the inclusion of psychiatrists, who, according to him, have a real fear of madness.

FT As I had to make the selection for the army, the first thing I did was to choose for myself. Well-understood charity begins with oneself. I chose lawyers who were afraid of going to war but who had never treated a madman, painters, men of letters, prostitutes. Seriously! I threatened to close the brothels (already forbidden, but which functioned as everywhere), unless there were three or four prostitutes who knew men well and who preferred to convert themselves into nurses – on condition of not sleeping with the patients. I guaranteed that we would not close their house if we could send soldiers to them. These brothels thus became annexes of the psychiatric service. Some of these prostitutes converted themselves into nurses of the thunder of God. It's extraordinary, isn't it? And since through their experience of men they knew that everyone is crazy – even men who go to prostitutes – their professional training was quick. In a month, a prostitute, a lawyer or a priest became someone extraordinary. Thus, all my activities have been a setting up of the sector and therapeutic communities, an action with local politicians, with the types who represented some power in the country. That's sectoral activity!

S&P March 1939 saw the fall of the Spanish Republic. Tosquelles tried to flee from Andalusia. He managed to get to France thanks to a network set up by his wife, Hélène. He joined the camp of Sept-Fons, one of the multiple concentration camps set up by the French administration to park the 450,000 Spanish refugees. The conditions of misery were atrocious: many died of hunger or various epidemics; others commited suicide. Tosquelles created a psychiatry service there.

FT In this service too it was all very comical. Once again, there were political activists, painters, guitarists… There was only one psychiatric nurse; all the others were normal people. It was very effective; I created a service. I believe that it is one of the places where I did very good psychiatry, in this concentration camp, in the mud. It was magnificent. And on the other hand, we used it to provoke escapes… stories like that. It is often overlooked that the Spanish Republicans who escaped from the camps provided the backbone of the Resistance during the Second World War throughout the south-west of France.

S&P Tosquelles arrived in Saint-Alban. To the diversity of patients were added refugees, illegal immigrants who found there a place of welcome and complicity. Among them were Tzara, Eluard, Canguilhem, Matarasso, Bardach… and others. Although he was a chief physician and already famous in his country, the administration granted this foreigner only the position and pay of a deputy nurse. It was under more than precarious conditions that Tosquelles would tackle the transformation of the hospital.

FT I arrived in Saint-Alban on 6 January 1940. Before talking about this period, I would like to say a few words about the cultural and ideological relation of French people to post-war

Spain, whether members of the Communist Party or not (it's the same), which is to say average French people. In my opinion, they all felt a very great sense of guilt because of the non-intervention of France in the Spanish Civil War. They realized, after the fact, that if the government or French workers had supported the Republic, if they had converted the Popular Front movement into a revolutionary movement – and not a demand for paid vacations – the whole history of the world would have unfolded differently. But it's like Cleopatra's nose. Things are as they are. Most French people – and especially those who had an ideal of freedom – felt very guilty about the events of the war. In Saint-Alban, for example, Eluard, Bonnafé, Cordes, Chambrun and many others, who were members of the Communist Party, behaved with me as if they were guilty. They relieved themselves by helping me. This collective French social guilt towards the Spanish revolution was very important; I benefited from it. Everyone helped me. You yourself, you came to tell me: 'My poor Tosquelles, how much you have suffered! We must help you. You must get back on your feet in life. You're not going to be depressed because you lost the war. One lost, ten found!'

S&P Paul Eluard stayed for some time in Saint-Alban.

FT Eluard, he was an angel, a lace-maker of speech. He crocheted speech all day long because he was cold. Eluard was a little boy who was cold, and his mother had to wrap him up with warm clothes. For him, the linen was speech. He wrapped himself in warm words.

S&P There is a poem by Paul Eluard from the collection *Souvenirs de la maison des fous*, written in Saint-Alban during the Resistance.

This cemetery here, spawned by the moon
Sits twixt two waves of the black, night sky
This cemetery, archipelago of memory,
Lives on mad wind and on spirit in ruin.
The earth is exposed from three hundred graves
For three hundred dead to be masked by earth
Crosses left nameless, the body inert
The soil snuffed out, man fades away.
All the forgotten ones took leave of prison
Adorned in absence, barefoot, they remain,
With nothing to hope for, nothing to gain
All the forgotten have died in the prison.
Their cemetery a place without reason[3]

Even before the arrival of Lucien Bonnafé, who was appointed chief physician in 1943, the hospital became an open space of encounter and confrontation. Psychoanalysis, communism and surrealism, during the critical years of Petainism, would fuel almost permanent meetings. At night, waiting for a visitor or a parachute drop of weapons, organizing care for the wounded or preparing clandestine editions, these meetings were already working on the world of the asylum, already dealing with 'healing life'. It was the Society of Gévaudan, named after the famous and elusive beast.

FT There is only resistance against an oppressor. As long as there is no barrier, a more or less violent obstacle, one does not realize the stupidity of normal life, which simply runs, a little dead like stagnant waters. Blocked modes of detour and resistance are organized simply to live. Of course, the Resistance was a specific political fact after the war in 1940. I mean, after the debacle. Because if there had not been the debacle there would not have been the awakening of Saint-Alban. At Saint-Alban the Resistance was the confluence of very different stories and

3. *Translator's note.* Paul Eluard's poem has been translated by Hunter Bolin for our edition.

people. I was already a stranger in Saint-Alban, a peasant from the Danube. But it is the Resistance that, beyond any diversity imposed by the patients, created the variety of our entourage, that of the caregivers who were also 'caring-cared for'.

S&P The nuns, who had already been separated from the world for so long, were caught up in the meshes of a society shaken by war. They cared for the wounded resistance fighters.

FT I had two specialities: converting communists into communists and nuns into nuns. Because most of the Catholics were not Catholic. I have nothing against being Catholic or communist. I am against those who call themselves communists and who are radical socialists or public officials; and against nuns who think they are nuns but are only officials of the Church. Part of my job was to convert individuals into what they really are, beyond their appearance, what they think they are, their 'ideal self'.

S&P The patients themselves were confronted with the reality of war and knew that on the third floor of the castle were hidden resistance fighters.

FT They were hidden like them. The word 'asylum' is very good! I prefer the word asylum to 'psychiatric hospital'. We do not know what it means, 'psychiatric hospital'. Asylum means that someone can take refuge there or that they are forced to take refuge there. Gentis said that everyone carries the walls of the asylum within themselves. It's like a protective gap, Melanie Klein's 'splitting'. Thus the walls protected patients from the harm of society.

S&P Hélène Tasque had just arrived in Saint-Alban, after crossing the Pyrenees alone with her first child. Saint-Alban was one

of the few psychiatric hospital in France, if not the only one, where famine did not prevail, this 'soft extermination' which killed more than 30,000 mentally ill patients during the war. As Jean Oury points out, the question of survival was quite didactic. Patients, nurses and even the stewards or doctors fought against hunger, left the hospital, went to the farmers to look for butter and turnips in exchange for some work.

FT We connected the patients to the outside world, not to wage war but to engage in the black market. We organized mushroom exhibitions to teach them how to gather them. And since there were food ration cards for tuberculosis patients, we created a tuberculosis service. When someone started to show signs of a deficiency, suddenly we would diagnose them with tuberculosis. There is a whole chain of events that ultimately leads to the fact that, in the end, the war came at the right time… and the Resistance too.

S&P In 1940 Saint-Alban was a miserable, dirty and overcrowded place. Patients rarely left. About twenty guards and a few sisters ensured surveillance and survival. First paradox: it was in the dilapidated asylum of a deprived department that Institutional Psychotherapy would be developed. The gamble, deemed impossible, was to treat psychotics by means of psychoanalysis. Without a couch, without a contract imposed through words, and where they were in great numbers, in hospitals and other places of separation and segregation. Second rupture: the hospital generates its own pathology, confining caregivers and patients to chronicity. It is the hospital that urgently needs treatment. Tear down the walls, remove the bars, eliminate the locks. But that's not enough. It is necessary to analyse, but above all to fight the domination, the hierarchies, the habits and the local feudalities. 'Nothing ever goes without saying', everyone

must be consulted, everyone can decide. Not just a concern for democracy, but a progressive conquest of speech, a mutual learning of respect. Patients must have a say in their living and care conditions, in the rights of exchange, expression and circulation. Third, the principle of permanent revolution: the work is never finished, which transforms a care establishment into an institution, a care team into a collective. It is the constant development of material and social means, of conscious and unconscious conditions of psychotherapy. And this is not the fact of doctors or specialists alone, but of a complex arrangement in which the patients themselves play a crucial role.

FT A human being is one who goes from one space to another, who cannot stay in the same space all the time. That is to say, the human is always a migrant, the type who goes elsewhere – what matters is the trajectory. The Club was a place where people who came out of the different hospital wards could meet and establish relationships with someone unknown, unusual, sometimes surprising. From that moment on, their discourse and actions were not frozen by the internal life of their ward. The important thing was to free oneself from the fatal characterological oppression of the head of the ward! In the end the psychiatrist does nothing but make everyone a prisoner of the particular psychopathology of their character. That is why it is necessary – as they say at La Borde – for there to be a freedom to roam, to be able to go from one place to another. Without this wandering, this 'right to wander', as Gentis proclaimed one day, one cannot speak of human rights. The first human right is the right to wander the earth. The Club was a place where such nomads could meet, a place for the practice and theorization of wandering, of rupture, deconstructing–reconstructing. First, one must separate oneself from somewhere to go elsewhere, to differentiate oneself in order to meet others, elements or things…

The Club is a self-managed system, if one wants to use a certain language. There one practises self-management. One of its main activities was the editorial committee of the newspaper, the most important place for collective psychotherapy in the hospital. This newspaper was titled *Le Trait d'Union*.

S&P A session of the editorial committee was filmed by Mario Ruspoli in a film dedicated to the Saint-Alban experience, *Images of Madness*. A patient speaks: 'Do you have that poem I gave you? I will read it if you want. It is titled "The Victory of Samothrace". That's why they said I was crazy.'

> She cleaves the blue. Seeing her,
> it is difficult to conceive that she came
> from the hand of man.
> Not that man isn't capable of the admirable,
> But – and I'm unsure of the origin
> of this assurance – there is something in her
> that transcends the work of man. A stroke
> a line, a light that came from, returns
> and irradiates her. She is not created, she creates.
> Nobody would say
> that the Sainte-Victoire mountain, where Cézanne
> let his admirable gaze wander,
> was his work.
> But the Victory of Samothrace, she
> could only come from the hands of the Gods.

FT *Art brut* is the spontaneous production of patients. Most often it is something they do alone. Moreover, when I arrived at Saint-Alban, Forestier, whom everyone knows, had already invented it. At that time, although there was a wall around the hospital, the doors were completely open once a week. The peasants who went to the fair would pass through with their cows, so as not to tire themselves. Forestier made his boats, his little marshals, and set up a display on the path. The people of Lozère,

passing by, would exchange a pack of cigarettes or a few coins for his works. They bought his *art brut*. It is important that this art be transformed into a commodity. In what has been mistakenly called 'socialization', one must know how to go beyond exhibitionism to meet the other. It is not so bad to exhibit oneself. Today I am exhibiting myself: I am happy because it allows me to meet you.

S&P In *The Captive Party*, another film directed by Mario Ruspoli at the Saint-Alban hospital, a patient walks through the annual ball saying: 'I have no one in the world. I am alone. I may be a little crazy, if you will. But I really wonder if there are any crazy people, if there are mentally ill people everywhere. I don't think so. They may be forgotten by the world, abandoned by everyone.'

FT When you walk around the world, what matters is not the head, but the feet! You have to know where to put your feet. They are the great readers of the world map, of geography. It's not on your head that you walk! The feet are what will become dynamic. That's why every mother starts by tickling the feet. It's about standing up, distributing the energy to go somewhere. But it's with your feet that you go there, not with your head!

S&P From the experience of Saint-Alban, one could retain the impression that the private life of caregivers must merge with their professional life. Does institutional psychotherapy prescribe living with the mad?

FT You know, it's like love stories. There are short acts of love that are enough for a lifetime. You have to live with the patients; but it's not because we stay in the psychiatric hospital day and night that we live with the patients. I live with them all the time, I inhabit them, they inhabit me. My first patients are still alive in

me. The best way to live with them is perhaps to separate from them.

At Saint-Alban, there was not a single agitated patient in 1950, although no medication was used against agitation. One took care of the *network*. Unfortunately, between 1950 and 1960 they discovered what are called tranquillizers, or something like that. From that moment on, psychiatrists said: 'Great! We no longer need to worry about the relations, about narcissism, eroticism' – the net, so to speak. 'Just give them the pill.' They fell into this trap, willingly. They were happy: 'Now, thanks to tranquillizers, we will be able to have relationships with the "person" of the patient and we will be able to talk like at school: Go right, go left, go up!' Finally, it was like being a shepherd with a stick.

S&P After Saint-Alban, institutional psychotherapy was relayed to many public and private establishments. Of these various centres of care and research mainly focused on the treatment of psychoses, the La Borde clinic, with Jean Oury and Félix Guattari, was undoubtedly, for Tosquelles, the place that best perpetuated his approach.

FT It's strange but in France I became a famous Frenchman, a Knight of Public Health or I don't know what. And at home, in Spain, where they would have killed me, I became an Illustrious Son. French, but Illustrious Son of Reus. The same guys who would have killed me decorated me. If I went to settle there, they would beat me with sticks. I never claimed to return to Reus. I had some effectiveness because I was a foreign Catalan. I have already said that one must always be a foreigner. Now, I am a foreigner in Catalonia. And that's why I'm effective.

I have much more grief over the loss of Saint-Alban than that of Catalonia or Spain. My parents are buried in Saint-Alban. I am not in favour of honouring or erecting tombs, but the

destruction of the Saint-Alban cemetery and the disappearance of the living corpses of my father, my mother and my aunt hurts my heart. However, this allows me to perfectly admit that one can speak of Saint-Alban and Institutional Therapeutics as if I had not existed.

S&P A quotation from François Tosquelles: 'Until about 1914 it was said that the subject had to become aware of its unconscious problems, unknown to itself. As soon as the truth thus known would be formulated, the suffering would disappear. By 1930 Freud had dispelled illusions in this regard, and, for my part, if I had to prophesy, I would consider that the proletariat might remain connected to the unconscious and not to the raising of awareness.'

TRANSLATED BY COOPER FRANCIS

Image credits

INTRODUCTION

Joanna Piotrowska, *Untitled*, 2022, photomontage.
Installation view, the Arsenale, Venice Biennale, September 2022.

PROCEEDINGS

Film Projector, City Museum Kassel, July 2022.

TRANSLATIONS

'Just Say No', Ugo Rondinone, *John Giorno*.
Installation view, detail, Palais de Tokyo, Paris, December 2015.

Photographs by Peter Osborne.

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